

**CODE OF PROCEDURE, PENAL CODE,  
AND  
CONSTITUTIONS.**





THE

GENERAL ~~STATUTES~~ *Statutes & codes* AND CODES

OF THE

STATE OF WASHINGTON.

ARRANGED AND ANNOTATED BY

WILLIAM LAIR HILL,

CODE COMMISSIONER OF THE STATE OF WASHINGTON.

VOL. II.

CODE OF PROCEDURE.

PENAL CODE.

CONSTITUTIONS.

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## PREFACE.

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By the act under which this volume is published, the commissioner was required to take the Code of 1881 as a basis, and to suggest such additions and alterations only as might be deemed necessary for its convenient application as a complete and harmonious system of remedial and penal laws under the new conditions arising out of the change from a territorial to a state government. Adhering to this plan as closely as practicable, the commissioner was still compelled, by the radical difference between the judicial system provided by the constitution of the state and that which existed under the territorial government, and also by other differences less prominently noticeable, but not less irreconcilable with the former condition, to suggest a great number of alterations and additions.

This was done in the form of bills presented to the legislature for enactment, and many of the bills so presented were enacted into laws as presented; some were enacted with amendments, and quite a number were not reached for final action. Some incongruities appear in the laws as consequence of the failure of such bills as were not acted on and the modification of others, necessitating the incorporation herein of a few sections of the Code of 1881 and other territorial statutes which are not in all respects conformable to the remedial system now in operation. Some of the more important of these are noted at the foot of the sections, others being inserted without note.

Sections of the Code of 1881 which have not been in any respect modified are indicated by a number in brackets corresponding to the number they bore in that Code; sections from other statutes, including those enacted at the last session of the legislature, have the date of their approval appended in *Italics*; and sections which were, by the terms of the acts, to take effect on approval are indicated at the end of the section, by the words "In effect immediately."

Statutes which appear clearly and certainly to be superseded by subsequent enactments are omitted; but wherever there has seemed to be reasonable ground for doubt upon this subject, the statute has been incorporated in juxtaposition with that which may be supposed to have superseded it; and no statute passed by the state legislature has been omitted because of supposed conflict with the constitution. In a number of cases the changes suggested by the commissioner were intended to remove uncertainties of this nature, and most, but not all of these, were passed by the legislature; so there will be found occasional provisions the constitutionality of which may be questioned, and others which the courts may hold to have been abrogated by later acts.

The titles of the statutes are omitted, except where there appears in the relation of the title to the body of the statute some special reason for inserting them. In such cases the title is given in the foot-notes.

W. L. H.

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# CODE OF PROCEDURE.





# CODE OF PROCEDURE.

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*Jurisdiction of the supreme court.*

§ 1. The supreme court shall have original jurisdiction in *habeas corpus* and *quo warranto* and *mandamus* as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property, when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute.

The supreme court shall also have power to issue writs of *mandamus*, review, prohibition, *habeas corpus*, *certiorari*, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of *habeas corpus* to any part of the state, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or before the supreme court, or before any superior court of the state, or any judge thereof. [December 23, 1889, § 6. *In effect immediately.*]

By section 15 of the act of December 23, 1889, it was provided that all undetermined causes in the supreme court of the territory, except such as were within the exclusive jurisdiction of the United States courts, should pass into the supreme court of the state. For the organization of the supreme court, consult article 4 of the constitution, and the statutes under the head of "Judiciary."

*Supreme court is a court of record — Its general powers.*

§ 2. The supreme court shall be a court of record, and shall be vested with all power and authority necessary to carry into complete execution all its judgments, decrees, and determinations in all matters within its jurisdiction, according to the rules and principles of the common law, and the constitution and laws of this state. [December 23, 1889, § 10. *In effect immediately.*]

*Supreme court always open — Regular sessions.*

§ 3. The supreme court shall always be open for the transaction of business, except on non-judicial days. It shall hold regular sessions for the hearing of causes at the seat of government, commencing on the second Mondays of January, May, and October of each year, and special sessions at the same place, at such other times as may be prescribed by the justices thereof. If proper rooms in which to hold the court, and for the accommodation of the officers thereof, are not provided by the state, together with attendants, furniture, fuel, lights, record books, and stationery, suitable and sufficient for the transaction of business, the court, or any three justices thereof, may direct the clerk of the supreme court to provide the same; and the expense thereof, certified by any three justices to be correct, shall be paid out of the state treasury, out of any funds therein not otherwise appropriated. Such moneys shall be subject to the order of the clerk of the supreme court, and be by him disbursed on proper vouchers, and accounted for by him in annual settlements with the state auditor. [December 23, 1889, § 4. *In effect immediately.*]

*Adjournments from time to time.*

§ 4. Adjournments from day to day, or from time to time, are to be construed as recesses in the sessions, and shall not prevent the court from sitting at any time. [December 23, 1889, § 7. *In effect immediately.*]

*Number necessary for quorum.*

§ 5. It shall require a majority of the justices of the supreme court to form a quorum and pronounce a decision. In the determination of causes, all decisions of the court shall be in writing, and the grounds of the decision shall be stated. [December 23, 1889, § 5. In effect immediately.]

**Quorum.** — The general rule is, that to make a quorum of a select and definite body of men possessing the power to act, a majority at least must be present, and that a majority of the quorum may decide: *Ex parte Willcocks*, 17 Am. Dec. 525.

Under a provision of the constitution of the state of New York, declaring that the court of appeals should be composed of eight judges, but containing no provision that a less number

might constitute the court, it was held competent for the legislature to enact that a less number should constitute a quorum; but that where the legislature had made six of the judges to constitute a quorum, a concurrence of four only was necessary in order to grant a motion to vacate a judgment, and for a reargument made before seven of the judges: *Oakley v. Aspinwall*, 3 N. Y. 547, 569.

*Power to make rules and prescribe forms.*

§ 6. The supreme court may, from time to time, institute such rules of practice and prescribe such forms of process to be used, and for the keeping of the dockets, records, and proceedings for the regulation of the said court, as shall be deemed most conducive to the due administration of justice, except as otherwise provided by law. [December 23, 1889, § 12. In effect immediately.]

**Rules of court** are subordinate to statutes, and where there is a conflict the statute must prevail: *Glenny v. Stedwell*, 64 N. Y. 120; *French v. Powers*, 80 N. Y. 146; *Suckley's Admir v. Rotchford*, 65 Am. Dec. 240. Should they deprive a party of a statutory right they are void: *People v. McClellan*, 3 Cal. 101. Every court has power to prescribe rules for orderly conduct of its business, not repugnant to law, and such rules may be changed or modified; but while they are in force, unless so provided in them, courts must apply them to all cases, and cannot make them applicable in their discretion: *Coyote G. S. M. Co. v. Ruble*, 9 Or.

121. And in *Hanson v. McCue*, 43 Cal. 178, it is held that the courts and suitors are alike bound by the rules, which should receive the same construction as statutes. And it is said that parties have no unqualified right to stipulate for the abrogation of rules of court: *Reynolds v. Lawrence*, 15 Cal. 359. But it is held that the court itself always has the power to suspend its own rules, or except a particular case from their operation, whenever the purposes of justice require it: *People v. Williams*, 32 Cal. 280; *Pickett v. Wallace*, 54 Cal. 147; *United States v. Breitling*, 20 How. 252-254; *Sullivan v. Wallace*, 73 Cal. 307.

*Style of process.*

§ 7. Its process shall run in the name of the "State of Washington," bear test in the name of the chief justice, be signed by the clerk of the court, dated when issued, sealed with the seal of the court, and made returnable according to law, or such rule or orders as may be prescribed by the court. [December 23, 1889, § 11. In effect immediately.]

*The seal of the supreme court.*

§ 8. The seal of the supreme court shall be the vignette of General George Washington, with the words "Seal of the Supreme Court, State of Washington," surrounding the vignette. [December 23, 1889, § 17. In effect immediately.]

*Effect of judgment of supreme court.*

§ 9. The judgments and decrees of the supreme court shall be final and conclusive upon all the parties properly before the court. [December 23, 1889, § 8. In effect immediately.]



## CHAPTER II.

## OF THE SUPERIOR COURTS.

- § 10. Original jurisdiction of the superior courts.
- § 11. Special provision for cases in probate court.
- § 12. Appellate jurisdiction.
- § 13. Are courts of record — Always open — Regular and special sessions.
- § 14. Adjournments from time to time.
- § 15. Judge may hold court in any county.
- § 16. Several superior court sessions in same county at same time.
- § 17. Process extends to all parts of the state.
- § 18. Judges to establish uniform rules.
- § 19. The seal of the superior court.
- § 20. Limit of time for giving decisions.
- § 21. Judges *pro tempore*.

*Original jurisdiction of superior courts.*

§ 10. The superior courts shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to one hundred dollars, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage, and for such special cases and proceedings as are not otherwise provided for; and shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court, and shall have the power of naturalization, and to issue papers therefor. Said courts and their judges shall have power to issue writs of *mandamus*, *quo warranto*, review, *certiorari*, prohibition, and writs of *habeas corpus*, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of *habeas corpus* may be issued on legal holidays and non-judicial days. [March 27, 1890, § 5. In effect immediately.]

For the organization of the superior courts, see article 4 of the constitution, and the statutes under the head of "Judiciary."

*Special provision for cases in probate court.*

§ 11. On the organization of the superior courts in the respective counties, the books, records, papers, and proceedings of the probate court in each county, and all causes and matters of administration pending therein, shall, upon the expiration of the term of office of the probate judges, on the second Monday in January, 1891, pass into the jurisdiction and possession of the superior court of the same county or district, and the said court shall proceed to final judgment or decree,

order, or other determination in the several matters and causes, as the territorial probate court might have done. And until the expiration of the term of office of the probate judges, such probate judges shall perform the duties now imposed upon them by the laws of the territory. The superior courts shall have appellate and revisory jurisdiction over the decisions of the probate courts, as now provided by law, until such latter courts expire by limitation. [*March 27, 1890, § 18. In effect immediately.*]

*Appellate jurisdiction.*

§ 12. The superior courts shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. [*March 27, 1890, § 6. In effect immediately.*]

*Are courts of record—Always open—Regular and special sessions.*

§ 13. The superior courts are courts of record, and shall be always open, except on non-judicial days. They shall hold their sessions at the county seats of the several counties, respectively. They shall hold regular and special sessions in the several counties of this state at such times as may be prescribed by the judge or judges thereof. [*March 27, 1890, § 7. In effect immediately.*]

*Adjournments from time to time.*

§ 14. Adjournments from day to day, or from time to time, are to be construed as recesses in the sessions, and shall not prevent the court from sitting at any time. [*March 27, 1890, § 8. In effect immediately.*]

*Judge may hold court in any county.*

§ 15. A judge of any superior court may hold the superior court in any county, at the request of the judge or judges of the superior court thereof, and, upon the request of the governor, it shall be his duty to do so, and in either case the judge holding the court shall have the same power as a judge thereof. [*March 27, 1890, § 10. In effect immediately.*]

*Several sessions in same county at same time.*

§ 16. In any county where there shall be more than one superior judge, there may be as many sessions of the superior court at the same time as there are judges thereof, and whenever the governor shall direct a superior judge to hold court in any county other than that for which he has been elected, there may be as many sessions of the superior court in said county at the same time as there are judges therein or assigned to duty therein by the governor, and the business of the court shall be so distributed and assigned by law, or, in the absence of legislation therefor, by such rules and orders of court, as shall best



promote and secure the convenient and expeditious transaction thereof. The judgments, decrees, orders, and proceedings of any session of the superior court held by any one or more of the judges of such court shall be equally effectual as if all the judges of said court presided at such session. [*March 27, 1890, § 2. In effect immediately.*]

*Process extends to all parts of state.*

§ 17. The process of the superior courts shall extend to all parts of the state; *provided*, that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions is situated. [*March 27, 1890, § 9. In effect immediately.*]

See notes to § 158.

*Judges to establish uniform rules.*

§ 18. The judges of the superior courts shall, from time to time, establish uniform rules for the government of the superior courts. [*March 27, 1890, § 13. In effect immediately.*]

See notes to §§ 6, 32.

*The seal of the superior court.*

§ 19. The seals of the superior courts of the several counties of the state shall be, until otherwise provided by law, the vignette of General George Washington, with the words, "Seal of the Superior Court of — County, State of Washington," surrounding the vignette. [*March 27, 1890, § 17. In effect immediately.*]

*Limit of time for giving decisions.*

§ 20. Every case submitted to a judge of a superior court for his decision shall be decided by him within ninety days from the submission thereof; *provided*, that if within said period of ninety days a rehearing shall have been ordered, then the period within which he is to decide shall commence at the time the cause is submitted upon such rehearing, and upon willful failure of any such judge so to do, he shall be deemed to have forfeited his office. [*March 27, 1890, § 12. In effect immediately.*]

*Judges pro tempore.*

§ 21. A case in the superior court of any county may be tried by a judge *pro tempore*, who must be a member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the case; and his action in the trial of such cause shall have the same effect as if he were the judge of such court. A judge *pro tempore* shall, before entering upon his duties in any cause, take and subscribe the following oath or affirmation: "I do

solemnly swear (or affirm, as the case may be) that I will support the constitution of the United States and the constitution of the state of Washington, and that I will faithfully discharge the duties of the office of judge *pro tempore* in the cause wherein — is plaintiff and — defendant, according to the best of my ability." He shall receive a compensation of ten dollars for each day engaged in said trial, to be paid in the same manner as the salary of the superior judge. [March 27, 1890, § 11. *In effect immediately.*]

## CHAPTER III.

### OF JUSTICES' COURTS.

- § 22. General powers and jurisdiction of justices of the peace.
- § 23. Particular specification of civil jurisdiction.
- § 24. Restrictions of civil jurisdiction.
- § 25. Jurisdiction in criminal cases.
- § 26. Jurisdiction to preserve the peace.
- § 27. Territorial extent of jurisdiction.
- § 28. Office must be in precinct, but may issue process elsewhere.
- § 29. Office not to be in attorney's office.

#### *General powers and jurisdiction of justices of the peace.*

§ 22. [1709.] Every justice of the peace elected in any precinct in this state is hereby authorized to hold a court for the trial of all actions [in] the next section enumerated, to hear, try, and determine the same according to law; and for that purpose, where no special provision is otherwise made by law, such court shall be vested with all the necessary powers which are possessed by courts of record in this state; and all laws of a general nature shall apply to such justice's court, as far as the same may be applicable, and not inconsistent with the provisions of this chapter.

#### *Particular specification of civil jurisdiction.*

§ 23. Every justice of the peace shall have jurisdiction and cognizance of the following civil actions and proceedings:—

1. Of an action arising on contract for the recovery of money only in which the sum claimed is less than one hundred dollars.

2. Of an action for damages for injuries to the person, or for taking or detaining personal property, or for injuring personal property, or for an injury to real property when no issue raised by the answer involves the plaintiff's title to or possession of the same, when the amount of damages claimed is less than one hundred dollars; also of actions to recover the possession of personal property, when the value of such property, as alleged in the complaint, is less than one hundred dollars.

3. Of an action for a penalty less than one hundred dollars.

4. Of an action upon a bond conditioned for the payment of money, when the amount claimed is less than one hundred dollars, though the penalty of the bond exceed that sum, the judgment to be given for the sum actually due, not exceeding the amount claimed in the complaint.

5. Of an action on an undertaking or surety bond taken by him or his predecessor in office, when the amount claimed is less than one hundred dollars.

6. Of an action for damages for fraud in the sale, purchase, or exchange of personal property, when the damages claimed are less than one hundred dollars.

7. To take and enter judgment on confession of a defendant, when the amount of the judgment confessed is less than one hundred dollars.

8. To issue writs of attachment upon goods, chattels, moneys, and effects, when the amount is less than one hundred dollars.

9. Of all other actions and proceedings of which jurisdiction is specially confessed by statute, when the amount involved is less than one hundred dollars, and the title to or right of possession of or to a lien upon real property is not involved. [March 3, 1891.]

**Justice's court jurisdiction, nature of.** — The jurisdiction of justices' courts is special and limited, and the law presumes nothing in their favor. The record of the proceedings of a justice's court must affirmatively show jurisdiction: *Jolley v. Foltz*, 34 Cal. 321; *King v. Randlett*, 33 Cal. 318; *Rowley v. Howard*, 23 Cal. 401; *Lowe v. Alexander*, 15 Cal. 296; *Swain v. Chase*, 12 Cal. 283. The party asserting a right under the judgment of a justice's court must affirmatively show jurisdiction: *King v. Randlett*, 33 Cal. 318. Jurisdictional facts not required by statute to be in writing may be proved by parol: *Jolley v. Foltz*, 34 Cal. 321. Consent will not give jurisdiction where it is denied by the constitution: *Feillett v. Engler*, 8 Cal. 76.

**Actions on contract.** — A judgment is a contract within the meaning of the word as used here: *Stuart v. Lander*, 10 Cal. 372.

**Amount involved.** — In actions to recover money, the amount sued for, exclusive of interest, and not the amount recovered, is the test of jurisdiction: *Ebey v. Engle*, 1 Wash. 72; *Dashiell v. Slingerland*, 60 Cal. 653; *Solomon v. Reese*, 34 Cal. 33; *Bradley v. Kent*, 22 Cal. 170; *Baily v. Sloan*, 65 Cal. 387.

Claims may be consolidated and the court still have jurisdiction, if the total claim does not exceed the statutory limit: *Cariaga v. Dryden*, 29 Cal. 307. So, also, to enforce the proportionate liability of a stockholder for the corporate debts when his liability is less than the statutory limit, a justice's court has jurisdiction: *Morrow v. Superior Court*, 64 Cal. 383; *Derby v. Stevens*, 64 Cal. 287.

A party may waive a recovery of and strike out a claim for damages, to reduce his claim within the jurisdiction: *Grass V. M. Co. v. Stackhouse*, 6 Cal. 414; *Wratten v. Wilson*, 22 Cal. 468. Justices' courts have no jurisdiction where a defendant sets up a counterclaim for a sum exceeding the statutory limit: *Marfield v. Johnson*, 30 Cal. 545.

**Possession of personalty.** — In actions for the recovery of specific personal property, the standard of jurisdiction is the value of the property, and the demand for damages cannot oust the court from jurisdiction, if the personalty is worth less than the statutory limit: *Astell v. Phillippi*, 55 Cal. 265. If the value of the property together with the amount of damages claimed do not exceed one hundred dollars, the court has jurisdiction: *Sanborn v. Contra Costa Co.*, 60 Cal. 425.

Neither the justice's court nor the superior court on appeal has jurisdiction of an action to recover the possession of specific personal property alleged to exceed the statutory limit in value, although the complaint prays judgment for a less amount in case possession cannot be had: *Sheator v. Superior Court of Amador County*, 70 Cal. 564.

**Penalty for collecting excessive toll.** — A justice's court has no jurisdiction to try an action brought to recover a penalty for collecting an alleged excessive toll, where the question at issue is whether the amount collected was a legal toll: *Culbertson v. Kinexin*, 68 Cal. 490. But it has jurisdiction of an action to recover a sum of money less in amount than the statutory limit, for a fine, penalty, or



forfeiture given by statute or ordinance of a municipal corporation; provided no question of the legality of any tax, impost, assessment, toll, or municipal fine is raised: *Williams v. McCartney*, 69 Cal. 556.

**Trespass on real property.** — A justice's court has jurisdiction of an action of trespass on real property, the damages claimed being less than the statutory limit: *Pollock v. Cummings*, 38 Cal. 683; *Livingston v. Morgan*, 53 Cal. 23. But the right of possession must not be put in issue: *Cornett v. Bishop*, 39 Cal. 319.

**Answer raising legality of tax.** — If, in an action for unpaid taxes, an answer is filed which puts in issue the legality of a tax, the justice is ousted of his jurisdiction. By trying the case he would trench upon the jurisdiction

of the superior court, under the constitution: *People v. F. Mier*, 24 Cal. 61.

**Confession of judgment for more than amount named is void:** *Feillett v. Engler*, 8 Cal. 77.

**Powers of justices' courts, how determined.** — When that part of the Code of Civil Procedure which expressly deals with proceedings in justices' courts prescribes the powers of those courts in relation to a general subject about which the powers of courts of record are expressly prescribed in another part of the code, then the powers of the justices' courts with respect to that subject are to be determined by the provisions of the code expressly applicable to them, and not by the provisions expressly applicable to courts of record: *Weimmer v. Sutherland*, 74 Cal. 341.

### *Restrictions of civil jurisdiction.*

§ 24. [1711.] The jurisdiction conferred by the last section shall not, however, extend to the following civil actions:—

1. In which the title to real property shall come in question;
2. Nor to an action for the foreclosure of a mortgage, or enforcement of a lien on real estate;
3. Nor to an action for false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction;
4. Nor to any action against an executor or administrator as such.

**Justices' courts — Jurisdiction over realty.** — An action in which the plaintiff, in order to recover, must allege and prove title, is not within the jurisdiction of a justice of the peace, notwithstanding it is in form an action of forcible entry and detainer: *Aiken v. Aiken*, 12 Or. 203.

If title to real property comes in question in a trial in justice's court by defense or plea,

such court is ousted of its jurisdiction: *Sweek v. Galbreath*, 11 Or. 516.

A justice's court cannot revive a judgment so as to make it a lien on real property: *Glaze v. Lewis*, 12 Or. 347.

Injury for diverting or appropriating running water is not within the jurisdiction of this court: *Hill v. Newman*, 5 Cal. 446; *Van Etten v. Jilson*, 6 Cal. 19.

### *General jurisdiction of justices in criminal cases.*

§ 25. [1886.] The jurisdiction of justices of the peace in criminal prosecutions shall be co-extensive with their respective counties, and they shall have concurrent jurisdiction with the superior courts in affrays, assault and battery, violation of estray laws, obstructions of highways and bridges, charging extra tolls at ferries and bridges, neglect of roads by supervisors, public indecency, having obscene books, pamphlets for exhibition or otherwise, forcible entry and detainer, malicious trespass, and in case of petit larceny, in all misdemeanors where the offense charged is not punishable by imprisonment, or by a fine greater than one hundred dollars, and public nuisance; and they shall also have jurisdiction over all criminal cases coming under any city or town ordinance, and on conviction shall have power to fine the person so offending in any sum not exceeding one hundred dollars.

### *Jurisdiction for preservation of peace.*

§ 26. [1903.] Justices of the peace shall have power to cause all

laws made for the preservation of the public peace to be kept; and in the execution of that power may require persons to give security to keep the peace, or for their good behavior, or both, in the manner herein provided.

*Territorial extent of jurisdiction.*

§ 27. [1706.] The jurisdiction of all justices of the peace shall be co-extensive with the limits of the county in which they are elected, and no other or greater unless otherwise expressly provided by statute.

**Jurisdiction of justices' courts — Residence.**—A justice's court has jurisdiction without regard to the residence of the parties, when personal service of the summons is made on the defendant in any precinct in the county, although such precinct is not the one in which the action is brought. Such service must be made by the constable of the precinct in which the action is brought: *Taylor v. Jenkins*, 11 Or. 274.

*Office must be in precinct, but may issue process elsewhere.*

§ 28. [1707.] Every justice of the peace shall keep his office in the precinct for which he may be elected, and not elsewhere; but he may issue process in any place in his county.

*Office not to be in attorney's office.*

§ 29. [1708.] No justice of the peace shall hold his office in the same room with a practicing attorney, unless such attorney shall be his law partner; and in that case, such partner shall not be permitted to appear or practice as an attorney in any case tried before such justice of the peace.

## CHAPTER IV.

### OF MAGISTRATES.

§ 30. Magistrates defined.

§ 31. Who are magistrates.

*Magistrates defined.*

§ 30. A magistrate is an officer having power to issue a warrant for the arrest of a person charged with the commission of a crime. [February 26, 1891, § 1.]

*Who are magistrates.*

§ 31. The following persons are magistrates:—

1. The justices of the supreme court;
2. The superior judges, and justices of the peace;
3. All municipal officers authorized to exercise the powers and perform the duties of a justice of the peace. [February 26, 1891, § 2.]



## CHAPTER V.

### OF THE INCIDENTAL POWERS OF COURTS AND JUDICIAL OFFICERS.

- § 32. Powers of courts respecting conduct of judicial proceedings.
- § 33. May punish for contempt.
- § 34. Judicial officers defined — Their powers.
- § 35. When may act as attorney.
- § 36. Powers of judge as distinguished from a court.
- § 37. Powers of judicial officers.
- § 38. Judicial officers may punish for contempt.
- § 39. Supreme and superior judges may act anywhere in the state.
- § 40. When other judicial officers may act.

#### *Powers of courts respecting conduct of judicial proceedings.*

§ 32. Every court of justice has power: —

1. To preserve and enforce order in its immediate presence;
2. To enforce order in the proceedings before it, or before a person or body empowered to conduct a judicial investigation under its authority;
3. To provide for the orderly conduct of proceedings before it or its officers;
4. To compel obedience to its judgments, decrees, orders, and process, and to the orders of a judge out of court, in an action, suit, or proceeding pending therein;
5. To control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto;
6. To compel the attendance of persons to testify in an action, suit, or proceeding therein, in the cases and manner provided by this code;
7. To administer oaths in an action, suit, or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers or the performance of its duties. [*Feb. 26, 1891, § 1.*]

**Rules of court.** — Rules of court are but a means to accomplish the ends of justice: *Pickett v. Wallace*, 54 Cal. 147. Should they deprive a party of a statutory right they are void: *People v. McClellan*, 3 Cal. 101. Under this section, every court has power to prescribe rules for orderly conduct of its business, not repugnant to law, and such rules may be changed or modified; but while they are in force, unless so provided in them, courts must apply them to all cases, and cannot make them applicable in their discretion: *Coyote G. S. M. Co. v. Ruble*, 9 Or. 121; and in *Hanson v. Mc-*

*Cue*, 43 Cal. 178, it is held that the courts and suitors are alike bound by the rules, which should receive the same construction as statutes. And it is said that parties have no unqualified right to stipulate for the abrogation of rules of court: *Reynolds v. Lawrence*, 15 Cal. 359. But it is held that the court itself always has the power to suspend its own rules, or except a particular case from their operation, whenever the purposes of justice require it: *People v. Williams*, 32 Cal. 280; *Pickett v. Wallace*, 54 Cal. 147; *United States v. Breitling*, 20 How. 252-254.

#### *Courts may punish for contempt.*

§ 33. For the effectual exercise of the powers specified in the last section, the court may punish for contempt in the cases and the manner provided by law. [*February 26, 1891, § 2.*]

*Judicial officers defined — Their powers.*

§ 34. A judicial officer is a person authorized to act as a judge in a court of justice. Such officer shall not act as such in a court of which he is a member in any of the following cases:—

1. In an action, suit, or proceeding to which he is a party, or in which he is directly interested;
2. When he was not present and sitting as a member of the court at the hearing of a matter submitted for its decision;
3. When he is related to either party by consanguinity or affinity within the third degree;
4. When he has been attorney in the action, suit, or proceeding in question for either party.

But this section does not apply to an application to change the place of trial, or the regulation of the order of business in court. In the cases specified in subdivisions three and four, the disqualification may be waived by the parties, and, except in the supreme court, shall be deemed to be waived, unless an application for a change of the place of trial be made as provided in this code. [*February 26, 1891, § 3.*]

**Disqualification of judge.** — This section should be liberally and not technically construed: *North Bloomfield G. M. Co. v. Keyser*, 58 Cal. 315. A disqualified judge has no right to sit though no objection be made: *Oakley v. Aspinwall*, 3 N. Y. 547; nor though the party interested in excluding the judge request him to sit: *Oakley v. Aspinwall*, 3

N. Y. 547; *People v. De la Guerra*, 24 Cal. 76.

Being related to a stockholder of a corporation party is a disqualification: *Plase v. Butternuts Co.*, 28 Barb. 503. Holding a power of attorney concerning the matter in dispute disqualifies a judge: *Oakley v. Aspinwall*, 3 N. Y. 547; *In re White*, 37 Cal. 190.

*When may act as attorney.*

§ 35. Any judicial officer may act as an attorney in any action, suit, or proceeding to which he is a party or in which he is directly interested. A justice of the peace, otherwise authorized by law, may act as an attorney in any court other than the one of which he is judge, except in an action, suit, or proceeding removed therefrom to another court for review; but no judicial officer shall act as attorney in any court, except as in this section allowed. [*February 26, 1891, § 4.*]

*Powers of judge as distinguished from a court.*

§ 36. A judge may exercise, out of court, all the powers expressly conferred upon a judge as contradistinguished from a court, and not otherwise. [*February 26, 1891, § 5.*]

*Powers of judicial officers.*

§ 37. Every judicial officer has power,—

1. To preserve and enforce order in his immediate presence, and in the proceedings before him, when he is engaged in the performance of a duty imposed upon him by this code or other statute;
2. To compel obedience to his lawful orders, as provided in this code;

3. To compel the attendance of persons to testify in a proceeding pending before him in the cases and manner provided in this code;

4. To administer oaths to persons, in a proceeding pending before him, and in all other cases where it may be necessary, in the exercise of his powers and the performance of his duties. [*Feb. 26, 1891, § 6.*]

*Judicial officer may punish for contempt.*

§ 38. For the effectual exercise of the powers specified in the last preceding section, a judicial officer may punish for contempt, in the cases and manner provided by law. [*February 26, 1891, § 7.*]

*Supreme and superior judges may act anywhere in the state.*

§ 39. The judges of the supreme and superior courts have power in any part of the state to take and certify, —

1. The proof and acknowledgment of a conveyance of real property, or any other written instrument authorized or required to be proved or acknowledged;

2. The acknowledgment of satisfaction of a judgment in any court;

3. An affidavit or deposition to be used in any court of justice or other tribunal of this state;

4. To exercise any other power and perform any other duty conferred or imposed upon them by statute. [*February 26, 1891, § 8.*]

*When other judicial officers may act.*

§ 40. Every other judicial officer may, within the county, city, district, or precinct in which he is chosen, —

1. Exercise the powers mentioned in subdivisions one, two, and three of the last preceding section;

2. Exercise any other power and perform any other duty conferred or imposed upon him by other statute. [*February 26, 1891, § 9.*]

## CHAPTER VI.

### MISCELLANEOUS PROVISIONS RESPECTING COURTS AND JUDICIAL OFFICERS.

§ 41. Superior courts to be held at county seats.

§ 42. Legal holidays.

§ 43. Same — Labor day.

§ 44. No courts on legal holidays, except, etc.

§ 45. Court appointed for legal holiday to be held next day.

§ 46. Proceedings may be adjourned from time to time.

§ 47. Proceedings not to fail for want of judge or court.

§ 48. Court may provide rooms, etc.

§ 49. Proceeding when mode not prescribed.

*Superior courts to be held at county seats.*

§ 41. The superior courts shall hold their sessions at the county seats of the several counties respectively. [*February 25, 1891, § 1.*]



*Legal holidays.*

§ 42. The following days are legal holidays, namely: Sunday; the first day of January, commonly called New-Year's day; the fourth day of July; the twenty-second day of February; the twenty-fifth day of December, commonly called Christmas day; and any day designated by public proclamation of the chief executive of the state as a legal holiday, or as a day of thanksgiving; the day known and observed as Memorial or Decoration Day; and the day on which a general election is held throughout the state. [February 25, 1891, § 1.]

*Same—Labor day.*

§ 43. The first Monday of September of each year is hereby declared to be a legal holiday in the state of Washington, to be known as Labor day. [February 24, 1891, § 1.]

*No courts on legal holidays, except, etc.*

§ 44. No court shall be open, nor shall any judicial business be transacted, on a legal holiday, except,—

1. To give, upon their request, instructions to a jury when deliberating of their verdict;
2. To receive the verdict of a jury;
3. For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature;
4. For hearing an application for writs of *habeas corpus*, injunction, prohibition, and attachment. [February 25, 1891, § 2.]

*Court appointed for legal holiday to be held next day.*

§ 45. If any legal holiday happen to be a day appointed for the sitting of a court, or to which it is adjourned, such sitting shall be deemed appointed for or adjourned to the next day which is not a legal holiday. [February 25, 1891, § 3.]

See § 720.

*Proceedings may be adjourned from time to time.*

§ 46. A court or judicial officer has power to adjourn any proceeding before it or him, from time to time, as may be necessary, unless otherwise expressly provided by law. [February 26, 1891, § 10.]

*Proceedings not to fail for want of judge or court.*

§ 47. No proceeding in a court of justice, in any action, suit, or proceeding pending therein, is affected by a vacancy in the office of any or all of the judges, or by the failure of a session of the court. [February 25, 1891, § 2.]

*Court may provide rooms, etc.* [February 25, 1891, § 2.]

§ 48. If the proper authority neglects to provide any supreme or superior court with rooms, furniture, fuel, lights, and stationery, suitable and sufficient for the transaction of its business, and for the jury attending upon it, if there be one, the court may order the sheriff to

do so, at the place within the county designated by law for holding such court; and the expense incurred by the sheriff in carrying such order into effect, when ascertained and ordered to be paid by the court, is a charge upon the county. [*February 26, 1891, § 11.*]

*Proceeding when mode not prescribed.*

§ 49. When jurisdiction is, by the constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding be not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code. [*Feb. 26, '91, § 12.*]

## TITLE II.

### OF PERSONS SPECIALLY INVESTED WITH POWERS OF A JUDICIAL NATURE.

#### CHAPTER I. — OF JURIES, AND THE QUALIFICATIONS AND EXEMPTIONS OF JURORS.

##### II. — OF THE MANNER OF DRAWING AND SUMMONING JURY.

##### III. — OF REFEREES.

#### CHAPTER I.

##### OF JURIES, AND THE QUALIFICATIONS AND EXEMPTIONS OF JURORS.

- § 50. Jury, definition of.
- § 51. Different kinds of juries.
- § 52. Grand jury, definition of.
- § 53. Trial jury, definition of.
- § 54. Jury of inquest, definition of.
- § 55. Competency of jurors.
- § 56. Who are exempt.
- § 57. Who may be excused from serving.

*Jury, definition of.*

§ 50. A jury is a body of men temporarily selected from the qualified inhabitants of a particular district, and invested with power, -

1. To present or indict a person for a public offense;
2. To try a question of fact. [*February 25, 1891, § 1.*]

*Different kinds of juries.*

§ 51. There shall be three kinds of juries:—

1. A grand jury;
2. A petit jury;
3. A jury of inquest. [*February 25, 1891, § 2.*]

*Grand jury, definition of.*

§ 52. A grand jury is a body of men, not less than twelve nor more



than seventeen in number, impaneled and sworn to inquire of public offenses committed or triable within the county. [*Feb. 25, 1891, § 3.*]

*Trial jury, definition of.*

§ 53. A petit jury is a body of men, twelve in number in the superior court, and six in number in the courts of justices of the peace, drawn by lot from the jurors in attendance upon the court at a particular session, and sworn to try and determine a question of fact; but in a justice's court the jury is drawn according to the mode specially provided for such court. [*February 25, 1891, § 4.*]

*Jury of inquest, definition of.*

§ 54. A jury of inquest is a body of men, six in number, summoned from the qualified inhabitants of a particular district, before the coroner, or other ministerial officer, to inquire of particular facts. [*February 25, 1891, § 5.*]

*Competency of jurors.*

§ 55. A person is not competent to act as a juror unless he be, —

1. An elector of the state of Washington;
2. A male inhabitant of the county in which he is returned, and who has been an inhabitant thereof for the year next preceding the time he is drawn or called;
3. Over twenty-one years of age;
4. In the possession of his natural faculties and of sound mind;
5. A person who has been convicted of a felony is not competent to act as a juror. [*February 25, 1891, § 6.*]

*Who are exempt.*

§ 56. Civil officers of the United States, civil and judicial officers of the state, attorneys at law, ministers of the gospel or priests, school teachers, practicing physicians, locomotive engineers, active members of the fire department of any city or village, all persons who have served twice as a juror within two years, and all persons over sixty years of age, shall not be compelled to serve as jurors; and in preparing jury lists the county commissioners shall omit the names of such persons; but no act of a grand or petit jury shall be invalid by reason of such person or persons aforesaid, qualified in other respects, serving thereon; nor shall any disqualification of any member of a grand or petit jury affect the indictment or verdict, unless the juror for that specific cause was challenged or excepted to before the finding of the indictment or rendition of the verdict, and the challenge or exception overruled, and error specifically assigned upon the overruling of such challenge or exception. [*February 25, 1891, § 7.*]

*Who may be excused from serving.*

§ 57. A person may be excused from acting as a juror when, for any reason, his interests or those of the public will be materially in-

jured by his attendance; or when his own health, or the death or illness of a member of his family, requires his absence; but no person shall be excused on account of the causes in this section mentioned, unless it appear that after he was summoned he could not, by reasonable precaution, have provided against them. [*February 25, 1891, § 8.*]

## CHAPTER II.

### OF THE MANNER OF DRAWING AND SUMMONING THE JURY.

- § 58. County commissioners must prepare jury list.
- § 59. Drawing trial jurors for session of court.
- § 60. Drawing grand jurors for session of court.
- § 61. Proceeding in case sheriff or auditor fail to assist.
- § 62. Irregularities do not invalidate.
- § 63. Proceeding when venire set aside.
- § 64. Venire to fill incomplete panel.
- § 65. Sheriff to summon jurors.
- § 66. Juror not to be summoned twice in same year.

*County commissioners must prepare jury list.*

§ 58. Every board of county commissioners, on or before the first Monday of February in each year, shall select from the persons in their county, qualified to serve as petit jurors, the names of one hundred persons to serve as petit jurors for the ensuing year, and from the persons in their county, qualified to serve as grand jurors, the names of one hundred persons to serve as grand jurors for the ensuing year, and shall certify the same in separate lists to the clerk of the superior court; *provided*, that if from any cause the county commissioners are unable to select the full number of names in this section provided for, they shall select such less number as they may agree upon, and in such case they shall include in their certificate to the clerk of the superior court the reason why such less number have been selected. [*February 2, 1888, § 1. In effect immediately.*]

*Drawing trial jurors for session of court.*

§ 59. Until otherwise provided, the judges of the superior courts may order, at such times as they see fit, a panel of not less than twelve nor more than twenty-four petit jurors, to be drawn from the last jury list certified by the county commissioners (whether same has been previously drawn from or not is not to be considered), and the clerk of the superior court, or his deputy, and the sheriff and county auditor, shall place ballots prepared from such list in a box, and having thoroughly mixed them, the clerk, or his deputy, being blindfolded, shall draw the requisite number to serve as such petit jurors. The list thus drawn shall be certified to by the sheriff and auditor, and within three days the clerk shall issue to the sheriff of the county a venire containing the names of the persons thus drawn as petit jurors, returnable at a day and hour to be named by the judge of said court; and until

otherwise provided, previous service as jurors within one or two years, or having been previously drawn from said list, shall be no excuse for service on said jury, the party being otherwise qualified to serve as a juror. [*December 23, 1889, § 1. In effect immediately.*]

*Drawing of grand jurors for session of court.*

§ 60. Until otherwise provided, the judges of the superior courts may, at such times as they see fit, order a panel of grand jurors to be drawn from the last jury lists certified by the county commissioners (whether the same has previously been drawn from or not), and the clerk of the superior court, or his deputy, and the sheriff and county auditor, shall place ballots prepared from such list in a box, and having thoroughly mixed them, the clerk, or his deputy, being blindfolded, shall draw the requisite number to serve as such grand jurors. The list thus drawn shall be certified to by the sheriff and auditor, and within three days the clerk shall issue to the sheriff of the county a venire containing the names of the persons thus drawn as grand jurors, returnable at a day and hour to be named by the judge of said court; and until otherwise provided, previous service as jurors within two years, or having been previously drawn from said list, shall be no excuse for service on said jury, the party being otherwise qualified to serve as a grand juror. [*February 11, 1890, § 1. In effect immediately.*]

*Proceeding in case sheriff or auditor fail to assist.*

§ 61. If from any cause the sheriff or auditor, or both, shall not attend and assist the clerk in drawing jurors, as in this chapter provided, the clerk may call to his assistance such other county officer or officers as he may choose, and they shall proceed as is prescribed for the auditor and sheriff. [*February 2, 1888, § 3. In effect immediately.*]

*Irregularities do not invalidate.*

§ 62. The failure on the part of any officer to perform the duties required within the time, or other irregularity in said drawing, shall in no way invalidate the selecting, drawing, or summoning of said jurors. [*December 23, 1889, § 2. In effect immediately.*]

*Proceeding when venire set aside.*

§ 63. If for any cause the court shall see fit to set aside the venire for grand or petit jurors, returned as above provided, an open venire may thereupon issue to the sheriff, who shall thereupon complete the panel by such open venire as speedily as possible. [*Feb. 25, 1891, § 8.*]

*Venire to fill incomplete panel.*

§ 64. If for any cause a sufficient number of grand or petit jurors are not returned by the sheriff in the manner first herein contemplated, or if a sufficient number of grand or petit jurors are not in



attendance, the court may order the panel filled by summoning a sufficient number by an open venire issued and directed to the sheriff. [February 25, 1891, § 9.]

*Sheriff to summon jurors.*

§ 65. When a venire is delivered to the sheriff, he shall without delay proceed to summon the jurors as therein directed, and shall immediately thereafter make and file in the court a return of his doings thereon. [February 25, 1891, § 10.]

*Juror not to be summoned twice in one year.*

§ 66. No person shall be summoned as a petit juror in any superior court, upon an open venire, more than once in one year; and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned upon an open venire and attended said court as a juror at any session of said court held within one year prior to the time of such challenge; or that he has been summoned from the by-standers or body of the county, and has served as a juror in any cause upon such summons, within one year prior to the time of such challenge. [February 25, 1891, § 11.]

## CHAPTER III.

### OF REFEREES.

#### § 67. Referee defined.

*Referee defined.*

§ 67. A referee is a person appointed by the court or a judicial officer, with power, —

1. To try an issue of law or of fact in a civil action or proceeding, and report thereon;

2. To ascertain any other fact in a civil action or proceeding, when necessary for the information of the court, and report the fact, or to take and report the evidence in an action;

3. To execute an order, judgment, or decree, or to exercise any other power or perform any other duty expressly authorized by law. [February 24, 1891, § 1.]

## TITLE III.

## OF THE MINISTERIAL OFFICERS OF THE COURTS OF JUSTICE.

## CHAPTER I.—OF CLERKS.

## II.—OF SHERIFFS, CORONERS, BAILIFFS, AND CRIERS.

## III.—OF THE ATTORNEY-GENERAL AND PROSECUTING ATTORNEYS.

## IV.—OF ATTORNEYS AND COUNSELORS.

## CHAPTER I.

## OF CLERKS.

- § 68. Supreme judges to appoint a clerk.
- § 69. Clerk must take oath and give bond.
- § 70. Must keep office at seat of government.
- § 71. Clerk of superior court must keep office at county seat.
- § 72. Office hours.
- § 73. Powers and duties of clerks.
- § 74. Deputy clerks, powers and duties of.
- § 75. Clerks not to practice law.

*Supreme judges to appoint a clerk.*

§ 68. [2174.] The supreme court, or the judges thereof, shall appoint a clerk, who shall hold his office during the pleasure of such court.

See Const., art. 4, § 22.

*Clerk must take oath and give bond.*

§ 69. [2175.] Before entering upon the duties of his office, he shall take an oath of office, and give bond in such a sum, with surety and condition, as the said court or judges thereof shall require, which bond shall be deposited with the secretary of state. The bond shall be to the state of Washington, and any party aggrieved by the official acts or omissions of said clerk may have his action thereon. •

*Must keep office at seat of government.*

§ 70. [2176.] The clerk shall keep his office at the seat of government, and shall keep it open at all seasonable hours, and shall keep such records and books as are prescribed by law and the supreme court.

*Clerk of superior court must keep office at county seat.*

§ 71. The office of the clerk of the superior court shall be kept at the county seat of the county of which he is clerk. [Feb. 26, 1891, § 1.]

The county clerk is *ex officio* clerk of the superior court: Const., art. 4, § 26.



*Office hours.*

§ 72. Each clerk of a superior court shall keep his office open for the transaction of business on every judicial day, from eight to twelve in the forenoon, and from one to five in the afternoon. [*February 26, 1891, § 2.*]

*Powers and duties of clerks.*

§ 73. The clerk of the supreme court, and each clerk of a superior court, has power to take and certify the proof and acknowledgment of a conveyance of real property or any other written instrument, authorized or required to be proved or acknowledged, and to administer oaths in every case when authorized by law; and it is the duty of the clerk of the supreme court, and of each county clerk for each of the courts for which he is clerk, —

1. To keep the seal of the court, and affix it in all cases where he is required by law;

2. To record the proceedings of the court;

3. To keep the records, files, and other books and papers appertaining to the court;

4. To file all papers delivered to him for that purpose, in any action or proceeding in the court;

5. To attend the court of which he is clerk, to administer oaths, and receive the verdict of a jury in any action or proceeding therein, in the presence and under the direction of the court;

6. To keep the journal of the proceedings of the court, and, under the direction of the court, to enter its orders, judgments, and decrees;

7. To authenticate, by certificate or transcript, as may be required, the records, files, or proceedings of the court, or any other paper appertaining thereto, and filed with him;

8. To exercise the powers and perform the duties conferred and imposed upon him elsewhere by statute;

9. In the performance of his duties, to conform to the direction of the court. [*February 26, 1891, § 3.*]

*Deputy clerks, powers of.*

§ 74. The clerk of the supreme court, and each clerk of a superior court, may have one or more deputies, to be appointed by such clerk in writing, and to continue during his pleasure. Such deputies have the power to perform any act or duty relating to the clerk's office that their respective principals have, and their respective principals are responsible for their conduct. [*February 26, 1891, § 4.*]

**Deputy county clerk.** — As duties of a court clerk are not only ministerial but quasi judicial, the appointment of a deputy having the powers of a county clerk must be expressly authorized by statute: *State v. Smith*, 1 Or. 250.

*Clerks not to practice law.*

§ 75. Each clerk of a court is prohibited during his continuance in office from acting, or having a partner who acts, as an attorney of the court of which he is clerk. [February 26, 1891, § 5.]

## CHAPTER II.

### OF SHERIFFS, CORONERS, BAILIFFS, AND CRIERS.

§ 76. The sheriff is chief executive officer of the court — His duties.

§ 77. Must keep his office at county seat.

§ 78. Office hours of sheriff.

§ 79. Sheriff may appoint deputies.

§ 80. Power of deputy sheriff.

§ 81. Coroner to act when sheriff incapacitated.

§ 82. Sheriff and coroner not to practice law.

§ 83. Bailiffs and criers.

*Sheriff is chief executive officer of court — His duties.*

§ 76. The sheriff is the chief executive officer and conservator of the peace of the county. In the execution of his office, it is his duty, —

1. To arrest and commit to prison all persons who break the peace, or attempt to break it, and all persons guilty of public offenses;

2. To defend his county against those who, by riot or otherwise, endanger the public peace or safety;

3. To execute the process and orders of the courts of justice or of judicial officers, when delivered to him for that purpose, according to the provisions of this code or other statutes;

4. To execute all warrants delivered to him for that purpose by other public officers, according to the provisions of particular statutes;

5. To attend the sessions of the courts of record held within his county, and to obey their lawful orders or directions.

The county is not responsible for the acts of the sheriff. [February 25, 1891, § 1.]

*Must keep his office at county seat.*

§ 77. The sheriff must keep his office at the county seat of the county of which he is sheriff. [February 25, 1891, § 2.]

*Office hours of sheriff.*

§ 78. The sheriff's office must be kept open on the days and during the hours required for the clerk's office to be kept open. [February 25, 1891, § 3.]

*Sheriff may appoint deputies.*

§ 79. [2767.] Each sheriff may appoint as many deputies as he may think proper, for whose official acts he shall be responsible to the amount of their [his] bond, and he may revoke such appointments at his pleasure; and persons may also be deputed by any sheriff in writing

to do particular acts; and the sheriff shall be responsible on his official bond for the default or misconduct in office of his deputies.

*Powers of deputy sheriff.*

§ 80. [2768.] Every deputy sheriff shall possess all the power, and may perform any of the duties, prescribed by law to be performed by the sheriff or by his deputies; shall serve or execute, according to law, all process, writs, precepts, and orders, issued or made by lawful authority, and to him directed, and he shall attend upon all courts of record at every session.

*Coroner to act when sheriff incapacitated.*

§ 81. [2776.] The coroner shall perform the duties of the sheriff in all cases where the sheriff is interested, or otherwise incapacitated from serving; and whenever the coroner acts as sheriff he shall possess the powers and perform all the duties of sheriff, and shall be liable on his official bond in like manner as a sheriff would be, and shall be entitled to the same fees as are allowed by law to the sheriff for similar services; but before serving any process, as required by this section, the coroner shall give an additional bond in double the amount of the sum sued for or damages claimed.

*Sheriff and coroner not to practice law.*

§ 82. No sheriff, deputy sheriff, or coroner shall appear or practice as attorney in any court, except in defense of himself or his deputies. [February 25, 1891, § 4.]

*Bailiffs and criers.*

§ 83. Every court of record shall have the power to appoint a crier and as many bailiffs as may be necessary for the orderly and expeditious dispatch of the business. [February 26, 1891, § 3.]

## CHAPTER III.

### OF THE ATTORNEY-GENERAL AND PROSECUTING ATTORNEYS.

- § 84. Powers and duties of the attorney-general.
- § 85. Prosecuting attorneys defined.
- § 86. Who are eligible to the office of prosecuting attorney.
- § 87. Special appointment of prosecuting attorney by the court.
- § 88. Prosecuting attorney may have deputies.
- § 89. General powers and duties of prosecuting attorneys.

*Powers and duties of the attorney-general.*

§ 84. The powers and duties of the attorney-general, in relation to actions and proceedings in the courts, shall be,—

1. To appear for and represent the state before the supreme court in all cases in which the state is interested;
2. To institute and prosecute all actions and proceedings for or for



the use of the state, which may be necessary in the execution of the duties of any state officer;

3. To defend all actions and proceedings against any state officer in his official capacity, in any of the courts of this state or the United States;

4. To consult and advise the several prosecuting attorneys in matters relating to the duties of their office, and when, in his judgment, the interests of the state require, he shall attend the trial of any person accused of a crime, and assist in the prosecution. [*Feb. 26, 1891, § 2.*]

The office of attorney-general is created by the constitution: Art. 3, § 1.

*Prosecuting attorneys defined.*

§ 85. Prosecuting attorneys are attorneys authorized by law to appear for and represent the state and the counties thereof in actions and proceedings before the courts and judicial officers. [*February 26, 1891, § 3.*]

*Who are eligible to the office of prosecuting attorney.*

§ 86. No person shall be eligible to the office of prosecuting attorney in any county of this state, unless he be a qualified elector thereof, and shall have been admitted as an attorney and counselor of the courts of this state. [*February 26, 1891, § 4.*]

With regard to admission of attorneys, consult §§ 92, 93.

*Special appointment of prosecuting attorney by the court.*

§ 87. When from illness or other cause the prosecuting attorney is temporarily unable to perform his duties, the court or judge may appoint some qualified person to discharge the duties of such officer in court until such disability is removed. [*February 26, 1891, § 5.*]

*Prosecuting attorney may have deputies.*

§ 88. The prosecuting attorney of each county may appoint one or more deputies, not to exceed two, who shall have the same power in all respects as their principal. Such appointment shall be in writing, signed by the prosecuting attorney, and filed in the county auditor's office. Each deputy thus appointed shall have the same qualifications required of the district attorney, but his appointment may be revoked by the district attorney at will. The prosecuting attorney shall be responsible for the acts of his deputies. [*February 26, 1891, § 6.*]

*General powers and duties of prosecuting attorneys.*

§ 89. The prosecuting attorney of each county shall have authority, and it shall be his duty, subject to the supervisory control and direction of the attorney-general, to appear for and represent the state and the county of which he is prosecuting attorney, in all criminal and civil actions and proceedings in such county in which the state or such county is a party. [*February 26, 1891, § 7.*]

## CHAPTER IV.

## OF ATTORNEYS AND COUNSELORS.

- § 90. Attorneys and counselors defined.
- § 91. Persons entitled to practice as attorneys and counselors.
- § 92. Qualifications for admission.
- § 93. Supreme court to prescribe rules for admission.
- § 94. Duties of attorneys and counselors.
- § 95. Authority of attorneys and counselors.
- § 96. Proceeding when attorney appears without authority.
- § 97. Attorney may be required to show authority.
- § 98. Change of attorneys.
- § 99. Notice of change and substitution.
- § 100. Proceeding upon death or removal of attorney.
- § 101. Lien of attorneys.
- § 102. Summary proceeding to compel delivery of papers, etc.
- § 103. Same subject continued.
- § 104. Removal and suspension of attorneys.
- § 105. Proceedings for removal or suspension.
- § 106. Same subject continued.
- § 107. Persons not admitted must not practice.

*Attorneys and counselors defined.*

§ 90. An attorney is a person authorized to appear for and represent a party in the written proceedings in any action or proceeding, in any stage thereof. An attorney, other than the one who represents the party in the written proceedings, may also appear for and represent a party in court or before a judicial officer, and then he is known in the particular action or proceeding as counsel only, and his authority is limited to the acts that are done in the court or before such officer at that time. [*February 26, 1891, § 1.*]

**Attorneys as public officers.** — Attorneys do not hold "office" in the constitutional sense of the term: *Ex parte Yale*, 24 Cal. 241. The office of attorney at law is public, so far as it concerns the necessity of a license of some kind for its exercise, and the duty imposed upon the attorney of subserving the interests of public justice in the mode pointed out by his oath for admission: *Waters v. Whittemore*, 22 Barb. 505; *Austin's Case*, 5 Rawle, 191; *Byrne v. Stewart*, 3 Desaus. Ch. 466. Nor is the right to practice law "property" or a "contract": *Cohen v. Wright*, 22 Cal. 293.

The attorney does not hold an "office of public trust": *Cohen v. Wright*, 22 Cal. 293. Any person may engage in the profession of law; the profession is open to all, and it is simply the right to practice in court which is not permitted except to those qualified: *Woods's Case*, 1 Hopk. Ch. 6; *Cohen v. Wright*, 22 Cal. 313; *Hobbs v. Smith*, 1 Cow. 588; *Thorn v. Lawson*, 6 Tex. 240.

In the admission of attorneys, courts are said to act judicially. The function is not executive, nor is it ministerial: *In re Brackenridge*, 1 Serg. & R. 187.

*Persons entitled to practice as attorneys and counselors.*

§ 91. The following persons are entitled to practice as attorneys and counselors of all the courts of this state:—

1. All citizens of the United States who were duly admitted as attorneys and counselors of the supreme court or any district court of the territory of Washington;

2. All citizens of the United States who shall have been admitted as attorneys and counselors of the supreme court of the state of Washington. [*February 26, 1891, § 8.*]



*Qualifications for admission.*

§ 92. Before any person shall be admitted as an attorney or counselor in this state, it must appear to the satisfaction of the court to which he applies for admission,—

1. That he is a citizen of the United States, and of the age of twenty-one years;

2. That he is of good moral character;

3. That he has the requisite learning and ability to practice as an attorney and counselor at law, and has diligently studied the common law and the laws of this state, for at least eighteen months previous to the date of his application, under the direction of some practicing attorney within the state, or is a graduate of a law school within the United States, or has been admitted as an attorney and counselor of the highest court of record of another state or territory of the United States. [February 26, 1891, § 9]

*Supreme court to prescribe rules for admission.*

§ 93. Subject to the provisions and restrictions contained in the last preceding section, the supreme court shall make rules for the examination and admission of attorneys and counselors of the courts of this state, and no person shall be admitted except in accordance with such rules. [February 26, 1891, § 10.]

*Duties of attorneys and counselors.*

§ 94. [3279.] It shall be the duty of an attorney and counselor,—

1. To support the constitution of the United States and the laws of the state;

2. To maintain the respect due to the courts of justice and judicial officers;

3. To counsel or maintain such actions, proceedings, or defenses only as appear to him legal and just, except the defense of a person charged with a public offense;

4. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never to seek to mislead the judge by any artifice or false statement of fact or law;

5. To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client;

6. To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged;

7. Never to reject, from any consideration personal to himself, the cause of the defenseless or oppressed.

**Duties as to persons charged with crime.**—It is part of the general duty of persons accused of crime, who are destitute of means, upon the appointment of the court, counsel to render their professional services to when not inconsistent with their obligations to

others: *Rorce v. Yuba Co.*, 17 Cal. 61. For compensation in such cases the attorney must look to the future ability of the party: *Rorce v. Yuba Co.*, 17 Cal. 61. The county is not responsible, even where the attorney expended money in the defense: *Lamont v. Solano Co.*, 49 Cal. 158.

**Good faith toward client.** — The attorney ought to disclose the fact of any adverse retainer: *De Celis v. Brunson*, 53 Cal. 372; or even of any prior retainer: *Williams v. Reed*, 3 Mason, 404. He is bound to the most scrupulous good faith: *Valentine v. Stewart*, 15 Cal. 387. Especially so where the attorney bargains with the client; the former must show by clear and positive proof that no unfair advantage was taken: *Valentine v. Stewart*, 15 Cal. 387; that the transaction was fair and equitable: *Kisling v. Shaw*, 33 Cal. 425. The onus of proving the fairness of the dealings is on the attorney: *Neshitt v. Lockman*, 34 N. Y. 167; *Evans v. Ellis*, 5 Denio, 640; *Howell v. Benson*, 11 Paige, 538; *Mills v. Mills*, 26 Conn. 213. And see generally, Weeks on Attorneys, 444 et seq.

An attorney having represented one side cannot go over and render assistance to the other side and enforce contract for compensation: *Valentine v. Stewart*, 15 Cal. 387. But a

client who consults an attorney relative to drawing up a deed to realty, which is never executed, cannot hold the attorney as trustee, should he subsequently buy the land: *Porter v. Peckham*, 44 Cal. 264.

An attorney ought to inform his client of all facts which he learns in relation to the subject-matter of the action: *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160; *Hoopes v. Burnett*, 26 Miss. 428; *Jett v. Hempstead*, 25 Ark. 462.

**Client's secrets.** — It is the duty of an attorney to preserve his client's secrets: *Valentine v. Stewart*, 15 Cal. 387; *Gallagher v. Williamson*, 23 Cal. 331; *Kisling v. Shaw*, 33 Cal. 425; *People v. Atkinson*, 40 Cal. 284.

**Powers and liabilities of attorneys:** See the next section.

**Representing both sides.** — The court will not allow the same attorney to represent both sides of the same case, whether issue is joined or not: *Clarke County ex rel. etc. v. Comm'rs of Clarke County*, 1 Wash. 250. See *Simpson v. Brown Bros. & Co.*, 1 Wash. 247.

Counsel once employed by the appellee in the same case cannot appear for the appellant in the appellate court; professional confidence once reposed cannot be divested by expiration of professional employment: *Nickels v. Griffin*, 1 Wash. 374.

### Authority of attorneys and counselors.

§ 95. [3280.] An attorney and counselor has authority, —

1. To bind his client in any of the proceedings in an action or special proceeding by his agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of or any of the proceedings in an action or special proceeding, unless such agreement or stipulation be made in open court, or in presence of the clerk, and entered in the minutes by him, or signed by the party against whom the same is alleged, or his attorney.

2. To receive money claimed by his client in an action or special proceeding during the pendency thereof, or after judgment upon the payment thereof, and not otherwise, to discharge the same or acknowledge satisfaction of the judgment.

3. This section shall not prevent a party employing a new attorney, or from issuing an execution upon a judgment, or from taking other proceedings prescribed by statute for its enforcement.

**Powers of attorneys, generally:** See the exhaustive note to *Clark v. Randall*, 76 Am. Dec. 256 et seq. The authority of an attorney at law to appear for parties will be presumed where nothing to the contrary appears: *Garrison v. McGowan*, 48 Cal. 592; *Hayes v. Shattuck*, 21 Cal. 51; *Willson v. Cleaveland*, 30 Cal. 192; *Holmes v. Rogers*, 13 Cal. 191; *Turner v. Caruthers*, 17 Cal. 431; *Ricketson v. Compton*, 23 Cal. 636; *Hamilton v. Wright*, 37 N. Y. 502; *Succession of Patrick*, 20 La. Ann. 204; *Leslie v. Fischer*, 62 Ill. 118. Attorneys appear and participate in legal proceedings by the license of the court whose officers they are: *Clark v.*

*Willett*, 35 Cal. 534. The license is *prima facie* evidence of authority to appear for parties whom they profess to represent: Cases *supra*; *Clark v. Willett*, 35 Cal. 534; *People v. Mariposa County*, 39 Cal. 683. But an attorney may be compelled by the court to show his authority, either at the instance of the party for whom he appears, or of the opposite party: *Id.*; and see the two sections following this. While the attorney of record remains such, his right to manage and control the action cannot be questioned by the opposite party: *Bourd Comm'rs Funded Debt of San José v. Younger*, 29 Cal. 147. An "attorney in fact" has no right to



sign a complaint as plaintiff's attorney; and an action so instituted is void as though commenced by an entire stranger: *Dixey v. Pollock*, 8 Cal. 570.

It is not a material point of inquiry whether an attorney exceeded his authority, or departed from his instructions: *Holmes v. Rogers*, 13 Cal. 200. Therefore where a motion of appeal was signed by an attorney of the court, it was presumed he had authority: *Ricketson v. Compton*, 23 Cal. 649. Where service of a notice of motion for a new trial is accepted by an attorney for another, who was his associate on the trial, each, however, appearing for different defendants, it will be presumed that he had authority to accept the service, if the point is first raised in the supreme court: *McCreery v. Everding*, 44 Cal. 284.

The proper mode of procedure, if the suit is not authorized, is for the defendant to move the court, upon proper affidavits, to dismiss it, upon the ground that it is not authorized by those in whose names it is brought. If the attorney, on such a motion, and after notice of it, fails to show his authority, the court may dismiss the case. But it would lead to great confusion to hold that the parties may be heard in the progress of a case on trial otherwise than through the attorneys appearing for them on the record: *Turner v. Caruthers*, 17 Cal. 432; *McKernan v. Patrick*, 4 How. (Miss.) 336, and cases there cited; *Clark v. Willett*, 35 Cal. 540; *People v. Mariposa Co.*, 39 Cal. 684. It is very doubtful whether, in an action or proceeding in the name of the people, a stipulation not made by the attorney-general by whom the suit was instituted, but only by the private counsel of the relator, will bind the people: *People v. Holden*, 28 Cal. 138.

Where counsel appears expressly for certain defendants in an action, his signature to papers in the case after that time, as the attorney for the defendants, will be construed as limited to those defendants for whom he expressly appeared: *Spangel v. Dellinger*, 42 Cal. 148; *Hobbs v. Duff*, 43 Cal. 485.

Where there are several defendants, and each appears by his own attorney, the proceedings on behalf of the defendants must be conducted by their respective attorneys, and the attorney for one defendant cannot give notice of motion or accept service or stipulate for another: *Hobbs v. Duff*, 43 Cal. 485.

If a party who has an undivided interest in a tract of land employs an attorney to act for him in relation to his interest in a partition suit, and at the same time, as the agent of another party, who also has an undivided interest, employs the attorney to act for such other party in relation to his interest, the relation of attorney and client does not exist between the employer and attorney as to the interest of the party for whom the employer acted as agent: *Porter v. Peckham*, 44 Cal. 204.

**Death of client terminates attorney's authority:** *Judson v. Love*, 35 Cal. 463.

**Client, how far bound and by what acts.** — The law of principal and agent is generally applicable to that of client and attorney. The client is bound, according to the ordinary rules of agency, by the acts of his attorney within the scope of the latter's authority: *Russell v. Lane*, 1 Barb. 519; *Lawson v. Bettison*,

12 Ark. 401; *Sampson v. Ohleyer*, 22 Cal. 200; *Greenlee v. McDowell*, 4 Ired. 481; *Fairbanks v. Stanley*, 18 Me. 296; *Rice v. Wilkins*, 21 Me. 558; *Bethel v. Carmack*, 2 Md. Ch. 143; *Chambers v. Hodges*, 23 Tex. 104; *Nave v. Baird*, 12 Ind. 318.

The general rule that an agent cannot delegate his authority applies to attorneys: *Johnson v. Cunningham*, 1 Ala. 249; *Dickson v. Wright*, 52 Miss. 585; 24 Am. Rep. 677; *Smalley v. Greene*, 52 Iowa, 241; 35 Am. Rep. 267; *Kellogg v. Norris*, 10 Ark. 18; *Danley v. Crawl*, 28 Ark. 95. Compare *Planters' Bank v. Massey*, 2 Heisk. 360. But this general rule will yield where the facts of a particular case are such that it may fairly be inferred that power to delegate his authority was given: *Willard v. Town of Danville*, 45 Vt. 93; *Paddock v. Colby*, 18 Vt. 485; and an attorney may employ an agent, by whose acts in receiving payment the client will be bound: *McEwen v. Mazyck*, 3 Rich. 210.

*Agreements or stipulations of counsel as to conduct of a trial are binding upon his client when made in good faith:* *Rosenbaum v. State*, 33 Ala. 354; *Hellman v. McWhennie*, 3 Rich. 364; *McCann v. McLennan*, 3 Neb. 25; *Greenlee v. McDowell*, 4 Ired. 481; *De Louis v. Meek*, 2 G. Greene, 55; 50 Am. Dec. 491, 503; *Kent v. Ricards*, 3 Md. Ch. 392; *Farmers' Trust etc. Bank v. Ketchum*, 4 McLean, 120. As by statute an attorney has authority to bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk or entered upon the minutes of the court only, verbal agreements not entered upon the minutes are not binding: *Borkheim v. North British etc. Ins. Co.*, 38 Cal. 623; *Merritt v. Wilcox*, 52 Cal. 238. While agreements by attorneys as to the manner of conducting a cause will be protected and upheld by the court, an agreement wanting in mutuality, and by which, without the consent of the client, an attorney has waived his client's substantial rights, will not be enforced: *Howe v. Lawrence*, 22 N. J. L. 99. If several actions are brought by the same plaintiff against different defendants, the defenses being the same in each, the attorneys of the several parties may agree that all the cases shall abide the final decision in one case: *North Missouri R. R. v. Stephens*, 36 Mo. 150. But an attorney has no power to bind his client by a general agreement with other attorneys not to try causes during a particular period: *Robert v. Commercial Bank*, 13 La. 528; 33 Am. Dec. 570. Where, in a criminal case, the defendant's attorney waived a trial by a jury of twelve men, and consented to a trial by a less number, and the defendant, though present in the court, was not consulted, and did not know that he could object to the act of the attorney, such waiver is not binding on the defendant: *Brown v. State*, 16 Ind. 496. Stipulations not to appeal or move for a new trial are not binding: *People v. Mayor etc. of New York*, 11 Abb. Pr. 66. *Contra*, *Pike v. Emerson*, 5 N. H. 393; 22 Am. Dec. 468. An attorney, of course, may waive informalities or irregularities: *Hanson v. Hoitt*, 14 N. H. 56; *Alton v. Gilmanton*, 2 N. H. 520. The law not only recognizes the binding force upon clients of stipulations and agreements by their attorneys concerning the conduct and management of a case, but it gives the attor-

ney the exclusive control in this regard. A party himself has therefore no authority to sign a stipulation for a continuance: *Nightingale v. Oregon Central R'y*, 2 Saw. 338; nor one granting time to file a statement on a motion for a new trial, although the attorney was temporarily absent from the county at the time: *Mott v. Foster*, 45 Cal. 72. And where a motion to dismiss an action was made by the defendant because an order had been received by the plaintiff directing his attorney to dismiss the suit at the defendant's costs, and the defendant offered to pay the costs, but the plaintiff's attorney objected, and the motion was overruled, it was held that as against the defendant the plaintiff's attorney had the right to control the case and to refuse to dismiss the action: *McConnell v. Brown*, 40 Ind. 384.

**Admissions.** — An attorney may bind his client by the admission of a fact made in the progress of a trial: *Starke v. Kenan*, 11 Ala. 818; *Wenans v. Lindsey*, 1 How. (Miss.) 577; *Talbot v. McGee*, 4 T. B. Mon. 375, 377; *Wilson v. Spring*, 64 Ill. 14; *Haller v. Worman*, 3 L. T. 741; 9 Week. Rep. 348; and the rule is the same when the client is a *feme covert*: *Wilson v. Spring*, 64 Ill. 14. So representations by counsel in the presence of his client, on the faith of which one has advanced money, are the representations of the client: *Gilkeson v. Snyder*, 8 Watts & S. 200. But "admissions of an attorney, in order to bind his client, must be distinct and formal, and made for the express purpose of dispensing with formal proof of a fact at the trial": *Treadway v. Sioux City etc. R. R.*, 40 Iowa, 526. Admissions made by an attorney long after a case has been tried, and his employment has ended, are not binding: *Walden v. Bolton*, 55 Mo. 405. And while attorneys may bind their clients by admissions of facts in a case, where such admissions are made improvidently and by mistake, the court, by means of its coercive powers over its own officers, has authority to relieve against the consequences of the admission: *Harvey v. Thorpe*, 28 Ala. 250; 65 Am. Dec. 344.

**Other acts.** — An attorney cannot release sureties without satisfaction: *Savings Inst. v. Chinn's Adm'r*, 7 Bush, 539; *Givens v. Briscoe*, 3 J. J. Marsh. 529, 532; *Stoll v. Sheldon*, 13 Neb. 207; *Roberts v. Smith*, 3 La. Ann. 205; even to obtain his testimony on the trial: *Bull v. Bank of Alabama*, 8 Ala. 590; 42 Am. Dec. 649; *Marshall v. Nagel*, 1 Bail. 308; *Bourne v. Hyde*, 6 Barb. 392; *Murray v. House*, 11 Johns. 464; *York Bank v. Appleton*, 17 Me. 55; *Springer v. Whipple*, 17 Me. 351; *Shores v. Caswell*, 13 Met. 413; *Succession of Weigel*, 18 La. Ann. 49.

**Power to dismiss nonsuit and restore action.** — An attorney's general authority will permit him to dismiss or discontinue the action: *Simpson v. Brown Co.*, 1 Wash. 247; *Paxton v. Cobb*, 2 La. 137; *McLeran v. McNamara*, 55 Cal. 508; *Rogers v. Greenwood*, 14 Minn. 333; *Gailard v. Smart*, 6 Cow. 385. But he has not the power to enter a *retraxit*: *Lambert v. Sandford*, 2 Blackf. 137; 18 Am. Dec. 149. Compare *Barnard v. Daygett*, 68 Ind. 305, decided under a statute. And counsel for the defendant in an action have no authority to agree that the dismissal of the action should be a bar to an action for malicious prosecution: *Mar-*

*bourg v. Smith*, 11 Kan. 554. Counsel have also the power to agree to a nonsuit: *Lynch v. Coel*, 12 L. T. 548, 13 Week. Rep. 846. An attorney may restore an action after a *non pros.* without the consent of his client: *Reinholdt v. Alberti*, 1 Binn. 469; and may consent to accept joinder in issue, after he has signed judgment for want of the joinder in due time, although contrary to the client's express orders: *Latuch v. Pasherante*, 1 Salk. 86.

**Confession of judgment.** — The powers of an attorney over the cause of his client extend so far as to enable him to confess judgment against the client: *Thompson v. Pershing*, 86 Ind. 303; *Potter v. Parsons*, 14 Iowa, 286; *Farmers' Bank v. Sprigg*, 11 Md. 389; *Holmes v. Rogers*, 13 Cal. 191; *Jones v. Williamson*, 5 Cold. 371. *Contra*, *Edwards v. Edwards*, 29 La. Ann. 597; *People v. Lumborn*, 1 Seam. 123; *Wadhams v. Gay*, 73 Ill. 415. An agreement, therefore, by an attorney to permit judgment to be entered against his client is binding: *Id.* It is even held that an attorney may bind his client by an agreement that judgment may be taken against him, although the attorney knew that his client had a good defense to the action: *Thompson v. Pershing*, 86 Ind. 303. This rule, thus maintained by a majority of cases, seems to be opposed to the well-settled American doctrine, *post*, that an attorney has no authority to compromise the cause of his client. Indeed, the confession of judgments and compromise of causes appear to stand upon the same footing. Of course, a confession of judgment by counsel, with the knowledge and at the instance of the client, is binding: *Lyon v. Williams*, 42 Ga. 168. A power to confess judgment, given by the defendant to the plaintiff's attorney is a power coupled with an interest, and is irrevocable: *Wassell v. Reardon*, 11 Ark. 705; 54 Am. Dec. 245.

**Authority to appeal, prosecute writ of error, etc.** — In *Grosvenor v. Danforth*, 16 Mass. 74, it was decided that an attorney of record not only may sue out a writ of error to reverse an erroneous judgment obtained against his client, but that it is his duty to do so; and in *Boch v. Ballard*, 13 La. Ann. 487, it was held that it is incumbent upon an attorney *ad hoc* to appeal, if in his opinion his client can be benefited thereby; but an authority to prosecute an action to judgment does not include an authority to prosecute a motion or action to reverse or set aside that judgment: *Richardson v. Talbot*, 2 Bibb, 382.

**Payment.** — An attorney to whom the collection of a debt or claim is intrusted is authorized to receive payment thereof, and payment to him is a payment to his client: *Yates v. Freckleton*, 2 Doug. 623; *Varley v. Garrard*, 2 Dowl. 490; *Powel v. Little*, 1 W. Black. 8; *Hudson v. Johnson*, 1 Wash. (Va.) 9; and in a suit by a county for the collection of money, payment may be made by the defendant to the lawfully authorized attorney of the county, the same as in other cases: *Carroll Co. v. Cheatham*, 48 Mo. 385. The attorney, it seems, may receive partial payments on account of the claim: *Pickett v. Bates*, 3 La. Ann. 627. The power to receive payment ceases, of course, when the relation of attorney and client ceases: *Ruckman v. Alwood*, 44 Ill. 183. And payment to an attorney by the defendant, after notice



by the client not to pay, is not binding; *Weist v. Lee*, 3 Yeates, 47. Where an attorney is employed by an administrator to obtain authority to sell real estate, he is not, by force of such employment, authorized to receive the purchase-money offered for the estate sold: *Nolan v. Jackson*, 16 Ill. 272.

Payment may be received by the attorney after suit has been commenced as well as before: *Ducett v. Cunningham*, 39 Mo. 386. And after judgment has been recovered, the attorney, by virtue of a general retainer, continues to be the agent for collection, and he is authorized to receive payment and to enter satisfaction: *Wycoff v. Bergen*, 1 N. J. L. 214; *McCurver v. Nealey*, 1 G. Greene, 360; *State v. Hawkins*, 28 Mo. 366; *Ely v. Harvey*, 6 Bush, 620; *Frazier v. Parks's Adm'rs*, 56 Ala. 363; *McDonald v. Todd*, 1 Grant Cas. 17; *Branch v. Burnly*, 1 Call, 147; *Rogers v. McKenzie*, 81 N. C. 164; *Yoakum v. Tilden*, 3 W. Va. 167; *Miller v. Scott*, 21 Ark. 396; *Erwin v. Blake*, 8 Pet. 17, 26. The power of an attorney to receive payment does not, however, extend so far as to authorize him to release or discharge his client's claim or money judgment without actual payment: *Harrow v. Farrow's Heirs*, 7 B. Mon. 126; 45 Am. Dec. 60; *Gilliland v. Gasque*, 6 S. C. 406; *Chambers v. Miller*, 7 Watts, 63; *Beers v. Hendrickson*, 45 N. Y. 665; *Mandeville v. Reynolds*, 68 N. Y. 528, 540; *Doub v. Barnes*, 1 M. L. Ch. 127. Nor is he authorized to receive anything but money in payment: *Walker v. Scott*, 13 Ark. 644; *McCurver v. Nealey*, 1 G. Greene, 360; *Perkins v. Grant*, 2 La. Ann. 328; *Lord v. Burbank*, 18 Me. 178; *Lewis v. Woodruff*, 15 How. Pr. 539; *Commissioners v. Rose*, 1 Desaus. Ch. 461, 469; *Wright v. Daily*, 26 Tex. 730.

**Compromise.** — It may be regarded as the well-settled doctrine that an attorney has no power to compromise a claim, action, or judgment of his client: *Robinson v. Murphy*, 69 Ala. 543; *Derwort v. Loomer*, 21 Conn. 245; *Wadhams v. Gay*, 73 Ill. 415; *De Louis v. Meek*, 2 G. Greene, 55; 50 Am. Dec. 491; *Smith's Heirs v. Diron*, 3 Met. (Ky.) 438; *Voorhies v. Harrison*, 22 La. Ann. 85; *Maddux v. Beran*, 39 Md. 485; *Fitch v. Scott*, 3 How. (Miss.) 314; 34 Am. Dec. 86; *Davidson v. Rozier*, 23 Mo. 387; *Walden v. Bolton*, 55 Mo. 405; *Hamrick v. Combs*, 14 Neb. 381; *Shaw v. Kidder*, 2 How. Pr. 244; *Barrett v. Third Avenue R. R.*, 45 N. Y. 628; *Stokely v. Robinson*, 34 Pa. St. 315; *Isaacs v. Zugsmith*, 103 Pa. St. 77; *Treasurers v. McDowell*, 1 Hill (S. C.), 184; *Adams's Assignee v. Roller*, 35 Tex. 711; *Vaul v. Conant*, 15 Vt. 314; *Granger v. Batchelder*, 54 Vt. 248; 41 Am. Rep. 846.

**Assignment or transfer of claims or judgments.** — An attorney to whom a note or other demand is given for collection has no power to assign or transfer the same to a third person: *Russell v. Drummond*, 6 Ind. 216; *Goodfellow v. Landis*, 36 Mo. 168; *White v. Hildreth*, 13 N. H. 104; *Card v. Walbridge*, 18 Ohio, 411; *Annely v. De Saussure*, 12 S. C. 488; *Penniman v. Patchin*, 5 Vt. 346; *Terhune v. Colton*, 10 N. J. Eq. 21; nor has he any authority to assign his client's judgment: *Boren v. McGehee*, 6 Port. 432; 31 Am. Dec. 695; *Walden v. Grant*, 8 Martin, N. S., 565; *Wilson v. Wadleigh*, 36 Me. 496; *Head v. Gervais*, Walk. (Miss.) 431; 12 Am. Dec. 577, and note; *Campbell's Appeal*, 20 Pa. St.

401; 72 Am. Dec. 641; *Fassitt v. Middleton*, 47 Pa. St. 214; *Rowland v. Slate*, 58 Pa. St. 196; *Noonan v. Gray's Ex'rs*, 1 Bail. 437; *Meyer v. Blease*, 4 S. C. 10; *Maxwell v. Owen*, 7 Cold. 630. But the transfer or assignment may be ratified by the client; and the reception by the client of the money paid the attorney may amount to a ratification: *Marshall v. Moore*, 36 Ill. 321.

**Submission to arbitration.** — It is generally held that an attorney has the power to submit his client's cause to a reference or arbitration: *Lee v. Grimes*, 4 Col. 185; *Jones v. Horsey*, 4 Md. 306; 59 Am. Dec. 81; *Inhabitants of Buckland v. Conway*, 16 Mass. 396; *Jenkins v. Gillespie*, 10 Smedes & M. 31; 48 Am. Dec. 732; *Morris v. Grier*, 76 N. C. 410; *Evans v. Kamphaus*, 53 Pa. St. 379; *Williams v. Tracey*, 95 Pa. St. 308, 310; *Township of North Whitehall v. Keller*, 100 Pa. St. 105; 45 Am. Rep. 361; *Tilton v. United States L. Ins. Co.*, 8 Daly, 84.

**Liability of attorneys.** — An attorney is liable for the want of such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise: *Gambert v. Hart*, 44 Cal. 542. The rule has been thus formulated in *Wilson v. Russ*, 20 Me. 421: "The attorney is bound to execute business in his profession with a reasonable degree of care, skill, and dispatch. If the client be injured by the gross fault, negligence, or ignorance of the attorney, the attorney is liable; but if he acts with good faith, to the best of his skill, and with an ordinary degree of attention, he will not be responsible." And this is the general rule: *O'Barr v. Alexander*, 37 Ga. 195; *Gilbert v. Williams*, 8 Mass. 51; *Bourman v. Tallman*, 27 How. Pr. 212; 2 Rob. (N. Y.) 385; *Stevens v. Walker*, 55 Ill. 151. If an attorney has not the skill usual with practitioners in his particular department, he is chargeable with the consequences of the want thereof. The want of the skill, diligence, and prudence usually possessed by lawyers fixes the liability of the attorney: *Chase v. Heaney*, 70 Ill. 268; *Reilly v. Caranagh*, 29 Ind. 435; *Morrill v. Graham*, 27 Tex. 646; *Eggleston v. Boardman*, 37 Mich. 14. See also note to *Fitch v. Scott*, 34 Am. Dec. 89.

An attorney is guilty of gross negligence who allows the time for an appeal to expire without taking an appeal when desired by the client: *Drais v. Hogan*, 50 Cal. 121; or where on motion for a new trial he fails to have the statement certified, thereby preventing the appellate court from looking into and reviewing the action of the court below on the motion: *Gambert v. Hart*, 44 Cal. 542; or where he does not present a claim against a decedent's estate in time: *Stevens v. Dexter*, 55 Ill. 151. An attorney may accept as a correct exposition of the law the decision of his state's supreme court: *Hastings v. Halleck*, 13 Cal. 203. But the state decision must be in advance of any decision of the supreme court on that subject: *Marsh v. Whitmore*, 21 Wall. 178.

**Receipt by attorney of a party to a judgment,** given to the clerk of court for money paid into clerk's office in satisfaction of the judgment will bind the client: *Lyons v. Bain et al.*, 1 Wash. 482.

**Stipulation by attorney,** who, without objection, has appeared generally in an action,

that notice of appeal might be given and statement of facts settled after the expiration of the time limited by law, is binding on all the defendants, though other defendants were represented, specially, by other attorneys; and the fact that a third defendant was specially represented by a firm, one of whose members bears

the same surname as the attorney stipulating, will not warrant the court in assuming the attorney signing the stipulation was the member of the firm, and that he represented only the third defendant: *Haas et al. v. Gaddis et al.*, Sup. Ct. Wash., January, 1890; 23 Pac. Rep. 1010.

*Proceeding when attorney appears without authority.*

§ 96. [3281.] If it be alleged by a party for whom an attorney appears that he does so without authority, the court may at any stage of the proceedings relieve the party for whom the attorney has assumed to appear from the consequences of his act; it may also summarily, upon motion, compel the attorney to repair the injury to either party consequent upon his assumption of authority.

*Attorney may be required to show authority.*

§ 97. [3282.] The court or a judge may, on motion of either party, and on showing reasonable grounds therefor, require the attorney for the adverse party, or for any one of several adverse parties, to produce or prove the authority under which he appears, and until he does so, may stay all proceedings by him on behalf of the party for whom he assumes to appear.

*Change of attorneys.*

§ 98. [3283.] The attorney in an action or special proceeding may be changed at any time before judgment or final determination as follows:—

1. Upon his own consent, filed with the clerk or entered upon the minutes; or

2. Upon the order of the court, or a judge thereof, on the application of the client, or for other sufficient cause; but no such change can be made until the charges of such attorney have been paid by the party asking such change to be made.

*Notice of change and substitution.*

§ 99. [3284.] When an attorney is changed, as provided in the last section, written notice of the change, and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party; until then, he shall be bound to recognize the former attorney.

**Notice of substitution of attorney must be served upon the adverse party:** *Grant v. White*, 6 Cal. 55; *Withers v. Little*, 56 Cal. 370; *Gizen v. Driggs*, 3 Caines, 300; *Hildreth v. Harrey*, 3 Johns. Cas. 300; *Dorlon v. Lewis*, 7 How. Pr. 132. And upon such notice received it is improper to recognize any other than the substituted attorney: *Preston v. E. A. Stone Co.*, 54 Cal. 198. Until such notice has been given, papers may be served upon the attorney of

record: *Grant v. White*, 6 Cal. 55; *Livermore v. Webb*, 56 Cal. 489.

The authority of an attorney to appear for the opposite party cannot be questioned by counsel who stipulate with him as such: *McDonald v. McConkey*, 54 Cal. 143. Nor can the authority of the substituted attorney be inquired into by the adverse attorney who accepts service of notice of substitution: *Withers v. Little*, 56 Cal. 370.



*Proceeding upon death or removal of attorney.*

§ 100. [3285.] When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action for whom he was acting as attorney must, at least twenty days before any further proceedings against him, be required by the adverse party, by written notice, to appoint another attorney, or to appear in person.

*Lien of attorneys.*

§ 101. [3286.] An attorney has a lien for his compensation, whether specially agreed upon or implied, as hereinafter provided, —

1. Upon the papers of his client, which have come into his possession in the course of his professional employment;

2. Upon money in his hands belonging to his client;

3. Upon money in the hands of the adverse party in an action or proceeding, in which the attorney was employed, from the time of giving notice of the lien to that party;

4. Upon a judgment to the extent of the value of any services performed by him in the action, or if the services were rendered under a special agreement, for the sum due under such agreement, from the time of filing notice of such lien or claim with the clerk of the court in which such judgment is entered, which notice must be filed with the papers in the action in which such judgment was rendered, and an entry made in the execution docket, showing name of claimant, amount claimed, and date of filing notice.

**Attorney's lien.** — *Mandamus* will not lie against the mayor and city clerk to pay attorney's lien filed on judgment obtained for a client against the city, which client had assigned and satisfaction of which had been entered of record, where no judicial proceedings have been had to determine validity: *Chambers et al. v. Territory of Washington*, 3 Wash. 280.

**Lien on papers.** — The lien attaches not only to papers which the attorney himself drew, but to all papers which come to his hands as attorney: *Gist v. Hanley*, 33 Ark. 233.

**Lien on judgment.** — The lien does not extend beyond the amount of costs, unless there is a special agreement: *Ex parte Kyle*, 1 Cal. 331.

**The lien does not attach** until after entry of judgment in favor of the attorney's client: *Hobson v. Watson*, 34 Me. 20; *Shank v. Shoemaker*, 18 N. Y. 489.

**Waiver.** — The lien may be waived in various ways; for instance, over papers, by parting with them: *Nichols v. Pool*, 89 Ill. 491; and so it may be waived by taking security: *Cowell v. Simpson*, 16 Ves. 275.

*Summary proceeding to compel delivery of papers, etc.*

§ 102. [3287.] When an attorney refuses to deliver over money or papers to a person from or for whom he has received them in the course of professional employment, whether in an action or not, he may be required by an order of the court in which an action, if any, was prosecuted, or if no action was prosecuted, then by order of any judge of a court of record, to do so within a specified time, or show cause why he should not be punished for a contempt.

*Same subject continued.*

§ 103. [3288.] If, however, the attorney claim a lien upon the money or papers, under the provisions of this chapter, the court or judge may, —

1. Impose as a condition of making the order that the client give security, in a form and amount to be directed, to satisfy the lien, when determined in an action;

2. Summarily to inquire into the facts on which the claim of a lien is founded, and determine the same; or

3. To refer it, and upon the report determine the same as in other cases.

*Removal and suspension of attorneys.*

§ 104. [3289.] An attorney or counselor may be removed or suspended by any court of record for either of the following causes, arising after his admission to practice:—

1. Upon his being convicted of felony, or of a misdemeanor involving moral turpitude, in either of which cases the record of his conviction is conclusive evidence;

2. For a willful disobedience or violation of the order of a court requiring him to do or forbear an act connected with or in the course of his profession;

3. For a willful violation of any of the provisions of section 94.

The words "at a regular term thereof," after "any court of record," are omitted, in view of the constitution declaring that the superior and supreme courts shall always be open, etc.

**Disbarring or suspending attorneys.**

— Attorneys are liable to forfeit their license to practice for any one of the above causes. The manner of declaring the forfeiture, and the proceeding upon which such action is based, are prescribed in the succeeding sections of this chapter. These sections regulate the exercise of the power to strike an attorney's name from the roll, but do not create such power; it is inherent in the court: *Weeks on Attorneys*, sec. 80; *People v. Twine*, 1 Cal. 143. In the exercise of this power, the court ought to give counsel an opportunity to explain: *Fletcher v. Duingerfield*, 20 Cal. 427. It is improper to declare an attorney guilty of contempt and strike his name from the rolls without affording an opportunity for explanation: *Fletcher v. Duingerfield*, 20 Cal. 427.

Attorneys have been disbarred for advising a client to verify a complaint which the attorney knew to be false, and which he led his client to suppose had been corrected before verification: *People v. Pearson*, 55 Cal. 472. The evidence held insufficient in *In re Lowen-*

*thal*, 2 West Coast Rep. 733, to justify the removal or suspension from the bar.

Whether an attorney can be removed or suspended for causes other than those mentioned in this section was not decided, although raised, in *In re Treadwell*, 4 West Coast Rep. 608. See the variety of instances in *Weeks on Attorneys*, secs. 80 et seq. For an interesting and valuable decision upon the power of the court to disbar attorneys, see *Ex parte Wall*, 107 U. S. 265.

**Reinstatement.** — Where an attorney is improperly disbarred, *mandamus* has been issued to restore him: *People v. Turner*, 1 Cal. 190. Some decisions have held this to be the appropriate remedy, while others declare that appeal or *certiorari* should be resorted to: See the cases *pro* and *con*, *Weeks on Attorneys*, secs. 142, 160, 161.

Court will not refuse to exercise its jurisdiction to disbar an attorney in a proper case merely because the offense charged is indictable, and the accused has not been convicted or prosecuted thereon: *State v. Winton*, 11 Or. 456.

*Proceedings for removal or suspension.*

§ 105. [3290.] The proceedings to remove or suspend an attorney and counselor, as provided in the last section, must be taken by the court of its own motion for matter within its knowledge, or may be taken upon the information of another, and in either case the party shall have the privilege of making his defense.

See note to § 104.

*Same subject continued.*

§ 106. [3291.] Such proceedings shall be by motion and answer, and evidence may be examined on either side.

See note to § 104.



*Persons not admitted must not practice.*

§ 107. [3292.] No person shall practice in any court of record except a party or his regularly authorized attorney and counselor at law; *provided*, that nothing herein contained shall be so construed as to prevent a party from employing any person to assist him in the preparation of his papers in the case before the time of trial, nor so as to prevent any person from trying any particular cause in court, leave of court being first had and obtained, and entered of record.

## TITLE IV.

### OF THE FORMS OF ACTIONS AND RULE OF DECISION.

#### CHAPTER I.

§ 108. Common law, how far prevails.

§ 109. Only one form of action in this state.

§ 110. Parties, how designated.

*Common law, how far prevails.*

§ 108. The common law, so far as it is not inconsistent with the constitution and laws of the United States, or of the state of Washington, nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state. [February 24, 1891, § 1.]

**Common law, etc.** — The above section does not confine the courts to the decisions of the English courts, and American courts which have followed them, for interpretation of the law: *Sayward v. Carlson*, 23 Pac. Rep. 830.

The term "*laws*" includes not only written expressions of the governing will, but also all other rules of property and conduct in which

the supreme power exhibits, and according to which it exerts, its governmental force: *Phelps et al. v. S. S. City of Panama*, 1 Wash. 518.

As it exists in England, and has been amended, the common law as to leases is not applicable here; the condition of things is widely different: *Smith v. Wingard*, 3 Wash. 291.

*Only one form of action in this state.*

§ 109. [2] There shall be in this state hereafter but one form of action. for the enforcement or protection of private rights and the redress of private wrongs, which shall be called a civil action.

**Form of civil action.** — In this state there is but one form of civil actions. The old rules of common-law and chancery pleading are superseded: *Cordier v. Schloss*, 12 Cal. 127; *Kimball v. Lohmas*, 31 Cal. 159. And the forms of pleading are exclusively those provided by the code: *Hentsch v. Porter*, 10 Cal. 558; *Jones v. Cortes*, 17 Cal. 497.

The provision that there shall be but one form of action was not intended to abolish the distinction between law and equity: *Garrison v. Cheeney*, 1 Wash. 489; *Thompson v. Caton*, 3 Wash. 31; *Parker v. Dacres*, 24 Pac. Rep. 192; *De Witt v. Hayes*, 2 Cal. 463; *Bonesteel v. Bonesteel*, 23 Wis. 245; *Wiggins v. McDonald*, 18 Cal. 126; *White v. Lyons*, 42 Cal. 279.

The course of proceeding in both classes of causes is now the same, and both legal and

equitable causes of action may be joined: *Thompson v. Caton*, 3 Wash. 31; *Garrison v. Cheeney*, 1 Cal. 489; *Parker v. Dacres*, 24 Pac. Rep. 192. Whether the action depend upon legal principles or upon equitable, it is still a civil action, to be commenced and prosecuted without reference to this distinction: *Thompson v. Caton*, 3 Wash. 31; *Garrison v. Cheeney*, 1 Wash. 489; *Parker v. Dacres*, 24 Pac. Rep. 192; *Cole v. Reynolds*, 18 N. Y. 74, 76. And to the same effect are *Bowen v. Aubrey*, 22 Cal. 566; *New York Ins. Co. v. Nat. Pro. Ins. Co.*, 14 N. Y. 85; *Wright v. Wright*, 54 Cal. 437; *Williams v. Slote*, 70 Cal. 601; *Stevens v. The Mayor*, 84 Cal. 296; *Chinn v. Prentiss*, 32 Ohio St. 236; *Gress v. Evans*, 1 Dak. 387; *Troost v. Davis*, 31 Ind. 34. The general rules of law applicable to the case before the code

still apply: *Goulet v. Asseler*, 22 N. Y. 228; *Lubert v. Chauriteau*, 3 Cal. 458; 58 Am. Dec. 415; *Jones v. Steamship Cortes*, 17 Cal. 487; 79 Am. Dec. 142.

Resulting from this change in the forms of action is this very important principle: "A party cannot be sent out of court merely because his facts do not entitle him to relief at law, or merely because he is not entitled to relief in equity, as the case may be. He can be sent out of court only when upon his facts he is entitled to no relief either at law or in equity": *Grain v. Aldrich*, 38 Cal. 514, 520. "A complaint which states a sufficient cause

of action either at law or in equity is not demurrable as not stating facts sufficient to constitute a cause of action": *White v. Lyons*, 42 Cal. 279, 283; *Carpentier v. Brenham*, 50 Cal. 551; *McPherson v. Weston*, 64 Cal. 275. So also are *Barlow v. Scott*, 24 N. Y. 40; *Crary v. Goodman*, 12 N. Y. 266; *Troost v. Davis*, 31 Ind. 34; *Leonard v. Rogan*, 20 Wis. 540; *Haniel v. Thompson*, 3 Col. 518; *Shilling v. Rominger*, 4 Col. 100; *Herring v. Hely*, 43 Iowa, 157; *Whiting v. Root*, 52 Iowa, 292. See *Pomeroy's Remedies*, sec. 65, as to the distinction between legal and equitable forms of action.

### *Parties, how designated.*

§ 110. [3] The party commencing the action shall be known as the plaintiff, and the opposite party the defendant.

## TITLE V.

OF THE COMMENCEMENT OF ACTIONS, AND OF PLEADINGS  
THEREIN.

## CHAPTER I. — OF THE TIME OF COMMENCING ACTIONS.

## II. — OF THE PARTIES TO ACTIONS.

## III. — OF THE PLACE OF TRIAL.

## IV. — OF THE MANNER OF COMMENCING ACTIONS.

## V. — OF PLEADINGS.

## VI. — OF THE VERIFICATION OF PLEADINGS.

## VII. — GENERAL RULES OF PLEADINGS.

## VIII. — OF MISTAKES AND AMENDMENTS.

## CHAPTER I.

## OF THE TIME OF COMMENCING ACTIONS.

- § 111. Can only be commenced within time specified — Objection, how taken.
- § 112. Actions to be commenced in ten years.
- § 113. Within six years.
- § 114. Within five years.
- § 115. Within three years.
- § 116. Within two years.
- § 117. Within one year.
- § 118. Special provision for actions on statute for penalty.
- § 119. Within three months.
- § 120. Actions not before specified, within two years.
- § 121. Actions on mutual open accounts.
- § 122. Actions in name of the state, etc.
- § 123. Operation of statute suspended when.
- § 124. Suspension for personal disability.
- § 125. Suspension by death of party.
- § 126. Suspension by war.
- § 127. Suspension by judicial proceedings.
- § 128. Suspension by reversal of judgment.
- § 129. Disability does not suspend unless existing when right arises.
- § 130. Cumulative disabilities not allowed.
- § 131. New promise must be in writing.
- § 132. Effect of partial payment.
- § 133. Foreign statutes of limitation, how applied.
- § 133 a. Time, what included in limitation.

*Can only be within time specified — Objection, how taken.*

§ 111. Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued, except when in special cases a different limitation is prescribed by statute; but the objection that the action was not commenced within the time limited can only be taken by answer or demurrer. [February 25, 1891, § 1.]



**Demurrer will lie** where the complaint shows on its face that the demand for which suit is brought is barred by the statute of limitations: *Wilt v. Buchtel*, 2 Wash. 417.

**Constitutionality of statutes of limitation.**—Legislatures have power to fix a reasonable time within which private rights may be enforced, and to that end may pass any act of limitation which does not violate the provisions of the United States constitution guarding the obligation of contracts: *Griffin v. McKenzie*, 7 Ga. 163; 50 Am. Dec. 389; *Briscoe v. Anketell*, 28 Miss. 361; 61 Am. Dec. 553; and see the extended note to the former case, on the subject of constitutionality of statutes of limitation in 50 Am. Dec. 391 et seq.; see also Wood on Limitations, sec. 11.

**Effect of statute.**—The statute of limitations simply suspends the remedy, but does not extinguish the right nor destroy the obligation: *Meyer v. Beal*, 5 Or. 130; *Goodwin v. Morris*, 9 Or. 322; *McCormick v. Brown*, 36 Cal. 180; *Grant v. Burr*, 54 Cal. 298. The debt or obligation remains unsatisfied and unextinguished, and is a sufficient consideration to support a new promise: See § 24, post; *Sichel v. Carrillo*, 42 Cal. 498; *Bulger v. Roche*, 11 Pick. 37; *Lincoln v. Battelle*, 6 Wend. 485; *Townsend v. Jennison*, 9 How. 413.

**Accrual of action.**—In *Tynan v. Walker*, 35 Cal. 643, the clause "after the cause of action shall have accrued" was construed, and it was held that it did not imply in addition the existence of a person legally competent to enforce it by suit, for, it is said, if it did there would be no occasion for the special provisions relieving persons not competent from the operation of the statute. On these grounds it was held that the statute runs in all cases not expressly excepted from its operation. But the authorities generally do not seem to support this view: See *Grubb v. Clayton*, 2 Hayw. (N. C.) 378; *Lewis v. Broadwell*, 3 McLean, 568; *Bucklin v. Ford*, 5 Barb. 393; *Davis v. Gurr*, 6 N. Y. 124; and see many other cases collected in Wood on Limitations, sec. 117, note 1, which support the rule there laid down without qualification, that a right of action

does not accrue nor the statute attach until there is in existence a competent party to sue and be sued.

**Pleading statute.**—The statute of limitations must be pleaded, and in the event of failure so to do, cannot be taken advantage of: *Steamer Senorita v. Simonds*, 1 Or. 274; *Smith v. Richmond*, 19 Cal. 476; *Budd v. Walker*, 29 Hun, 344. Plaintiff's complaint need not show that his claim has not been barred, this being a matter of defense to be pleaded by the party claiming it: *Backus v. Clark*, 1 Kan. 303; 87 Am. Dec. 437. By suffering an action to go on without setting up the statute, the party is deemed to have elected to stand on other defenses, which election he should not be allowed on the trial to abjure: *Clinton v. Eldy*, 54 Barb. 54.

**Construction of the statute.**—Statutes of limitation were early looked on with disfavor, and strictly construed. Courts still lay down the rule that such statutes should be strictly construed: *Tynan v. Walker*, 34 Cal. 634; but it is said that this must be a reasonable strictness, for the benefit of the rights sought to be defeated thereby: Wood on Limitations, sec. 4; *Clarke v. Bunk of Mississippi*, 10 Ark. 516; 52 Am. Dec. 248; *Bell v. Morrison*, 1 Pet. 360; and instead of being received as discreditable defenses, they are now generally regarded with more indulgence, and as statutes of repose, and are not to be evaded by a forced construction: *Id.*; *Roberts v. Pillow*, 1 Humph. 624; *People v. Wayne Co.*, 27 Mich. 138; *Conyers v. Kenan*, 4 Ga. 308; 48 Am. Dec. 226.

**Repeal or modification of statute.**—A demand barred by the statute is not revived by the repeal or modification thereof: *Baldro v. Tolmie*, 1 Or. 176; *Girdner v. Stephens*, 1 Heisk. 280; 2 Am. Rep. 700; *Bradford v. Shine*, 13 Fla. 393; 7 Am. Rep. 239; *Yancy v. Yancy*, 5 Heisk. 353; 13 Am. Rep. 5; *Rockport v. Walden*, 54 N. H. 167; 20 Am. Rep. 131; and a statute changing the period of limitation will include only causes accruing after passage of the act, unless, of course, it is expressly made retroactive: *Pitman v. Bump*, 5 Or. 17; *Pearshall v. Kenan*, 79 N. C. 472; 28 Am. Rep. 336.

### *Actions to be commenced in ten years.*

§ 112. [26.] The period prescribed in the preceding section for the commencement of actions shall be as follows:—

Within ten years,—

1. Actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within ten years before the commencement of the action.

**Adverse possession.**—Adverse possession for the period mentioned in the statute is a bar to an action by the owner to recover possession: *Shuffleton v. Nelson*, 2 Saw. 540; and every possession is presumed to be rightful and adverse to the title of any other claimant until proved otherwise: *Stark v. Starr*, 1 Saw. 23. To constitute adverse possession, occupation must be

visible, notorious, and exclusive, and under a claim of right: *Thompson v. Pioche*, 44 Cal. 509; *Unger v. Mooney*, 63 Cal. 586; and see the note to *Ford v. Wilson*, 72 Am. Dec. 137. The owner must have knowledge, or means of knowing, of such possession and claim; and such an occupation as just mentioned will charge others with notice of the occupant's



claim: *Dutton v. Warschauer*, 21 Cal. 609; 82 Am. Dec. 765; *Pacific L. I. Co. v. Stroup*, 63 Cal. 150. The occupation must be continuous and without interruption during the statutory period: *San José v. Trimble*, 41 Cal. 536; and possessions of several cannot be tacked to make one continuous possession unless they are privies in possession; for otherwise, as soon as one quits, the seisin is restored to the owner: *Shuffleton v. Nelson*, 2 Saw. 540; *San Francisco v. Fulde*, 37 Cal. 349; note to *Beaupland v. McKeen*, 70 Am. Dec. 115. So possession must be hostile, and as well in its continuance as its origin, for if the occupant admits another's title but for a moment, he destroys the continuity of his hostile possession: *Adams v. Burke*, 3 Saw. 415. Where naked possession is relied on, there must be an actual occupancy: *Joy v. Stump*, 14 Or. 361; evidenced (so it is said in *Wilson v. McEwan*, 7 Or. 87) by the exercise of some visible, notorious acts, such as inclosing, cultivating, and improving the land. But the erection of a fence or other artificial boundary to indicate the limits of the possession is not an essential to constitute adverse possession: *Zeilin v. Rogers*, 10 Saw. 200.

*Color of title.* — Color of title to support adverse possession is only necessary where the possession, as to part of the premises, is constructive, and not actual: *Shuffleton v. Nelson*, 2 Saw. 540. See *Swift v. Mulkey*, 14 Or. 59; *Zeilin v. Rogers*, 10 Saw. 200. Possession of donation claim under what purports to be a quitclaim deed, executed before the expiration of the four years' residence required by the act, is possession under a contract prohibited by law, and gives no color of title, and is therefore not adverse so as to give the possessor the benefit of the statute of limitations: *Bullens v. Garrison*, 1 Wash. 587. A tax deed gives color of title, and is competent evidence, even though the description be imperfect: *Smith v. Shattuck*, 12 Or. 362. So a quitclaim deed is color of title: *Swift v. Mulkey*, 14 Or. 59.

*Within six years.*

§ 113. [27.] Within six years,—

1. An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States;
2. An action upon a contract in writing, or liability express or implied arising out of a written agreement.
3. An action for the rents and profits or for the use and occupation of real estate.

*Actions upon judgments.* — In *Trenouth v. Farrington*, 54 Cal. 273, it is said: "The judgment here spoken of is a complete judgment, one that has been reduced to a tangible form, — a record. In the case at bar it will be observed that the court itself did not enter judgment. It only ordered that judgment be entered. This was not in fact done until five days afterwards, when for the first time judgment became a matter of record, and a complete and final judgment. In our opinion it was from this date that the statute began to run." See also *Parke v. Williams*, 7 Cal. 247; *Mason v. Cronise*, 20 Cal. 211; *Stout v. Macy*,

*Burden of proving adverse possession is on him who claims the benefit of it as a defense: Shuffleton v. Nelson*, 2 Saw. 540; and the question of its establishment is for the jury: *Id.*

*Seisin or possession of predecessor.* — One buying land in adverse possession of others is barred within the statutory period from the time a right of action accrued to those through whom he claims: *Le Roy v. Rogers*, 30 Cal. 230. If adverse possession commences to run in the lifetime of an ancestor, it will continue to run against the heir, notwithstanding the disability of the latter when the right accrues: *Fleming v. Griswold*, 3 Hill, 85. A grantor's adverse possession against his grantee, subsequent to his deed, is not the possession of the grantee's predecessor when the bar of the statute is set up against him: *Franklin v. Dorland*, 28 Cal. 180.

*Title created by adverse possession.* — Adverse possession not only suspends the remedy, but extinguishes the right, and vests title absolutely in the possessor: *Parker v. Metzger*, 12 Or. 407, commenting upon and limiting *Meyer v. Beal*, 5 Or. 130; *Goodwin v. Morris*, 9 Or. 322; and see *Johnson v. Brown*, 63 Cal. 391; and when so vested it is enforceable by a possessory action: *Joy v. Stump*, 14 Or. 361; or by a suit to quiet title: *Arrington v. Liscom*, 34 Cal. 381.

*Action to redeem.* — An action to redeem real property sold under a decree of foreclosure of mortgage does not fall within this section: *Parker v. Dacres et al.*, 2 Wash. 439.

*Pleading the statute.* — The statute should be pleaded directly, as that the cause of action did not accrue within the prescribed period next before the commencement of the action; but an allegation that neither the plaintiff nor his grantor was seised or possessed of the premises during that period, and that the defendant was in their exclusive possession, is sufficient to allow proof of adverse possession by the defendant: *Zeilin v. Rogers*, 10 Saw. 200; *Sharp v. Doughney*, 33 Cal. 511.

22 Cal. 647. When a judgment rendered is payable in installments, the time begins to run from the period fixed for the payment of each installment as it falls due: *De Uprey v. De Uprey*, 23 Cal. 352. Such a statute as this applies to a judgment of foreclosure and sale as well as to an ordinary money judgment: *Barnard v. Onderdonk*, 2 N. Y. Civ. Proc. Rep. 294. In case of an unsatisfied balance on the foreclosure of a mortgage, the statute runs from the judgment of foreclosure, and not from the date of docketing the balance: *Bowers v. Crary*, 30 Cal. 621. But see *Chapin v. Broder*, 16 Cal. 493. An action by the cred-

itor of an intestate debtor, to reach assets fraudulently assigned by the administrator, must be commenced within the statutory period from the docketing of the judgment, which is prescribed in the limitation of actions on judgments: *Malloy v. Vanderbilt*, 4 Abb. N. C. 127.

After lapse of the statutory period which will bar an action on a judgment, it is not competent for the parties to revive it for the purpose of an action, by stipulation, but the action can only be supported by a new promise: *Thompson v. Jenks*, 2 Abb., N. S., 229; *Carshore v. Huyck*, 6 Barb. 583; *Waltermire v. Westorer*, 14 N. Y. 21.

*Domestic judgments.* — It has been held that such judgments do not fall within the provisions of subdivision 1 of this section: See *Murch v. Moore*, 2 Or. 189; *Strong v. Barnhart*, 5 Or. 496. A motion to revive a judgment is not the commencement of action, and the right does not expire by the limitation provided in this section: *Brown v. Comm'rs*, 25 Pac. Rep. 386 (Wash.).

**Actions on contracts founded upon written instruments, etc.** — This section refers to contracts, obligations, and liabilities resting in or growing out of written instruments immediately. Thus the obligation of the principal, on a note to pay the surety, who has satisfied the judgment recovered against them, is not founded upon an instrument in writing: *Chipman v. Morrill*, 20 Cal. 131. The following obligations were decided to have arisen out of written instruments: Accounts with the words "audited and approved, and certified to be correct": *Sannickson v. Brown*, 5 Cal. 57. Published offer of reward: *Ryer v. Stockwell*, 14 Cal. 134. Where the reward was "for such information as would lead to the arrest and conviction of the offender," the statute did not run until conviction. The board of trustees of a company made the following order: "Ordered, that the compensation of the president of the board of trustees be established at fifty dollars per month." Previous to that time there was no order, resolution, or by-law fixing his compensation. The court held that the order was a contract in writing within the statute: *Rosborough v. Shasta R. Co.*, 22 Cal. 556. A receipt or acknowledgment in writing for money, which also contains a clause stating that the money received is to be applied to the account of the person from whom received, partakes of the double nature of a receipt and contract, and shows upon its face a liability to account, and an action upon it is not barred by the statute of limitations until the statutory period has expired: *Ashley v. Vischer*, 24 Cal. 322.

*Promissory notes.* — Action must be brought in four years from maturity: *Banks v. Marshall*, 23 Cal. 223; *Hibernia Bank v. Herbert*, 53 Cal. 375; *Hathaway v. Patterson*, 45 Cal. 299; *Hibernia Bank v. O'Grady*, 47 Cal. 579; *Pendleton v. Rouse*, 34 Cal. 149, where the note matured six months after date. But payment of interest on note will relieve the note from the statute of limitations: *Koslowski v. Yesler et al.*, 2 Wash. 407. Where a note was payable six months after date, interest payable monthly, and in default thereof the whole principal and interest to become due and payable immediately, the cause of action arises at the expi-

ration of the credit fixed by the note, and not at the time of default in payment of interest: *Belloc v. Davis*, 38 Cal. 242. On a banker's certificate of deposit, payable on demand, the statute runs from the date of the same: *Brummagin v. Tallant*, 29 Cal. 503. If a complaint is amended by setting out a new cause of action on a promissory note, the statute runs up to the day of filing the amendment: *Anderson v. Meyers*, 50 Cal. 525. And see *Meeks v. S. P. R. R. Co.*, 61 Cal. 149. Where a note was given payable upon the yielding of profit to the maker from certain mines, if the maker puts it out of his power to receive such profit by conveying the mines, the note becomes due, and the statute runs from such conveyance: *Wolf v. Marsh*, 54 Cal. 228. The statute is a bar to an action on a note by the payee against the maker, though the former, after the statutory period from the maturity of the note, paid it to his indorsee and became repossessed of it: *Woodruff v. Moore*, 8 Barb. 171. Notes payable on demand, with or without interest, are due forthwith, and under this statute would be barred if not sued on within the period fixed: *Merritt v. Todd*, 23 N. Y. 28; 80 Am. Dec. 243; and see the extended note thereto on this point.

*Check.* — A claim against the drawer of a check who had no funds in bank to meet it would be barred: *Brush v. Barrett*, 82 N. Y. 400, affirming 16 Hun, 409.

*Coupons on municipal bonds* partake of the nature of the bonds to which they belong, and are not barred until the bonds are barred: *Meyer v. Porter*, 1 West Coast Rep. 874.

*Notes secured by mortgage.* — If the statutory period elapses from the maturity of the note, the foreclosure proceedings are barred. "Where an action upon a promissory note secured by a mortgage of the same date upon real property is barred by our statute of limitations, the remedy upon the mortgage is barred": *McCarthy v. White*, 21 Cal. 495; *Lord v. Morris*, 18 Cal. 482; *Heinlin v. Castro*, 22 Cal. 100; *Wormouth v. Hutch*, 33 Cal. 121; *Cunningham v. Hawkins*, 24 Cal. 403. The plea of the statute is available to the assignee of the mortgagor: *McCarthy v. White*, 21 Cal. 495. But if the action against the mortgagor is not barred for any reason, it is not barred against the grantee of the mortgagor: *Rickard v. Hutchinson*, 1 West Coast Rep. 659. In *U. W. Co. v. Murph. Flat F. Co.*, 22 Cal. 620, it was held that a mortgage given to secure a verbal debt was a contract "founded upon an instrument in writing." See also *Sichel v. Carrillo*, 42 Cal. 493, where the mortgage executed by a third person was held not barred, although the payee of the note had lost his rights against the payor by omitting to present the note to the administrator of the payor, who had died. And see *Woods v. Goodfellow*, 43 Cal. 185, where a distinction is also made between the mortgage and the mortgage debt. Renewal of the note extends the lien of the mortgage given as security: *Lent v. Morrill*, 25 Cal. 492. The right of holders of other notes of the mortgagor to redeem must be enforced within the statutory period: *Grattan v. Wiggins*, 23 Cal. 16. And see *Espinosa v. Gregory*, 40 Cal. 58; *Siter v. Jewett*, 33 Cal. 92; *Cunningham v. Hawkins*, 24 Cal. 403; *Arrington v. Liscom*, 34 Cal. 365.



*Within five years.*

§ 114. No action for the recovery of any real estate sold by an executor or administrator under the laws of this state, or the laws of the territory of Washington, shall be maintained by any heir or other person claiming under the deceased, unless it is commenced within five years next after the sale, and no action for any estate sold by a guardian shall be maintained by the ward, or by any person claiming under him, unless commenced within five years next after the termination of the guardianship, except that minors and other persons under legal disability to sue at the time when the right of action first accrued may commence such action at any time within three years after the removal of the disability.

The act of which this is section 1 was presented to the governor March 28, 1890, and not being filed with objections by the governor, became a law, under section 12 of article 3 of the constitution.

*Within three years.*

§ 115. [28.] Within three years,—

1. An action for waste or trespass upon real property;
2. An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;
3. An action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;
4. An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;
5. An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity and by virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution; but this subdivision shall not apply to action for an escape;
6. An action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing it prescribed a different penalty;
7. An action for seduction and breach of promise of marriage.

**Trespass on real property.**—Statute runs to the filing of the amended complaint as to land therein contained which was omitted from the original complaint: *Atkinson v. A. & S. Canal Co.*, 53 Cal. 102.

**Actions relating to personalty.**—The statute runs from the time of the conversion: *Sheppard v. Yocum*, 10 Or. 403. After the statute has commenced running, the case cannot be taken out of the statute by a demand and refusal of the property made after the defendant had parted with it: *Kelsey v. Griswold*, 6 Or. 436; *Bruce v. Tilson*, 25 N. Y. 194. In case of a wrongful transfer by a pledgee, the action against the transferee accrues at the

moment he obtains possession, and not from the time of a subsequent sale by him of the property: *Harpending v. Meyer*, 55 Cal. 555. Where an agent, converting his principal's money to his own use, bought land with it, taking deeds in his own name, fraud was held to be the basis of the action, and that the statute did not run until discovery of the facts: *Reitz v. Reitz*, 80 N. Y. 538; but see *contra*, *Carr v. Thompson*, 87 N. Y. 160, where fraud was declared not to be the basis of the action. Where the maker of a note fraudulently procures possession of the same, and retains it until action on it would be barred, the owner thereof will nevertheless have his action for

the deceit: *Cockrill v. Hale*, 3 West Coast Rep. 106.

**Contracts, etc., not founded upon writings.** — As examples of verbal contracts, recovery on which has been declared barred in the statutory period, see *In the Matter of Galvin's Estate*, 51 Cal. 215, a case of money loaned, where the statute was held to run from the time of the loan; *Ashley v. Vischer*, 24 Cal. 322, a loan where a mere receipt for the same was not deemed an instrument in writing within the meaning of the statute; *Sherwood v. Dunbar*, 6 Cal. 53, and *Chipman v. Morrill*, 20 Cal. 136, actions of *assumpsit* to enforce contribution from a co-debtor; *Traylor v. Sonora M. Co.*, 17 Cal. 594, *Adams v. Patterson*, 35 Cal. 122, a simple account; *Keller v. Hicks*, 22 Cal. 457, money had and received; *Pimental v. San Francisco*, 21 Cal. 351, *Hancock v. Pio Pico*, 47 Cal. 162, contract of hiring.

Where the maker of a note verbally agrees to furnish goods to the holder to the value thereof, and does so, he cannot, after the expiration of the time fixed above, seek to have the note canceled on the ground of such verbal agreement: *Gates v. Lane*, 49 Cal. 266.

Specific enforcement of verbal contract to convey land: *Lowell v. Kier*, 50 Cal. 646, and *Dodge v. Clark*, 17 Cal. 586. Attorney's claims are within this subdivision, and the statute will not run against such claims until the relation of attorney is ended; and any suspension of the suit not operating to terminate it would not set the statute running against the claim: *Bathgate v. Haskin*, 59 N. Y. 533. A debt from an administrator, for which a judgment has been recovered, is, as to the estate, regarded as a simple contract debt, within such a statute as this: *Ball v. Miller*, 17 How. 300. Where goods are sold at different times, bills being rendered for each lot, as they do not constitute a running account, the statute will run from the time of each sale: *Albro v. Figueroa*, 60 N. Y. 630. Where a broker employed to purchase goods is held personally liable by reason of his failure to disclose his principals, he can maintain no suit against the latter, unless it is brought within the period prescribed by such a statute, after the vendor's claim accrues: *Knapp v. Simon*, 46 N. Y. Sup. Ct. 225. The statute would bar a recovery for the use of goods for any period antecedent to the statutory limitation before action brought: *Rider v. Union I. R. Co.*, 5 Bosw. 86; 28 N. Y. 379. An action upon the express or implied promise of a grantee to pay a consideration for the transfer of property is barred by such a statute as this, although the transfer was made by an instrument under seal containing no obligation to pay: *Coleman v. Second Ave. R. Co.*, 38 N. Y. 201, affirming 48 Barb. 371. On a hiring of services for several years with no provision for the time of payment, a hiring from year to year will be presumed, and the statute will run from the time each year's wages become payable: *Davis v. Gorton*, 16 N. Y. 255.

**Actions for malicious suit.** — Actions for malicious prosecution fall within this subdivision: *Sharp v. Miller*, 54 Cal. 329; *Anderson v. Coleman*, 56 Cal. 124. And an action for maliciously suing out a writ of injunction must be brought within the time fixed above from its dissolution; if brought after that time, although

within the statutory period, from the judgment for defendant, it will be barred: *Anderson v. Coleman*, 56 Cal. 124.

**"Liability"** defined: *Piller v. Southern P. R. Co.*, 52 Cal. 42. Liability of railroad company for damages for an injury done to a passenger by collision of its cars accrues when the collision occurs, and the action must be brought within the statutory period from such time: *Piller v. Southern P. R. Co.*, 52 Cal. 42. See also *Wood v. Currey*, 57 Cal. 208, where an action for wrongfully levying an execution on a judgment already satisfied was held barred within the time fixed by statute, from the levy, notwithstanding the pendency of injunction proceedings to restrain the levy of the execution.

**Instrument executed out of state.** — A foreign judgment does not fall within this category: *Patten v. Roy*, 4 Cal. 287.

**Fraud.** — Where relief is sought on the ground of fraud, the statute does not begin to run until the discovery of the fraud: *Currey v. Allen*, 34 Cal. 554; *Moore v. Moore*, 56 Cal. 89; *Cota v. Jones*, 8 Pac. C. L. J. 1044. That is, discovery of such facts as would put a person of ordinary intelligence and prudence on inquiry: *Boyd v. Blankman*, 29 Cal. 19. Where one is induced to sign writings of whose contents she is ignorant, whereby a fraud is perpetrated, an action within three years from the discovery of the nature of the contents is in time: *Moore v. Moore*, 56 Cal. 89. It is not such a fraud as this section contemplates, that by a secret agreement between the members of a firm with whom the plaintiff traded one of their number was not to be disclosed: *Soule v. Atkinson*, 18 Cal. 225. Judgment creditors of a decedent who had fraudulently conveyed realty may bring action within three years from the recovery of their judgments: *Forde v. Exempt T. Co.*, 50 Cal. 299.

Nor has this provision relation to an equitable proceeding to set aside a fraudulent deed of real estate, when the effect of it is to restore the possession of the premises to the defrauded party. In such a case the action is really an action for the recovery of real estate: *Oakland v. Carpentier*, 13 Cal. 552. So where the plaintiff seeks to set aside and cancel certain conveyances, upon the ground of there being a cloud on his title, and fraudulent, this section does not apply. "Fraud is not a universal characteristic of the action": *Stewart v. Thompson*, 32 Cal. 260. Compare with *People v. Blankenship*, 52 Cal. 619, where an action by the state to cancel a patent was demurred out of court, it not having been brought within three years from the discovery of the fraud.

**Constructive frauds** are included in this section: *Boyd v. Blankman*, 29 Cal. 19.

**Insanity and fraud.** — While the plaintiff was temporarily insane, the fraud complained of was practiced. After recovering his reason, and within three years from discovering the fraud, the action was brought, and was declared in season: *Crowther v. Rowlandson*, 27 Cal. 384.

**Pleading.** — A complaint should state the discovery of the acts constituting the fraud complained of within the three years: *Sublette v. Tinney*, 9 Cal. 423; but in a case where the discovery within three years was averred in



general terms in the replication, and the issue thereupon was tried without objection in the court below, the findings were taken as if made upon an issue properly raised by the pleadings: *Boyd v. Blankman*, 29 Cal. 44.

See also *Cota v. Jones*, 8 Pac. C. L. J. 1044, and *Moore v. Moore*, 56 Cal. 89, for considerations of the sufficiency of pleading in setting out the discovery of the fraud; there liberality in the construction of the pleading was favored. For want of proper allegations in this particular the complaint was held imperfect in *Le Roy v. Multiken*, 59 Cal. 281.

**Actions against sheriffs, etc.** — This statute does not extend to acts done merely *colore officii*, but only to those done *virtute officii*: *Morris v. Van Voast*, 19 Wend. 283; *Elliot v. Cronk*, 13 Wend. 40. A deputy sheriff for liability incurred by acts done in his official capacity is entitled to the benefit of the statute of limitations against sheriffs: *Cumming v. Brown*, 43 N. Y. 514. As "acts in an official capacity," within the meaning of the statute, may be cited the return of an execution by a sheriff: *Peck v. Hurburt*, 46 Barb. 559; *Darey v. Field*, 2 Keyes, 608; *Coddington v. Carnley*, 2 Hilt. 528; the taking, under attachment, of property of another, supposed to be that of the debtor: *Cumming v. Brown*, 43 N. Y. 514; *People v. Schuyler*, 4 N. Y. 173; selling property of one on execution against another: *Dennison v. Plumb*, 18 Barb. 89. An action against a sheriff for procuring payment by means of a sworn bill and false vouchers for board of fictitious persons never confined in jail is not within the statute: *Board of Supervisors v. Walter*, 4 Hun, 87.

*For non-payment of moneys collected on execution.* — An action against a sheriff by a purchaser at an execution sale, which was afterwards set aside for irregularity, to recover back the money paid, is an action for the non-

payment of money collected upon an execution: *Bourne v. O'Brien*, 5 Daly, 474. A motion to compel the determination of the surplus on a sale under execution, and its payment to defendant, comes within the statute: *Frankel v. Elias*, 60 How. Pr. 74. So does an action against a sheriff and his sureties upon his official bond for the seizure of property by the sheriff under attachment: *Paige v. Carroll*, 61 Cal. 211.

**Action for penalty or forfeiture.** — The statute embraces only penalties and forfeitures, properly so called, and other causes of action, penal in their nature, where both the cause of action and the remedy are given by statute, but does not extend to cases where the action is partly given by the common law and partly by statute: *Corning v. McCullough*, 1 N. Y. 47; and a suit against a stockholder to charge him with the debts of the corporation, under a statute making the stockholders liable, is not such a forfeiture or penalty: *Corning v. McCullough*, 1 N. Y. 47; but an action against trustees of a corporation to charge them with the debts of the company for failure to file an annual report comes within this section, for it is an action to enforce a forfeiture or penalty: *Merchants' Bank v. Bliss*, 35 N. Y. 412; *Knox v. Baldwin*, 80 N. Y. 610; *Duckworth v. Rouch*, 81 N. Y. 49. An action under a statute against illegal sales of lottery tickets, to recover of the defendant double their value, would be an action for a forfeiture or penalty: *Grover v. Morris*, 73 N. Y. 473. As to actions upon "a liability created by statute," such as those upon official undertakings and against stockholders for corporate debts, and not being for a forfeiture or penalty, as contemplated above, see *Chase v. Lord*, 16 Hun, 369; *Knox v. Baldwin*, 80 N. Y. 610; *Howe v. Taylor*, 6 Or. 284; *Placer Co. v. Dickerson*, 45 Cal. 14; *Stilphen v. Ware*, 45 Cal. 110.

### *Within two years.*

§ 116. [29.] Within two years, —

1. An action for libel, slander, assault, assault and battery, and false imprisonment;
2. An action upon a statute for a forfeiture or penalty to the state.

**Assault and battery and false imprisonment.** — When a servant in the course of his employment commits an assault and battery, an action for damages, though brought only against his employer, is an action for assault and battery: *Priest v. Hudson River R. Co.*, 10 Abb. Pr., N. S., 60; 2 Sweeney, 595; 40 How. Pr. 456.

**False imprisonment.** — The statute commences to run as soon as the imprisonment ceases: *Dusenbury v. Keiley*, 85 N. Y. 383; 61 How. Pr. 408; *Van Ingen v. Snyder*, 24 Hun, 81.

**Action for forfeiture or penalty to state:** See note to preceding section under this head.

### *Within one year.*

§ 117. [30.] Within one year, —

1. An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process;
2. An action by an heir, legatee, creditor, or other party interested, against an executor or administrator, for alleged misfeasance, malfeasance or mismanagement of the estate within one year from the time

of final settlement, or the time such alleged misconduct was discovered.

**Escapes.** — The statute applies as well to escapes after arrest and before commitment as to escapes after commitment: *Roe v. Beakes*, 7 Wend. 459.

*Special provisions for action on statute for penalty.*

§ 118. [31.] An action upon a statute for a penalty given in whole or in part to the person who may prosecute for the same shall be commenced within three years after the commission of the offense; and if the action be not commenced within one year by a private party, it may be commenced within two years after the commission of the offense in behalf of the state by the prosecuting attorney of the county where said offense was committed.

*Within three months.*

§ 119. [32.] Within three months, —

1. An appeal from any order of a board of county commissioners, or upon a claim rejected by said board;

2. Upon claims against an estate, rejected by an executor or administrator within three months after the rejection.

*Actions not before specified, within two years.*

§ 120. [33.] An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued.

**An action to redeem real property** this section: *Porker v. Dacres*, 2 Wash. sold on foreclosure of mortgage falls under 439.

*Actions on mutual open accounts.*

§ 121. [34.] In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side; but whenever a period of more than one year shall have elapsed between any of a series of items or demands, they are not to be deemed such an account.

**Mutual, open, and current accounts.** — The statute of limitations runs from the time of the last item on either side of a mutual, open, and current account: *Sickles v. Mather*, 20 Wend. 72; 32 Am. Dec. 521; *Hodge v. Manley*, 25 Vt. 210; 60 Am. Dec. 253; *Menges v. Frick*, 73 Pa. St. 137; 13 Am. Rep. 731, and note 733; *Hellenbeck v. Collier*, 8 N. Y. Week. Dig. 293.

“Reciprocal demands” means no more than “mutual accounts” as understood in the law: *Green v. Dishbrow*, 79 N. Y. 1; 35 Am. Rep. 496. Accounts are mutual when each party makes charges against the other: *Ross v. Ross*, 6 Hun, 80. There must be items of account on both sides: *Hallock v. Losee*, 1 Sand. 220. In *Norton v. Larco*, 30 Cal. 126, the court say: “Mutual accounts are made up of matters of

set-off; there must be a mutual credit founded on a subsisting debt on the other side, or on an express or implied agreement for a set-off of mutual debts.” It is not a mutual account where one sells goods, and the buyer pays sums of money thereon from time to time: *Adams v. Patterson*, 35 Cal. 122; nor where the defendant gave to the plaintiff a lump of gold to be sent to the mint for coinage, the proceeds to be applied on the account: *Weatherwax v. Consummes V. M. Co.*, 17 Cal. 544; nor where the items are all on one side: *Fraylor v. Sonora M. Co.*, 17 Cal. 594; but one proper item of credit is enough: *Green v. Dishbrow*, 7 Lans. 381. The distinction has been held to be between payments in money and payments by merchandise: *Green v. Dishbrow*, 79 N. Y. 1; 35 Am. Rep. 496; *Schall v. Eisner*, 58 Ga. 190; *Payne v.*



*Walker*, 26 Mich. 60. Where the defendant delivered to the plaintiff butter and eggs at different times to be credited upon his account, the account was held to thereby become mutual: *Green v. Disbrow*, 7 Lans. 381. Reciprocal promissory notes were held not to constitute a mutual, open, and current account: *Perrine v. Hotchkiss*, 2 Thomp. & C. 370; 59 N. Y. 649.

An "open and current" account is distinguished from a "stated" account. Where a balance has not been struck, the account is

open, and not stated: *Norton v. Larco*, 30 Cal. 126. Plaintiff cannot prove an open account for the purpose of avoiding the statute of limitations by simply offering a paper of his own production in which he has given credit for articles furnished him: *Cuck v. Quackenbush*, 13 Hun, 107. Where a bill was paid excepting one item, the accuracy of which was denied, it was held that such item would not prevent the running of the statute: *Peck v. New York & L. Co.*, 5 Bosw. 226.

### *Actions in the name of the state, etc.*

§ 122. [35.] The limitations prescribed in this act shall apply to actions brought in the name of the state, or any county or other public corporation therein, or for its benefit, in the same manner as to actions by private parties. An action shall be deemed commenced when the complaint is filed.

**Action is commenced when.**—See generally, note to *Ross v. Luther*, 15 Am. Dec. 344-347; and *Johnson v. Farwell*, 22 Am. Dec. 203. So far as the statute of limitations is concerned, an action is commenced when the complaint is filed: *Sharp v. Maguire*, 19 Cal. 577; *Pimental v. San Francisco*, 21 Cal. 351; *Allen v. Marshall*, 34 Cal. 166; and without the issuance of summons thereon: *Id.* And after the commencement of the action no mere lapse of time will bar it under the statute of limitations: *Id.*; *Evans v. Cleveland*, 72 N. Y. 486.

**Amended complaint**, which introduces a new cause of action, or extends the original cause of action to property not embraced therein, does not relate back to the filing of the original

complaint for the purposes of the statute of limitations. But in such cases the statute runs to the filing of the amended complaint: *Lawrence v. Ballou*, 50 Cal. 258; *Anderson v. Mayer*, 50 Cal. 525; *Atkinson v. A. & S. Co.*, 53 Cal. 102; *Meeks v. S. P. R. R. Co.*, 61 Cal. 149.

**Supplemental complaint** bringing in new parties defendant, while a continuance of the original action as against the original defendant, is the commencement of a new action as against the new defendants. Until they are made parties, the action is not commenced as to them: *Jeffers v. Cook*, 58 Cal. 147. And until then the statute runs: *Id.*; *Atkinson v. A. & S. Co.*, 53 Cal. 102; *Shaw v. Cook*, 78 N. Y. 194.

### *Operation of statute suspended when.*

§ 123. [36.] If the cause of action shall accrue against any person who shall be out of the state or concealed therein, such action may be commenced within the terms herein respectively limited after the return of such person into the state, or after the time of such concealment; and if after such cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action.

**Absence from state.**—For a full discussion of the law concerning the effect of absence from the state to stop the running of the statute of limitations, see the note to *Moore v. Armstrong*, 36 Am. Dec. 73 et seq.

**Non-residents.**—In Oregon, it is held that this section was not intended to and does not include non-residents of the state: *McCormick v. Blanchard*, 7 Or. 232. But in other states, generally, this exception of persons from operation of the statute has been held to include non-residents: *Thomasson v. Odum*, 23 Ala. 480; *Hatch v. Spofford*, 24 Conn. 432; *Paine v. Drew*, 44 N. H. 306; *Mayer v. Friedman*, 7 Hun, 218; 69 N. Y. 608; *Carpenter v. Wells*, 21 Barb. 593; *Crocker v. Arey*, 3 R. I. 178.

**Joint debtors.**—Absence of one joint debtor from state suspends running of statute against

him, though his co-debtor remained within the state: *Denny v. Smith*, 18 N. Y. 567; and so of one of two joint and several debtors: *Bogert v. Vermilya*, 10 N. Y. 447; 10 Barb. 32. And see *Lane v. Doty*, 4 Barb. 530.

**Foreign corporations.**—There is a conflict in the authorities as to whether a foreign corporation comes within the meaning of a person out of the state, or a non-resident, or not. The rule in New York is, that the statute is not available as a defense by the corporation: *Olcott v. Tioga R. R. Co.*, 20 N. Y. 210; 75 Am. Dec. 393, and cases in the note; *Rathbun v. New York Central R. R. Co.*, 50 N. Y. 656. In California, if the corporation does business in another state, and has a managing agent therein, it cannot set up the statute on the ground of non-residence: *Lawrence v. Ballou*,

50 Cal. 264. See also the note to *Moore v. Armstrong*, 36 Am. Dec. 73.

**Absence of mortgagor.** — The absence of a mortgagor will not suspend the right to foreclose the mortgage: *Anderson v. Baxter*, 4 Or. 105; *Watt v. Wright*, 4 West Coast Rep. 622.

**Successive absences.** — Successive absences may be aggregated; and the whole time the defendant has been absent deducted from the time which has elapsed since the cause of action has accrued will give the time the statute has run: *Rogers v. Hatch*, 44 Cal. 280; *Smith v. Bond*, 8 Ala. 386; *Crocker v. Clements*, 23 Ala. 296; *Cole v. Jessup*, 10 N. Y. 96; *Harden v. Palmer*, 2 E. D. Smith, 172; *Barrien v. Wright*, 26 Barb. 208; *Cutler v. Wright*, 22 N. Y. 472. Time of absence during several journeys has been held not to count: *Hickok v. Bliss*, 34 Barb. 321; *Murray v. Fisher*, 5 Lans. 98. And so where a defendant, domiciled in another state, does business in the state, spending all but business hours out of the state, it has been held that the hours of his absence cannot (if any) be allowed as so much of the statutory time out of the state: *Bennett v. Cook*, 43 N. Y. 537; 3 Am. Rep. 727.

**Return to state to set statute running.** — The return, to set the statute running, must not be clandestine, nor for such a short space of time as would be insufficient to enable the creditor to institute proceedings: *Palmer v.*

*Shaw*, 16 Cal. 96. The time during which one is in the state on business, it has been held, is not to be counted as part of the time to be deducted from the period of his absence from the state: *Burroughs v. Bloomer*, 5 Denio, 532. Though in *Cole v. Jessup*, 2 Barb. 309, a single return after absence from the state has been held sufficient to set the statute running: *Id.*

**Demands barred by laws of foreign state.** — In *McCormick v. Blanchard*, 7 Or. 232, it is held that the statute of limitations commences to run at the time when a cause of action accrues in another state, by the laws thereof, where based on a debt contracted there when the debtor lived there until removal to this state. For a discussion of the question as to when and whether demands are barred by the laws of the country where they originated, see the note to *Bulger v. Roche*, 22 Am. Dec. 362; *Clark v. L. S. & M. S. R. R. Co.*, 94 N. Y. 217.

**Pleading — The issue.** — Absence of defendant, it has been held, must be alleged in the complaint, or his presence will be presumed: *Bass v. Berry*, 51 Cal. 264. When the question of absence from the state is set up as a defense, the only question is, whether the defendant has been in the state and amenable to process for the statutory period: *Gans v. Frank*, 36 Barb. 320; *Bassett v. Bassett*, 55 Barb. 505; *Power v. Hathaway*, 43 Barb. 214; *McCord v. Woodhull*, 27 How. Pr. 54.

### *Suspension for personal disability.*

§ 124. [37.] If a person entitled to bring an action mentioned in this chapter, except for a penalty or forfeiture, or against a sheriff or other officer, for an escape, be, at the time the cause of action accrued, either under the age of twenty-one years, or insane, or imprisoned on a criminal charge, or in execution under the sentence of a court for a term less than his natural life, the time of such disability shall not be a part of the time limited for the commencement of action.

**Disabilities, generally.** — A disability relied upon to stop the running of the statute must have existed at the time the right to sue accrued; for when the statute has once commenced to run, subsequent disabilities will not stop it unless expressly so provided by statute: *Hoyan v. Kurtz*, 94 U. S. 773; *Bozeman v. Browning*, 31 Ark. 364; *Kistler v. Herath*, 75 Ind. 177; 39 Am. Rep. 131; *Dugan v. Gittings*, 3 Gill, 138; 43 Am. Dec. 306; *Stevenson v. McReary*, 12 Smedes & M. 9; 51 Am. Dec. 102; *Watts v. Gunn*, 53 Miss. 502; *Hodges v. Dunham*, 51 Miss. 199; *Cozzens v. Farnan*, 30 Ohio St. 491; 27 Am. Rep. 470; *Bensell v. Chancellor*, 5 Whart. 371; 34 Am. Dec. 561; *Smilie v. Bifle*, 2 Pa. St. 52; 44 Am. Dec. 156; *Hogg v. Ashman*, 83 Pa. St. 80. Persons relying on exceptions in statutes of limitation must bring themselves within such exceptions by proof: *Stevenson v. McReary*, 12 Smedes & M. 9; 51 Am. Dec. 102.

**Successive disabilities:** See § 130, *post*.

**Effect of disability of one on rights of others.** — The disability of one of a number of parties, if their rights are not joint, though it will stop the running of the statute as to him,

will not affect the others: *Daniel v. Day*, 51 Ala. 431; *Wilder v. Mayo*, 23 Ark. 325; *Storval v. Carmichael*, 52 Tex. 383; *Peters v. Jones*, 33 Iowa, 512; *Pendergast v. Gullatt*, 10 Ga. 218. Where, however, their rights are joint, it is held in some states that if one is barred all are barred: *Hardeman v. Sims*, 3 Ala. 747; *Jordan v. McKenzie*, 30 Miss. 32; *Moore v. Calvert*, 6 Bush, 356; *Morgan v. Reed*, 2 Head, 276; *Riden v. Frrior*, 3 Murph. 577; while on the contrary, in other states, the disability of one protects all jointly interested: *Riddle v. Role*, 24 Ohio St. 572; *Priest v. Hamilton*, 2 Tyler, 44.

**Infancy.** — Rights of infant against person who has entered upon his land are not barred until after the expiration of the nonage: *Burton v. Robinson*, 51 Cal. 186; *Crosby v. Dord*, 61 Cal. 557. As to the operation of the statute, in cases where land has descended to an infant, against whose ancestor the statute had commenced to run, the authorities are conflicting: See a collection of them in the note to *Moore v. Armstrong*, 36 Am. Dec. 68. In some states it is held that the statute will continue to run against the heir in such cases, notwithstanding his infancy: *Daniel v. Day*, 51 Ala.



431; *Bozeman v. Browning*, 31 Ark. 364; *Rogers v. Brown*, 61 Mo. 187; *Henry v. Carson*, 59 Pa. St. 297; while in others the contrary ruling will be found: *Ladd v. Jackson*, 43 Ga. 288; *South v. Thomas*, 7 B. Mon. 59. So on the question whether the statute will run in cases where the infant is represented by a trustee or guardian the courts are divided. In *Darnall v. Adams*, 13 B. Mon. 273, *Copse v. Eddius*, 15 La. Ann. 528, *Crook v. Glenn*, 30 Md. 55, *Wilmerding v. Russ*, 33 Conn. 67, it is held that the statute will run in such cases; while on the contrary, in other states, the neglect of the representative to sue will not prejudice the infant, who may bring his action within the statutory time after reaching majority: *Moore v. Wallis*, 18 Ala. 458; *Bacon v. Gray*, 23 Miss. 140; *Pittman v. McClellan*, 55 Miss. 229; *Eckford v. Evans*, 56 Miss. 18; *Fearn v. Shirley*, 31 Miss. 301; *Lacy v. Williams*, 8 Tex. 182. The title of a purchaser of an infant's estate in

lands is not barred by the statute of limitations if the infant's title was not so barred: *Thomson v. Gaillard*, 3 Rich. 418; 45 Am. Dec. 778.

**Insanity.** — The running of the statute is suspended while mental incapacity lasts, and only commences to run when the incapacity is removed by recovery or death: *Arnold v. Arnold*, 13 Ired. 174; 55 Am. Dec. 434; *Dickens v. Johnson*, 7 Ga. 484; *Little v. Downing*, 37 N. H. 355; *Sasser v. Davis*, 27 Tex. 656; provided, under the above section, that it does not continue more than five years. Deaf-mutes are *prima facie non compos mentis*, and within this exception to the statute, unless their capacity to understand their legal rights and liabilities is shown: *Oliver v. Berry*, 53 Me. 206. And see the note to *Moore v. Armstrong*, 36 Am. Dec. 71.

**Imprisonment:** See Wood on Limitations, sec. 241.

### *Suspension by death of party.*

§ 125. [38.] If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives after the expiration of the time and within one year from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.

**Actions against representatives, etc.** — Where the action is one on a claim against the estate, it need only be commenced within the time fixed by the statute after the appointment of the administrator or executor, and it is of no consequence in such case that a long period intervened between the death and the administration taken on the estate: *Danglada v. De la Guerra*, 10 Cal. 386; *Smith v. Hall*, 19 Cal. 86; *Quivey v. Hall*, 19 Cal. 100. The statute of limitations, as a rule, does not begin to run when no administration exists on the estate of the deceased at the time the cause of action accrued; and the last clause of the above section applies only to cases where the statute has commenced to run. While the above section may, under some circumstances, prolong the

time originally limited, it cannot operate in any case to shorten it: *Lowell v. Kier*, 50 Cal. 646; *Smith v. Hall*, 19 Cal. 85. In *Hibernia etc. Society v. Herbert*, 53 Cal. 375, an action on certain notes was held to be in time if commenced within one year after the issuance of letters of administration on the estate of the grantee. Under this head, see *Healy v. Buchanan*, 34 Cal. 567; — *v. Hutchinson*, 8 Pac. Rep. 628. As to case where the administrator was plaintiff, and not defendant, see *Grattan v. Wiggins*, 23 Cal. 28. The provision as to the accruing of a cause of action before the intestate's death cannot be construed to give an indefinite time in which to bring the action, where the cause accrued after his death: See *Tynan v. Walker*, 35 Cal. 645.

### *Suspension by war.*

§ 126. [39.] When a person shall be an alien subject or a citizen of a country at war with the United States, the time of the continuance of the war shall not be a part of the period limited for the commencement of the action.

**War.** — War suspends the statute of limitations between citizens or subjects of two countries at war: *Wall v. Robson*, 2 Nott & McC. 498; 10 Am. Dec. 623; *Selden v. Preston*, 11 Bush, 191. The statute of limitations barring the right to sue does not run during the

time of civil war, where the courts are not open to suitors: *Coleman v. Holmes*, 44 Ala. 124; 4 Am. Rep. 121; *Perkins v. Rogers*, 35 Ind. 124; 9 Am. Rep. 639; *McKinzie v. Hill*, 61 Mo. 303; 11 Am. Rep. 450; *Caperton v. Martin*, 4 W. Va. 138; 6 Am. Rep. 270; *Chappells v. Olney*,

1 Saw. 401. Open organized rebellion is "war," within the meaning of this section: See *Sanderson v. Morgan*, 39 N. Y. 231. Where the

persons were residents of the same state, it was held that the statute was not suspended: *Smith v. Charter Oak Ins. Co.*, 64 Mo. 330.

### *Suspension by judicial proceedings.*

§ 127. [40.] When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action.

**Limitation by contract.** — This section applies to statutory limitations only, and not to those arising from contract of the parties: See *Wilkinson v. First Nat. F. I. Co.*, 9 Hun, 522; affirmed 77 N. Y. 499. As to statutory prohibitions, see *Crosby v. Dowd*, 61 Cal. 557, 600; *Bradford v. Dorsey*, 63 Cal. 122.

**Bankruptcy.** — It has been held that proceedings in bankruptcy, which stay action against the debtor, stop the running of the statute during the pendency thereof: *Hoff v. Funkenstein*, 54 Cal. 233; *Von Sachs v. Kretz*,

10 Hun, 95; affirmed 72 N. Y. 548. But on the other hand, see *Doe v. Erwin*, 15 Chic. L. N. 220; *Hill v. Erwin*, 27 Alb. L. J. 000.

**Injunction.** — Though an injunction was not served, if the party to be enjoined had notice thereof, and obeyed the order, the time of its continuance would not be reckoned as part of the period of limitation: *Berrien v. Wright*, 26 Barb. 208; *McQueen v. Babcock*, 41 Barb. 337; *Sands v. Campbell*, 31 N. Y. 345; *Hubbell v. Medbury*, 53 N. Y. 98.

### *Suspension by reversal of judgment.*

§ 128. [41.] If an action shall be commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on error or appeal, the plaintiff, or if he die and the cause of action survives, his heirs or representatives, may commence a new action within one year after the reversal.

**Reversal of judgment.** — This section gives the plaintiff one year after final judgment in the court of last resort, and not one

year after judgment of a lower appellate court: *Worster v. Forty-second St. R. R. Co.*, 71 N. Y. 471.

### *Disability does not suspend, unless existing when right arises.*

§ 129. [42.] No person shall avail himself of a disability unless it existed when his right of action accrued.

**Disability must exist when right accrues.** — It is only such disabilities as exist when the right of action accrues of which a party can avail himself as stopping the running of the statute: *Hogan v. Kurtz*, 94 U. S. 773; *Demarest v. Wynkoop*, 8 Am. Dec. 467; *Daniel v. Day*, 51 Ala. 431; *Fritz v. Joiner*, 54 Ill. 101; *Rogers v. Brown*, 61 Mo. 187; *Swearingen v. Robertson*, 39 Wis. 462.

**Successive disabilities are not regarded:** *Hogan v. Kurtz*, 94 U. S. 773; *Demarest v. Wynkoop*, 8 Am. Dec. 467. Where a right of action accrues to an unmarried female minor, and she afterwards marries before she becomes of full age, her coverture is not available as a disability within the statute: *Cozzens v. Farnan*, 30 Ohio St. 491; 27 Am. Rep. 470; *Dugan v. Gittings*, 3 Gill, 138; 43 Am. Dec. 306.

### *Cumulative disabilities not allowed.*

§ 130. [43.] When two or more disabilities shall co-exist at the time the right of action accrues, the limitation shall not attach until they all be removed.

**Co-existing disability.** — Where several disabilities under the statute co-exist, the statute shall be suspended until all are removed:

See *Crowther v. Rowlandson*, 27 Cal. 384. See also § 129, *supra*.

### *New promise must be in writing.*

§ 131. [44.] No acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out



of the operation of this chapter, unless the same is contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.

**Acknowledgment or new promise:** See this topic fully treated in Wood on Limitations, chapters 7, 8, and 9.

The acknowledgment of a debt, to take a case out of the operation of the statute of limitations, must be a direct, distinct, unqualified, and unconditional admission of the debt for which the party is liable and willing to pay: See *Harlan v. Bernie*, 22 Ark. 217; 76 Am. Dec. 428, and the cases cited in the note 431; *McCormick v. Brown*, 36 Cal. 184; *Farrell v. Palmer*, 36 Cal. 192; *Richardson v. Bricker*, 1 West Coast Rep. 270; *Bloodgood v. Bruen*, 8 N. Y. 362; *Turner v. Martin*, 4 Rob. (N. Y.) 661; *Berrian v. Mayor*, 4 Rob. (N. Y.) 538; *Loomis v. Decker*, 1 Daly, 186. It need not express an intention to pay the debt; such intention is to be presumed: *McNamee v. Tenny*, 41 Barb. 495; *Morrow v. Morrow*, 12 Hun, 386. The new promise may be either express or implied: *McCormick v. Brown*, 36 Cal. 180; *Farrell v. Palmer*, 36 Cal. 192; and a clear, distinct, and unequivocal acknowledgment of the debt, consistent with a promise to pay, will suffice for the law to imply a promise: *Green v. Coos Bay Co.*, 10 Saw. 625; *Palmer v. Gillespie*, 95 Pa. St. 340. A compliance with conditions of a conditional new promise must be shown, to have the effect of taking the case out of the operation of the statute. *McCormick v. Brown*, 36 Cal. 180; *Wakeman v. Sherman*, 9 N. Y. 85; *Watkins v. Stevens*, 4 N. Y. 168.

**Writing.** — The requisites of the statute must be complied with, and therefore where, as in this state, the acknowledgment must be in writing signed by the party to be charged, no other acknowledgment will be sufficient: *Esseltyn v. Weeks*, 12 N. Y. 635; *Heintlin v. Castro*, 22 Cal. 100; *Estate v. Galvin*, 51 Cal. 215; *Biddle v. Brizzolara*, 56 Cal. 374. A mere verbal promise is not sufficient: *Shapley v. Abbott*, 42 N. Y. 443; 1 Am. Rep. 548. The writing need not show the time of the promise: *Kincaid v. Archibald*, 73 N. Y. 189; 10 Hun, 9; *Fletcher v. Uplike*, 67 Barb. 364; nor its application to the demand in suit; these facts may be proved by parol: *McNamee v. Tenney*, 41 Barb. 495.

**Promise of creditor to extend time of payment** must be founded on a consideration, or it is void, and will not prevent the running of the statute: *Green v. Coos Bay W. R. Co.*, 10 Saw. 625.

**To and by whom made.** — The acknowledgment must be made to the creditor or some one acting in his behalf: *Wakeman v. Sherman*, 9 N. Y. 85; *Bloodgood v. Bruen*, 8 N. Y. 362; *Winterton v. Winterton*, 7 Hun, 230; *Fletcher v. Uplike*, 67 Barb. 364; *Henry v. Root*, 33 N. Y. 526. An acknowledgment to a stranger is not sufficient: *Biddle v. Brizzolara*, 56 Cal. 374; *Siebert v. Wilder*, 16 Kan. 529; 17 Am. Rep. 171; *Kyle v. Wells*, 17 Pa. St. 286; 55 Am. Dec. 555; unless intended by the debtor to be communicated to the creditor: *Bachman v. Roller*, 9 Baxt. 409; 40 Am. Rep. 97. A promise to the attorney of the creditor has been held sufficient: *Kirby v. Mills*, 78 N. C. 184; 24 Am.

Rep. 460. A new promise to an administrator inures to the benefit of the estate: *Farrell v. Palmer*, 36 Cal. 192; and so a new promise made to the payee of a promissory note inures to the benefit of the indorsee: *Smith v. Richmond*, 19 Cal. 476.

**Joint debtors.** — The question whether a promise or acknowledgment by one of several joint debtors will revive the debt as to all or only as to the debtor making it, is variously decided. In some states it is held that it only revives the debt as to the one: *City Nat. Bank v. Phelps*, 86 N. Y. 484; *Kallenback v. Dickinson*, 100 Ill. 427; 39 Am. Rep. 47; *Miller v. Miller*, McAr. & M. 109; 48 Am. Rep. 738; while in other states it is held to operate as to all: *Burgoon v. Bixler*, 55 Md. 384; 39 Am. Rep. 417; *Vernon v. Stewart*, 64 Mo. 408; 27 Am. Rep. 250.

**Pleading, practice, and evidence.** — In some states it is held that the action is founded on the new promise supported by a moral obligation arising from the old or original contract: *McCormick v. Brown*, 36 Cal. 180; *Jones v. Moore*, 5 Binn. 573; 6 Am. Dec. 428; *Coles v. Kelsey*, 2 Tex. 541; 47 Am. Dec. 661; while in others it is held to be founded on the original demand, and that the new promise merely operates to remove the presumption of payment from lapse of time: *Van Alen v. Feltz*, 4 Abb. App. 439; 42 Barb. 139; *Newlin v. Duncan*, 1 Harr. (Del.) 204; 25 Am. Dec. 66; *Kyle v. Wells*, 17 Pa. St. 286; 55 Am. Dec. 555. An allegation that the party to be charged "has in writing acknowledged and promised to pay" involves an allegation of the signature: *Porter v. Elam*, 25 Cal. 292. The burden is on the defendant of proving that the debt acknowledged is not the one sued on: *Morrell v. Ferrier*, 1 West Coast Rep. 277; *Martin v. Broach*, 6 Ga. 21; 50 Am. Dec. 306. The sufficiency of the promise or acknowledgment to take the case out of the operation of the statute is a question for the court, while the determination of the facts claimed to constitute such promise or acknowledgment is for the jury: *Morrell v. Ferrier* and *Martin v. Broach*, *supra*.

**Instances.** — It is impossible to enumerate here more than a few instances of the sufficiency of acknowledgments and promises to revive a debt or take it out of the operation of the statute. A full collection of the cases will be found in Wood on Limitations, c. 7. Where a debtor wrote, "I will pay as soon as possible," it was held a sufficient acknowledgment and promise: *Norton v. Shepherd*, 48 Conn. 141; 40 Am. Rep. 157; *Abrahams v. Swann*, 18 W. Va. 274; 41 Am. Rep. 292. Letters inclosing checks for monthly interest, and saying they were for interest on the loan for certain months, was held a sufficient acknowledgment: *Barron v. Kennedy*, 17 Cal. 577. An executor including in an inventory notes given by himself, which are then barred, has been held to be a sufficient acknowledgment: *Ross v. Ross*, 6 Hun, 80; *Clark v. Van Amburgh*, 14 Hun, 557; *Morrow v. Morrow*, 12 Hun, 386. A new prom-

ise to pay a debt is not inferred from the debtor's including such debt in his schedule of debts filed with his petition for the benefit of the insolvent law: *Hidden v. Cozzens*, 2 R. I. 401; 60 Am. Dec. 93; *Christy v. Flemington*, 10 Pa. St. 129; 49 Am. Dec. 590; *Gilman v. Dwight*, 13 Gray, 356; 74 Am. Dec. 636. But see *contra*, *Stuart v. Foster*, 28 How. Pr. 273. A promise to "pay all indebtedness" is sufficiently specific to embrace the only debts shown to be owing: *Belloc v. Davis*, 38 Cal. 243. A letter asking a "bill of items of your account," and promising satisfaction, is sufficient: *Chace v. Higgins*, 1 Thomp. & C. 229. An acknowledgment by the defendant that the items in the plaintiff's account are just, but that he has some offsets thereto, and a subsequent promise to settle all differences, and account fairly, and not to take advantage of the statute of limitations, is not sufficient to remove the bar of the statute: *Sutton v. Burrows*, 9 Leigh, 381; 33 Am. Dec. 246; *Harlan v. Bernie*, 22 Ark. 217; 76 Am. Dec. 428. An admission by a defendant that a debt has only been paid in part amounts to a waiver of the statute and an acknowledgment of the debt: *McClenny v. McClenny*, 3 Tex. 192; 49 Am. Dec. 738. An offer to compromise, coupled with an expressed unwillingness to pay and determination not to pay if rejected, is not an acknowledgment within the statute: *Creuse v. Deniganiere*, 10 Bosw. 122. The use of words "audited and approved" and "we certify the above to be correct," written on an account by trustees of an association, was held to create a liability of a higher character than that arising from a mere account, and constituted the matters sued upon instruments of writing within the meaning of the statute: *Sannickson v. Brown*, 5 Cal. 58. A memorandum on a bond signed by the obligee acknowledging payment of part of the debt, and extending the time, was held not an instrument signed by the party to be charged: *Pena v. Vance*, 21 Cal. 149. A demand is not taken out of the operation of the statute by a written acknowledgment found among the debtor's papers after

his death: *Allen v. Collins*, 70 Mo. 138; 35 Am. Dec. 416. A new promise made in ignorance of the fact that the promisor is legally discharged from all liability is void: *Kenan v. Holloway*, 16 Ala. 53; 50 Am. Dec. 162.

**Payment.** — The statute preserves the common-law rule that partial payment of principal or interest will continue the debt: See *Smith v. Ryan*, 66 N. Y. 352. A part payment ordinarily is held to furnish evidence from which a new promise may be inferred: *McLaren v. McMartin*, 36 N. Y. 88. But in this state, by reason of the wording of § 132, *infra*, a different construction is given: See the note to § 132. To be operative, the part payment must be voluntary: *Miller v. Talcott*, 46 Barb. 167; 54 N. Y. 114; and must be on account as part payment of the larger debt: *Arnold v. Downing*, 11 Barb. 554; for if paid and received in full of all demands, it will operate as such, and not as part payment to take the balance out of the operation of the statute: *Berrian v. Mayor*, 4 Rob. (N. Y.) 538. Payment may be proved by parol, to effect the object of taking the case out of the operation of the statute: *First Nat. Bank v. Ballou*, 49 N. Y. 155. A payment by operation of law, or acknowledged by the creditor on account of an equitable set-off or counterclaim, which the debtor might insist upon, but which he has never claimed to have applied as such, is not such a payment as will operate to prevent the statute from running: *Anderson v. Baxter*, 4 Or. 105.

**To and by whom to be made.** — Such payments only as are made by the debtor or his authorized agent will operate to prevent the bar of the statute: *Harper v. Farlie*, 53 N. Y. 442; *Kelley v. Webber*, 15 N. Y. Week. Dig. 230. A payment by one of several joint contractors is sufficient: *Partlow v. Singer*, 2 Or. 307; *Sutherlin v. Roberts*, 4 Or. 378; though unknown to the others. Payment by an attorney prevents a bar of the client's right to sue him for collections which he has made and wrongfully retained: *Torrance v. Strong*, 4 Or. 39. See the note to the next section.

### *Effect of partial payment.*

§ 132. [45.] When any payment of principal or interest has been or shall be made upon any existing contract, whether it be a bill of exchange, promissory note, bond, or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made.

**Part payment:** See the note to § 131, *supra*. This section refers only to payments made on contracts before the statute has run against them, and fixes by such payment a new date for the running of the statute: *Creighton v. Vincent*, 10 Or. 56; *Partlow v. Singer*, 2 Or. 308. The effect of this section is to make the fact of part payment the test for ascertaining whether the action or suit is barred, in

cases to which it applies, and if it is not barred the action then is founded, not on a new promise arising from the facts of part payment, but upon the original promise: *Sutherlin v. Roberts*, 4 Or. 378; *Torrance v. Strong*, 4 Or. 39. It has been held that it revives the old rule that payment by one joint debtor or contractor revives the liability as to all: *Partlow v. Singer*, 2 Or. 307.

### *Foreign statutes of limitation, how applied.*

§ 133. [46.] When the cause of action has arisen in another state, territory, or country between non-residents of this state, and by the



laws of the state, territory, or country where the action arose an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state.

**Foreign statutes of limitation.** — When a debt is contracted in another state by a person who afterwards removes to this state, the statute of limitations begins to run against the debt at the time when the cause of action accrued where the debt was created, and not at the time of the debtor's arrival

in this state: *McCormick v. Blanchard*, 7 Or. 232.

As to pleading statute of limitations under this section, see *Crawford v. Roberts*, 8 Or. 324, *Sherman v. Osborn*, 8 Or. 66. The statute of limitations of the forum governs in transitory actions: *Adams v. Kelly*, 2 Wash. 263.

*Time, what included in limitation.*

§ 133 a. [1683.] When a limitation, or a period of time prescribed in any existing statute for acquiring a right or barring a remedy, has begun to run before this code takes effect, and the same or any other limitation is prescribed in this code, the time which is run shall be deemed part of the time prescribed as such limitation.

“**This code.**” — The code of 1881.

## CHAPTER II.

### OF THE PARTIES TO ACTIONS.

- § 134. Actions must be commenced in name of party in interest.
- § 135. Executor, trustee, etc., may sue in their own names.
- § 136. Husband and wife, when must join.
- § 137. When husband and wife may join.
- § 138. When widow, or widow and children, may sue.
- § 139. Action for death of child or ward.
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- § 142. Appointment of guardians *ad litem*.
- § 143. All persons interested must be parties.
- § 144. When one party may represent numerous parties.
- § 145. Actions by assignees — Counterclaim in such actions.
- § 146. Persons severally liable on same obligation may be sued severally or jointly.
- § 147. Action not to abate by disability.
- § 148. Action for personal injury survives to wife or child.
- § 149. Parties and judgment in actions for purchase price of land.
- § 150. When courts may determine rights of all parties — New parties may be brought in.
- § 151. New party is entitled to service of summons.
- § 152. Substitution of party in action to recover personal property.
- § 153. Parties to actions of interpleader.
- § 154. Plaintiff may disclaim and deposit disputed property.
- § 155. Court may protect interest of all claimants.
- § 156. Interventions.
- § 157. Proceedings under intervention.

*Actions must be prosecuted in name of party in interest.*

§ 134. [4.] Every action shall be prosecuted in the name of the real party in interest, except as is otherwise provided by law.

**Effect of section, generally.** — This section, which is enacted in many of the states, produced a revolutionary effect on the common law of parties plaintiff. Its effect will be found fully discussed in Pomeroy on Remedies, sec. 124, and in Bliss on Code Pleading, 45. In

cases where it applies, this section merely enacts the rule which always prevailed in equity, that a person beneficially interested may maintain a suit in his own name to enforce his rights: *Grinnell v. Schmitt*, 2 Sand. 707; *Beerlew v. Hallinan*, 16 N. J. Eq. 25;

*Wheatley v. Strobe*, 12 Cal. 98; *Wiggins v. McDonald*, 18 Cal. 126; *Gradwohl v. Harris*, 29 Cal. 150; *Grain v. Aldrich*, 38 Cal. 514.

Failure to bring the action in the name of the real party in interest will be fatal thereto: *Dubbers v. Goux*, 51 Cal. 153; *Davis v. Mayor of N. Y.*, 14 N. Y. 506; *Clark v. Clark*, 20 Ohio St. 128; *Galpin v. Lamb*, 29 Ohio St. 529; *Smith v. C. & N. W. R. R.*, 23 Wis. 267; and the defect cannot be cured by amendment: *Dubbers v. Goux*, 51 Cal. 153; *Clark v. Clark*, 20 Ohio St. 128.

The word "prosecuted," when taken in connection with § 146, *post*, must be taken to mean that all actions must be commenced in the name of the real party in interest: *Elliot v. Teal*, 5 Saw. 190.

The objection may be raised by general demurrer that the complaint does not state facts sufficient to constitute a cause of action: *People v. Haggin*, 57 Cal. 579.

**Who is real party in interest.** — It is generally, but not always, easy to ascertain who is the real party in interest. One is said to be such if he has a valid transfer as against the assignor, and holds the legal title to the demand: *Freeman v. Falconer*, 45 N. Y. Sup. Ct. 384; *Sheridan v. Mayor*, 68 N. Y. 30. Indians sustaining tribal relations may sue and be sued: *Zack Gho v. Jules*, 1 Wash. 325; but a receiver cannot be sued without leave of the court appointing him, and the question may be raised at any stage of the proceedings, as it is jurisdictional: *Brown v. Ranch*, 20 Pac. Rep. 785. When suit was brought by A against B, for damage to his crop by cattle of B, and on trial it was disclosed that C had an interest in part of the crop injured, and the action was dismissed for non-joinder of parties: *held*, error; that the interest of C might be consistent with right of A to recover for the trespass: *Washburn v. Case*, 1 Wash. 253.

In order to maintain an action, the plaintiff must have a real and subsisting interest at the time of the commencement of the suit: *Dugas v. Truxillo*, 15 La. Ann. 116; *Leberman v. N. O. & Fla. & St. S. Co.*, 28 La. Ann. 412. An interest entirely contingent and unascertained, that may never have an actual existence, i. e., a bare possibility, is not sufficient: *Keene's Appeal*, 60 Pa. St. 510. In an action for breach of contract, the plaintiff must be a party or privy to the contract: *Clancy v. Byrne*, 56 N. Y. 129. Where an action is commenced on a contract by one not a party to it, his interest should be affirmatively shown by proper allegations in the petition or complaint: *Hicklin v. Nebraska City N. Bank*, 8 Neb. 465. A principal may sue on the contracts of his agent in the latter's name, whether described as such or not, and though the agency was not disclosed: *Hall v. Plaine*, 14 Ohio St. 417; *St. Louis etc. Ry Co. v. Thacher*, 13 Kan. 564; *First Div. etc. Ry Co. v. Ames*, 12 Minn. 412; *Nicoll v. Burke*, 73 N. Y. 580. Whether the consignor or consignee is the real party in interest, in suing a carrier for goods not delivered, is a question of title in the goods: See *Krulder v. Ellison*, 47 N. Y. 36; *Van Rensselaer v. Barringer*, 39 N. Y. 9. One holding choses in action as collateral security may enforce payment of them by suit in his own name to satisfy his own demand: *Nelson v. Edwards*, 40 Barb. 279; *Greene v.*

*Tallman*, 20 N. Y. 191; 75 Am. Dec. 384. Assignees of policies of insurance must sue as the real parties in interest: *Bergson v. Builders' Ins. Co.*, 38 Cal. 541; *Bibend v. Liverpool F. & L. I. Co.*, 30 Cal. 78; so must assignees of judgments: *Fore v. Manlove*, 18 Cal. 436; but not of judgments for non-assignable torts: *Lawrence v. Martin*, 22 Cal. 173.

The person to whom an order is given by a creditor upon his debtor must sue in his own name, although the debtor has not accepted the order: *McEwen v. Johnson*, 7 Cal. 260; *Wheatley v. Strobe*, 12 Cal. 92; *Walker v. Mauro*, 18 Mo. 564; *Pope v. Huth*, 14 Mo. 403. A mere transferee for collection is not the real party in interest, and cannot sue on a note in his own name: *Taylor v. Surget*, 14 Hun, 516; *Bell v. Tilden*, 16 Hun, 346. Assignees of claims for collection, where they have the legal title and an interest to the extent of their compensation from the proceeds, may sue in their own name: *Curtis v. Sprague*, 51 Hun, 239; *Hays v. Hathorn*, 74 N. Y. 486. Assignees of negotiable notes not indorsed are the real parties in interest: *Osgood v. Artt*, 17 Fed. Rep. 575; *Andrews v. McDaniel*, 68 N. C. 385; *Fultz v. Walters*, 2 T. B. Mon. 165; *Weeks v. Medler*, 20 Kan. 57; and so are transferees of negotiable instruments: *McCann v. Lewis*, 9 Cal. 246; *Price v. Dunlap*, 5 Cal. 483; *Gushee v. Learitt*, 5 Cal. 160. But the mere holder of a note without any interest in it can no longer maintain an action on it: *Parker v. Totter*, 10 How. Pr. 233; *Clark v. Phillips*, 27 How. Pr. 87; *Prall v. Hinchman*, 6 Duer, 351. Transferees of non-negotiable instruments are the real parties in interest: *Lucas v. Pico*, 55 Cal. 126; so is the assignee of a promise to pay in consideration of the promisee's ceasing to defend a suit: *Gray v. Garrison*, 9 Cal. 325; or of a lease of a stallion for a certain time: *Doll v. Anderson*, 27 Cal. 248; of a claim against a city under a contract: *Wetmore v. San Francisco*, 44 Cal. 295; of a right of action for the conversion of personal property: *Lazard v. Wheeler*, 22 Cal. 142; or for damages to real estate: *More v. Massini*, 32 Cal. 592. Actions for breaches of covenants which do not run with the land cannot be brought in the name of the grantee of the realty: *Lawrence v. Montgomery*, 37 Cal. 189; nor can an action be maintained by the assignee of one not the real party in interest: *Skewes v. Dunn*, 1 West Coast Rep. 628 (Utah). An assignee for the benefit of creditors may sue in his own name: *Mellen v. Hamilton F. I. Co.*, 17 N. Y. 609; *Lewis v. Graham*, 4 Abb. Pr. 106.

In the case of an assignment of part of a demand, when made with the knowledge and consent of the debtor, the assignee may sue alone for his portion: *Grain v. Aldrich*, 38 Cal. 514; nor in any event is the assignee a necessary party to the action brought by the assignor for his portion: *Leese v. Sherwood*, 21 Cal. 152. Where the assignment is absolute, the assignee may sue for and recover the entire amount, even though by the assignment he acquired only a portion of the demand: *Gradwohl v. Harris*, 29 Cal. 150. That an action cannot be maintained by the assignee of a portion of the claim without the consent of the debtor, see *Thomas v. Rock Island Co.*, 54 Cal. 578. There must be an express agreement or distinct ratification by the debtor to authorize such an



action: *Grain v. Aldrich*, 38 Cal. 514; *Marizou v. Pioche*, 8 Cal. 536. If the debtor does agree, the action will lie: *McEwen v. Johnson*, 7 Cal. 260. And that an assignment of part in the absence of the debtor's assent is valid in equity, see *Grain v. Aldrich*, 38 Cal. 514.

**Assignability of things in action:** See Pomeroy on Remedies, sec. 144.

It is generally held that "all choses in action embracing demands which are considered as matters of property or estate are now assign-

able, either at law or in equity. Nothing is excluded except mere personal torts which die with the party": *Hoyt v. Thompson*, 5 N. Y. 320, 347. The criterion, therefore, by which to judge of the assignability of things in action, is to ascertain whether the demand survives upon the decease of the party or dies with him: Pomeroy on Remedies, sec. 147. As to what rights in action survive, see various sections of this code on abatement and survivorship of actions.

*Executor, trustee, etc., may sue in their own names.*

§ 135. [5.] An executor or administrator, or guardian of a minor or person of unsound mind, a trustee of an express trust, or a person authorized by statute, may sue without joining the person for whose benefit the suit is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.

**Construction of section, generally.** — The language here used is permissive rather than imperative, and it is held that while the classes of persons mentioned in the section may sue, without joining the party for whose benefit the action is brought, they are not compelled to bring the action, and it may be brought in the name of the latter party: Pomeroy on Remedies, sec. 138; *Sloman v. Great R'y Co.*, 67 N. Y. 608; *St. Louis R'y Co. v. Thacher*, 13 Kan. 564; *McClanahan v. Beasley*, 17 B. Mon. 117; *Rice v. Savory*, 22 Iowa, 470; *Weide v. Porter*, 22 Minn. 429; *Price v. Phoenix Ins. Co.*, 17 Minn. 499; *Hall v. Plaine*, 14 Ohio St. 417, 423.

**Trustees of express trusts.** — To constitute one a trustee of an express trust, there must be some express agreement to that effect, or something which is equivalent thereto: *Robbins v. Dererill*, 20 Wis. 142; *Weaver v. Wabash & E. C. Co.*, 28 Ind. 112; *Tyler v. Houghton*, 25 Cal. 29. In *Considerant v. Brisbane*, 22 N. Y. 389, cited in all the text-books as the leading case defining this expression, the court say: "It [the section] is intended manifestly to embrace not only formal trusts declared by deed *inter partes*, but all cases in which a person acting in behalf of a third person enters into a written express contract with another, either in his individual name, without description, or in his own name, expressly in trust for, or on behalf of, or for the benefit of, another, by whatever form of expression such trust may be declared."

The assignee of a claim in trust for another is trustee of an express trust: *Wetmore v. Hedgeman*, 88 N. Y. 69. One holding a note as trustee of an express trust may sue thereon in his own name alone: *Davidson v. Elms*, 67 N. C. 228; *Mebane v. Mebane*, 66 N. C. 335; *Love v. Johnson*, 72 N. C. 420; *Willey v. Gatling*, 70 N. C. 420; *Winters v. Rush*, 34 Cal. 127; as when a note is transferred as collateral to secure a debt due the transferee: *Willey v. Gatling*, 70 N. C. 421. A mere transfer creating an agency to collect would entitle the assignee to sue in his own name: *Poorman v. Mills*, 35

Cal. 120. A purchaser from a trustee in insolvency may sue in the name of the trustee: *Hart v. Stone*, 30 Conn. 97. A mere naked trustee of land cannot maintain a suit in relation thereto without joining the *cestui que trust*: *Malin v. Malin*, 2 Johns. Ch. 240. A grantee who has agreed to convey after litigation is trustee of an express trust: *Smith v. Logan*, 18 Nev. 149. Where the legal title to premises is in trustees, they may sue for a trespass: *Cox v. Walker*, 26 Me. 512; but if the *cestui que trust* be in possession, he should be the plaintiff: *Wright v. Bundy*, 11 Ind. 402. The trustee of an unincorporated association may sue in his own name for its benefit: *Trustees v. Adams*, 4 Or. 78; *Laughlin v. Greene*, 14 Iowa, 92.

Where one sues as a trustee of an express trust, the complaint should show for whose benefit the action is brought: *Holladay v. Davis*, 5 Or. 40.

**One for whose benefit promise is made.**

— Such a person may sue alone on the promise, for he is the person beneficially interested, — the real party in interest: *Wiggins v. McDonald*, 18 Cal. 126; *Western Development Co. v. Emery*, 61 Cal. 611; *Holladay v. Davis*, 5 Or. 43; *Johnson v. Knapp*, 36 Iowa, 616; *Derin v. Hendershott*, 32 Iowa, 192; *Rogers v. Gosnell*, 58 Mo. 589; *Rogers v. Peak*, 51 Mo. 466; *Jordan v. White*, 20 Minn. 91; *Sanders v. Clason*, 13 Minn. 379; *Kimball v. Noyes*, 17 Wis. 695; *Clafin v. Ostrom*, 54 N. Y. 581; *Glen v. Hope Mutual L. I. Co.*, 56 N. Y. 379; *Davis v. Callo-way*, 30 Ind. 112; *Miller v. Billingsley*, 41 Ind. 489; *Durham v. Bischoff*, 47 Ind. 211; *Meyer v. Lowell*, 44 Mo. 328.

**Agency.** — If the fact of agency is known, and the contract is made in the name of the agent, he may sue thereon without joining the principal: *Winters v. Rush*, 34 Cal. 146; *Ord v. McKee*, 5 Cal. 515; *Considerant v. Brisbane*, 22 N. Y. 389; *Cheltenham Fire Brick Co. v. Cook*, 44 Mo. 29; *Wright v. Tinsley*, 30 Mo. 389; *Rice v. Savory*, 22 Iowa, 470; *Weaver v. Trustees of Wabash Canal Co.*, 28 Ind. 112; *Noe v. Christie*, 51 N. Y. 270, 274; *Hubbell v. Medbury*, 53 N.

Y. 98; *Salmon v. Hoffman*, 2 Cal. 138; 56 Am. Dec. 322.

The principal, on whose behalf a contract is made by an agent, is the real party in interest, and may sue on the contract, though the fact of the agency was not disclosed: *Ruiz v. Norton*, 4 Cal. 358; 60 Am. Dec. 618; *Thurn v. Alta Tel. Co.*, 15 Cal. 472; *Nicoll v. Burke*, 78 N. Y. 580; *Sloman v. Great W. R'y Co.*, 67 N. Y. 208; *Hall v. Plaine*, 14 Ohio St. 417; *First Nat. Bank of Greenfield v. M. & C. R. R. Co.*, 20 Ohio St. 259; *Weide v. Porter*, 22 Me. 429; *St. Louis R'y Co. v. Thacher*, 13 Kan. 564. But in such case the principal, to sue, must show the fact of the agency: *Ruiz v. Norton*, 4 Cal. 358; 60 Am. Dec. 618; *Thurn v. Alta Tel. Co.*, 15 Cal. 472.

One who contracts merely as agent, and has no personal interest in the contract, is not the trustee of an express trust within the meaning

of the statute: *Rawlings v. Fuller*, 31 Ind. 255 (no promise in this case having been made to the agent individually). An agent cannot sue in his own name to enforce an implied liability to his principal; if by any possibility he should be a trustee under such circumstances, he would not be the trustee of an express trust: *Palmer v. Fort Plain etc. Co.*, 11 N. Y. 376.

#### Persons authorized by statute to sue.

— A public officer thereto authorized may sue in his own name: *Paige v. Fuzackerly*, 36 Barb. 392; *Gould v. Glass*, 19 Barb. 179; *Supervisors v. Stimson*, 4 Hill, 136; *Sutter v. Fauble*, 25 Hun, 95. Thus it has been held that a sheriff may sue on a bond taken by him: *Stillwell v. Hurlbert*, 18 N. Y. 374. A county may sue on a forfeited recognizance, though it be made in the name of the state: *Mendocino Co. v. Lamar*, 30 Cal. 629.

#### Husband and wife, when must join.

§ 136. [6.] When a married woman is a party, her husband must be joined with her, except, —

1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone.

2. When the action is between herself and her husband, she may sue or be sued alone.

3. When she is living separate and apart from her husband, she may sue or be sued alone.

See notes to § 137.

**Married woman as party.** — As a general rule, when a married woman is a party to an action, her husband must be joined with her, and the above section, while recognizing this, makes certain exceptions, permissive in their nature, which do not prevent the wife from joining her husband with her. That the section is permissive, see *Corcoran v. Doll*, 32 Cal. 82; *Calderwood v. Pyser*, 31 Cal. 333; *Van Maren v. Johnson*, 15 Cal. 308; *Reinheimer v. Carter*, 31 Ohio St. 579; *Gillen v. Kimball*, 34 Ohio St. 352; *Gee v. Lewis*, 20 Ind. 149; *Kennedy v. Williams*, 11 Minn. 314; *Botkin v. Earl*, 6 Wis. 393. Where the wife may sue or be sued alone, the consent of her husband is not necessary: *Breiman v. Paasch*, 7 Abb. N. C. 249. In a complaint against a married woman, she may be treated as a *feme sole*; she must plead her coverture: *Smith v. Denning*, 61 N. Y. 249; *Kennard v. Sax*, 3 Or. 263. She is not obliged to sue by *prochein ami*: *Kashaw v. Kashaw*, 3 Cal. 312.

The wife being allowed to sue or be sued alone in certain cases, she may therein bind herself by admissions in writing the same as other parties: *Alderson v. Bell*, 9 Cal. 321. Her separate estate is liable for costs: *Leonard v. Townsend*, 26 Cal. 443.

**Suits concerning wife's separate property.** — Most of the code states allow the wife to sue alone only, and not to be sued alone, in matters affecting her separate property: Pomeroy on Remedies, sec. 236. In those states where the wife may sue or be sued alone, it is held that the wife may sue and be sued in all matters relating to her separate estate, in the same

manner as a *feme sole*: *Barton v. Beer*, 21 How. 309; *Morrell v. Cawley*, 17 Abb. Pr. 76; *Spies v. Accessory T. Co.*, 5 Duer, 662. The pleadings should disclose the fact that the property is the wife's separate property: *Thomas v. Desmond*, 63 Cal. 426. In an action by or against her for contracts relating to her separate property, her husband need not be joined: *Draper v. Stouvenal*, 35 N. Y. 507; *Palmer v. Davis*, 28 N. Y. 242; *Brigham v. Bush*, 33 Barb. 596; *Nichols v. Kinney*, 13 N. Y. Week. Dig. 418; so in an action on a lease to her: *Draper v. Stouvenal*, 35 N. Y. 509; or on an award: *Palmer v. Davis*, 28 N. Y. 242; or in an action to determine the rights of parties interested in an estate, her interest being separate property: *Brownson v. Gifford*, 8 How. Pr. 389; an action against a common carrier for loss of her clothing and jewelry, the gift of her husband: *Ratson v. Pennsylvania R. R. Co.*, 2 Abb. Pr., N. S., 220; on a note taken by her for her money loaned: *Smart v. Comstock*, 24 Barb. 411. Her husband need not be joined in an action against her on notes given in the course of her separate business, or for her separate estate: *Andrews v. Monilawa*, 8 Hun, 65; *Barton v. Beer*, 21 How. Pr. 309; 35 Barb. 78; or on her indorsement upon a note: *Treadwell v. Hoffman*, 5 Daly, 207. A wife may be sued alone on a note given by her, for a loan on a representation that the money was to be applied to her separate estate, though it was not so applied: *McVey v. Cautrell*, 70 N. Y. 295. A married woman is liable on purchases made by her as if she were a *feme sole*, and without regard to the fact that she did or did not have separate property, and hence in a suit for the purchase



price, she is properly sued alone: *Speck v. Gurnee*, 25 Hun, 644; and *Tremeyer v. Turnquist*, 85 N. Y. 516, — a case in which she bought groceries on her personal credit. And it was so held, where she purchased realty for her separate use: *Cashman v. Henry*, 75 N. Y. 103. Goods bought for her separate estate or business are chargeable upon her, and she may be sued alone for the price: *Klen v. Gibney*, 24 How. Pr. 31; *Coster v. Isaacs*, 16 Abb. Pr. 628; *Diggins v. Clancey*, 67 Barb. 566. She sues alone to recover possession of her separate real estate: *Darby v. Callaghan*, 16 N. Y. 71; *Hillman v. Hillman*, 14 How. 456; or for false representations inducing her to sell her separate real estate: *Newbery v. Garland*, 31 Barb. 121; *Beardsley v. Duntley*, 69 N. Y. 577; in a suit to remove a cloud upon her title: *Smith v. Fellows*, 41 N. Y. Sup. Ct. 36; or upon a guaranty of lease of lands hired by her: *Prevot v. Lawrence*, 51 N. Y. 219. She is properly sued alone upon her debt contracted in leasing real estate: *Ackley v. Westervelt*, 86 N. Y. 448; or upon her covenant to pay a mortgage debt existing upon land which she purchases: *Vrooman v. Turner*, 8 Hun, 78; or upon a warranty of title in a deed of her separate estate: *Kolls v. De Leger*, 41 Barb. 208. The wife is solely responsible for injuries done by her separate property, or a nuisance caused by it, as by her cattle trespassing: *Rowe v. Smith*, 45 N. Y. 230. The wife may intervene in foreclosure proceedings against her husband, if she claims the land as her separate estate: *Kohner v. Ashenauer*, 17 Cal. 578. The fact that the wife has joined her husband as a party plaintiff in an action concerning her separate estate will not work an abatement of the action where, pending it, they are divorced: *Cablerwood v. Pyser*, 31 Cal. 333; for in such case the relation between the parties is severed, but the original right of action still continues in the wife: *Id.*

**Actions for services by or to wife.** — The wife may sue for her earnings for services or labor performed for another, where she is living separate from her husband: *Pursell v. Fry*, 19 Hun, 595. She may sue alone for the seduction of her servant, employed in her separate business: *Badgley v. Decker*, 44 Barb. 577. A wife can maintain an action against one who entices her husband from her: *Breiman v. Paasch*, 7 Abb. N. C. 249. The wife may be sued for work and labor performed and materials furnished to her separate estate: *Colvin v. Currier*, 22 Barb. 371; *Dickerman v. Abrahams*, 21 Barb. 155; *Fowler v. Seaman*, 40 N. Y. 592. It has been held that a married woman is not liable to and cannot be sued alone for the services of a physician who attends her: *Moody v. Osgood*, 50 Barb. 628. She is liable to an attorney for services concerning her personal estate: *Blanke v. Bryant*, 55 N. Y. 649; *Owen v. Cawley*, 36 N. Y. 600.

**Actions for injuries to the wife's person or property.** — She may sue alone for conversion of her personalty: *Ackley v. Tarbox*, 31 N. Y. 564; *Spies v. Accessory T. Co.*, 5 Duer, 622. Or for trespass upon her realty: *Fox v. Duff*, 1 Daly, 196. Or on premises hired by her: *Fox v. Duff*, 1 Daly, 196. For injuries done by her separate property, as a nuisance caused by it, or injury done by her trespassing cattle, she may be sued alone: *Rowe v. Smith*, 45 N. Y. 230.

So she may be sued alone for torts committed in the management of her separate estate: *Baum v. Mullen*, 47 N. Y. 577.

For her personal injuries, as by an assault and battery upon her, she was allowed to sue alone: *Colvill v. Langdon*, 22 Minn. 565; *Mann v. Marsh*, 35 Barb. 68; *Ball v. Bullard*, 52 Barb. 141; *Rumsey v. Lake*, 55 How. 339.

For special damages to the husband by reason of injuries to his wife, he must sue alone: *Kavanaugh v. Janesville*, 24 Wis. 618; *Beaulette v. Fond du Lac*, 40 Wis. 44; *Meese v. Fond du Lac*, 48 Wis. 323; *Rogers v. Smith*, 17 Ind. 323; 79 Am. Dec. 483; *Barnett v. Leonard*, 66 Ind. 422; *Dailey v. Houston*, 58 Mo. 361; *Filer v. N. Y. Central R. R. Co.*, 49 N. Y. 47.

See generally, on the subject of injuries to the wife and actions therefor, the extended note to *Cary v. Berkshire R. R. Co.*, 48 Am. Dec. 622.

**Miscellaneous.** — If a wife executes a mortgage with her husband, she is a proper party defendant to the foreclosure proceedings: *Anthony v. Nye*, 30 Cal. 401. And husband and wife are properly co-defendants in actions on the wife's contracts before marriage: *Keller v. Hicks*, 22 Cal. 457; *Vlantin v. Bumpus*, 35 Cal. 214. As for the price of goods purchased before marriage: *Heller v. Rossele*, 6 Hun, 631. The wife may be sued alone for the value of assets paid her by the executor of her late husband in an action brought after her remarriage: *Merchants' Ins. Co. v. Hinman*, 34 Barb. 410. A wife who loans money, by her husband as her agent, is liable to the borrower for usurious interest paid, and should be sued alone: *Porter v. Mount*, 45 Barb. 422. In the absence of a statute so providing, a wife could not sue alone to recover the homestead: *Poole v. Gerrard*, 6 Cal. 71; 65 Am. Dec. 481; *Revalk v. Kraemer*, 8 Cal. 66; 68 Am. Dec. 304; *Cook v. Klink*, 8 Cal. 347; *Gee v. Moore*, 14 Cal. 407; *Guod v. Guidol*, 14 Cal. 507; 76 Am. Dec. 441.

**Suits between husband and wife.** — In actions between herself and her husband, she may be either sole plaintiff or defendant: *Wilson v. Wilson*, 36 Cal. 447. Having settled that the action is between the husband and wife, the necessity of introducing other parties cannot affect her right to sue alone: *Kashaw v. Kashaw*, 3 Cal. 312. A wife may sue her husband on a note given by him to her before marriage: *Wright v. Wright*, 54 N. Y. 437; 59 Barb. 505; *Minier v. Minier*, 4 Lans. 421; *Wilson v. Wilson*, 36 Cal. 447; or during marriage: *May v. May*, 9 Neb. 16; 31 Am. Rep. 398, and cases cited therein. A husband cannot sue his wife for services rendered to her by him personally: *Perkins v. Perkins*, 7 Lans. 19; 62 Barb. 531. A wife may sue on a loan made to a firm of which her husband is a member: *Devlin v. Devin*, 17 How. Pr. 514. Or for services rendered to such firm: *Adams v. Curtis*, 4 Lans. 164. The husband may sue his wife for property of his, forcibly taken and carried away by her: *Bordell v. Parkhurst*, 19 Hun, 358; *Howland v. Howland*, 20 Hun, 472. She may maintain an action against her husband for personal injuries: *Schultz v. Schultz*, 2 N. Y. Civ. Proc. Rep. 282; 63 How. Pr. 181. But see *Longendyke v. Longendyke*, 44 Barb. 366,

where it is held that she cannot sue him for an assault and battery, or for a slander and libel: *Freethy v. Freethy*, 42 Barb. 641. She may

sue her husband for converting her separate property: *Whitney v. Whitney*, 3 Abb. Pr., N. S., 350.

*When husband and wife may join.*

§ 137. [7.] Husband and wife may join in all causes of action arising from injuries to the person or character of either or both of them, or from injuries to the property of either or both of them, or arising out of any contract in favor of either or both of them. If a husband and wife be sued together, the wife may defend for her own right, and if the husband neglect to defend, she may defend for his right also. And she may defend in all cases in which she is interested, whether she is sued with her husband or not.

**Husband and wife may join in actions for injury to the wife, or she may sue alone:** *Phelps et al. v. S. S. City of Panama*, 1 Wash. 518.

**Wife may defend, etc.** — As to husband and wife joining, see notes to preceding section. For a construction of the second sentence of the above section, see Pomeroy on Remedies, sec. 328, where it is stated that the

first clause of such sentence, at least, applies only to equitable suits in which separate rights of the wife are involved. To enable the wife to appear in and defend an action separately from her husband, she must possess the rights of a *feme sole*: *Alderson v. Bell*, 9 Cal. 315; *Leonard v. Townsend*, 26 Cal. 435; *Deuprez v. Deuprez*, 5 Cal. 387.

*When widow, or widow and children, may sue.*

§ 138. [8.] The widow, or widow and her children, or child or children if no widow, of a man killed in a duel, shall have a right of action against the person killing him, and against the seconds and all aiders and abettors. When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or when the death of a person is caused by an injury received in falling through any opening or defective place in any sidewalk, street, alley, square, or wharf, his heirs or personal representatives may maintain an action for damages against the person whose duty it was, at the time of the injury, to have kept in repair such sidewalk or other place. In every such action the jury may give such damages, pecuniary or exemplary, as under all circumstances of the case may to them seem just.

Compare §§ 148 and 703 with the provisions of this section.

**Action and measure of damages for causing death or injury.** — See next section. In cases of the death of a party, where damages are sought therefor, the actual pecuniary injury sustained by the plaintiff by reason of the death is not the sole measure of damages. In an action for causing the death of the plaintiff's husband it was declared: "We think that the social and domestic relations of the parties, their kindly demeanor toward each other, the society, were part of 'all the circumstances of the case' for the jury to take into consideration in estimating what damages would be just from a pecuniary point of view": *Beeson v. Greene Mt. G. M. Co.*, 57 Cal. 20. But from the same case it seems that "damages by way of solace" can-

not be allowed. Following this decision in *Cook v. Clay St. Hill R. R. Co.*, 60 Cal. 604, 608, an action for killing the plaintiff's husband, the plaintiff suing as heir at law and as administratrix, she was permitted to testify that they lived a happy married life, that for eight years prior to his death she had been an invalid and unable to leave the house, and that he, during that time, had been very kind and attentive, and that she depended upon him. The daughter also was allowed to testify that deceased was a kind father, that the social and domestic relations, as to the family on his part, were happy, and that he was kind and loving to the plaintiff.

Both of these cases were affirmed in *Nehrbas v. C. P. R. R. Co.*, 62 Cal. 320; and in *Wolford v. Lyons G. & S. M. Co.*, 63 Cal. 483. And see *McKee v. Market St. R. R.*, 59 Cal. 294.



Evidence of decedent's education and habits of sobriety and economy are competent and pertinent, as tending to prove the value of his earnings had he lived: *Taylor v. W. P. R. R. Co.*, 45 Cal. 324.

Funeral expenses can be recovered only as special damages: *Gay v. Winter*, 34 Cal. 153.

As to actions for injuries to relatives, see extended note to *Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 619-641.

### *Action for death of child or ward.*

§ 139. [9.] A father, or in case of the death or desertion of his family the mother, may maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward.

**Civil action for injury or death of child or ward.** — This section did not create any right of action where none existed before, but merely designated the persons by whom an action then existing, or which might thereafter be created by statute, should be brought: *Kramer v. Market St. R. R. Co.*, 25 Cal. 435. The actions for injuries mentioned in the section are such as existed at the common law, and needed no special enactment. There was no action at the common law for the death of a relative: *Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 616; 1 Cush. 475. In *David v. Waters*, 11 Or. 448, it was said that in an action for injuries resulting in the death of plaintiff's minor son, an allegation that plaintiff (the mother) was "next of kin" of the decedent, will be held sufficient after verdict. She could only maintain the action if the father was dead or had deserted the family, and the allegation stated assumes that the father was

dead, and could only be sustained before verdict by proof of the death of the father.

Concerning actions by relatives for injury or death, see the extended note to *Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 618. In cases under the above section, two causes of action arise, one in favor of the infant for his personal injuries, and one in favor of the parent or guardian for losses suffered by him on account of the injury to the child or ward: *Durkee v. Central Pacific R. R. Co.*, 56 Cal. 388. The parent may recover such damages as he has sustained by way of compensation, leaving to the infant a further right of recovery of such damages as are personal to himself: *Durkee v. Central Pacific R. R. Co.*, 56 Cal. 388. The parent may recover expenses incurred in healing the wound: *Karr v. Parks*, 44 Cal. 46; *Sykes v. Lawlor*, 49 Cal. 238; but not in removing disfiguration or deformity: *Karr v. Parks*, 44 Cal. 46.

### *Action by parent for seduction of daughter.*

§ 140. [10.] A father, or in case of his death or desertion of his family the mother, may maintain an action as plaintiff for the seduction of a daughter, and the guardian for the seduction of a ward, though the daughter or ward be not living with or in the service of the plaintiff at the time of the seduction or afterwards, and there be no loss of service.

**Action for seduction of unmarried female:** See notes to *Coon v. Moffet*, 4 Am. Dec. 406; *Weaver v. Bachert*, 44 Am. Dec. 162; and notes to succeeding section, *infra*. Statutes similar to this and the succeeding section have been adopted in Indiana, Iowa, and Tennessee: *Lee v. Hefley*, 21 Ind. 98; *Thompson v.*

*Young*, 51 Ind. 599; *Galvin v. Crouch*, 65 Ind. 56; *Dowling v. Crapo*, 65 Ind. 209; *Smith v. Yargan*, 69 Ind. 445; *Buckles v. Ellers*, 72 Ind. 220; *Smith v. Millburn*, 17 Iowa, 30; *Delvee v. Boardman*, 20 Iowa, 446; *Gover v. Dill*, 3 Iowa, 337; *Gray v. Bean*, 27 Iowa, 221; *Love v. Masoner*, 6 Baxt. 24; *Witcell v. Blackford*, 6 Baxt. 141.

### *Action by woman for her own seduction.*

§ 141. [11.] An unmarried female over twenty-one years of age may maintain an action as plaintiff for her own seduction, and recover therein such damages as may be assessed in her favor; but the prosecution of an action to judgment by the father, mother, or guardian, as prescribed in the preceding section, shall be a bar to an action by such unmarried female.

**Action by unmarried female for her own seduction:** See the note to the preceding section.

Where the right of action is given, as in this section, to an "unmarried woman," the complaint and proof must, of course, show that

the plaintiff is or was unmarried at the time of the injury: *Gover v. Dill*, 3 Iowa, 337; *Thompson v. Young*, 51 Ind. 199; *Galvin v. Crouch*, 65 Ind. 56; *Dowling v. Crapo*, 65 Ind. 209. But if the allegation that she is unmarried is not denied, proof is, of course, unneces-

sary: *Gover v. Dill*, 3 Iowa, 337. Plaintiff's marriage after her seduction does not defeat her right of action: *Dowling v. Crapo*, 65 Ind. 209; *Gover v. Dill*, 3 Iowa, 337. The remedy here allowed was not intended to apply to

cases where both parties are equally guilty: *Breon v. Henkle*, 14 Or. 494. Such a statute as this has no extraterritorial effect: See *Buckles v. Ellers*, 72 Ind. 220; 37 Am. Rep. 156.

### *Appointment of guardians ad litem.*

§ 142. When an infant is a party, he shall appear by guardian, or if he has no guardian, or in the opinion of the court the guardian is an improper person, the court shall appoint one to act. Said guardian shall be appointed as follows:—

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years, or if under that age, upon the application of a relative or friend of the infant.

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within thirty days after the service of the summons; if he be under the age of fourteen, or neglect to apply, then upon the application of any other party to the action, or of a relative or friend of the infant. [*February 25, 1891, § 1.*]

**Guardians ad litem.**—It is an inherent power of a court to appoint a guardian *ad litem* for an infant: *Brick's Estate*, 15 Abb. Pr. 12. When there is a general guardian, and the court does not specially appoint a guardian *ad litem*, it is the duty of the former to appear for the ward: *Gronfier v. Puymiro*, 19 Cal. 629. Where, in a suit against infants, there was no personal service upon them, but their general guardian appeared and defended for them, it was held that such appearance gave the court jurisdiction of their persons, and that there was no occasion for his special appointment as guardian *ad litem* in the action. As general guardian he was authorized—indeed, it was his duty—to appear for his ward: *Smith v. McDonald*, 42 Cal. 487. An infant may maintain an action for use and occupation though he has a general guardian: *Porter v. Bleiler*, 17 Barb. 149. If creditors apply for a fund in court in which an infant is interested, a guardian must be appointed: *Matter of Howe*, 2 Edw. Ch. 484. A guardian *ad litem* may be appointed for an infant defendant in summary proceedings: *Jessurun v. Mackie*, 24 Hun, 624. A guardian cannot be appointed in an action submitted without controversy, as an infant cannot submit a controversy: *Fisher v. Stilson*, 9 Abb. Pr. 33.

The duty of the guardian *ad litem* is to protect the interest of the infant, and bring his rights to notice of the court: *Knickerbacker v. De Freest*, 2 Paige, 304. The court will protect the infant's rights if the guardian neglects them: *Stephens v. Van Buren*, 1 Paige, 479. A guardian *ad litem* may be removed if negligent or incompetent: *Litchfield v. Burwell*, 5 How. Pr. 341. Admissions or errors of a guardian *ad litem* do not bind his ward: *Litchfield v. Burwell*, 5 How. Pr. 341; *Bulkley v. Van Wyck*, 5 Paige, 536; *Leggett v. Sellon*, 3 Paige, 84.

A guardian who has appeared must answer: *Farmers' L. & T. Co. v. Reid*, 3 Edw. Ch. 414. This guardian is an officer of the court; he does not control the ward's estate, nor can he

make any binding agreement for the payment of attorney's fee: *Cole v. Superior Court*, 63 Cal. 86. He is authorized to prosecute, not to settle; he can settle only by authority of the court: *Edsall v. Vandemark*, 39 Barb. 589.

An infant is bound where he is duly served, and a guardian is appointed who accepts the trust: *Phillips v. Dusenberry*, 8 Hun, 348. If an infant is entitled under the law to have "a day" given in the judgment, and the judgment is absolute, giving no day, it is erroneous, and will be reversed or modified on appeal; or if properly attacked by a direct proceeding, will be vacated for the error and irregularity. But it is not a nullity on its face; it is only voidable, not void: *Joyce v. McStory*, 31 Cal. 274; *Porter's Heirs v. Robinson*, 3 A. K. Marsh. 254; 13 Am. Dec. 153,—a case in which no guardian *ad litem* was appointed, and in which the decree gave the infant no day to show cause. If a guardian is not appointed, the proceedings may be set aside for irregularity: *Wilder v. Ember*, 12 Wend. 191; *Freyberg v. Pelerin*, 24 How. Pr. 202; and a judgment taken against an infant defendant will be irregular: *Kellogg v. Klock*, 2 Caines, 28; *Boyle v. McAvoy*, 29 How. Pr. 278; *Fairweather v. Satterly*, 7 Rob. 546; and the proceedings will be set aside even after the judgment: *Boyle v. McAvoy*, 29 How. 278; but the judgment is not void: *Rogers v. McLean*, 10 Abb. Pr. 306; it is voidable only: *McMurray v. McMurray*, 66 N. Y. 175. But if the infant comes of age before the objection is raised, it is cured: *Rutter v. Puckhofer*, 9 Bosw. 638; *Havens v. Sherman*, 42 Barb. 636; so it is waived by pleading to the merits when he comes of age before trial; *Smart v. Haring*, 14 Hun, 276.

Where a general guardian of the plaintiff was improperly described in the title as guardian *ad litem* before the commencement of the action, but the body of the complaint showed sufficiently his relations to his ward, the court upheld the complaint: *Spear v. Ward*, 20 Cal. 676.



**Appointment of guardian ad litem.** —

The court has no right to appoint a guardian *ad litem* for an infant defendant until the infant is properly brought into court by service of summons: *Gray v. Palmer*, 9 Cal. 638; *Johnston v. San Francisco Sav. Union*, 63 Cal. 554; *McCloskey v. Sweeney*, 66 Cal. 53; *Glover v. Haws*, 19 Abb. Pr. 161, note; *Grant v. Van Schoonhoven*, 9 Paige, 255; 37 Am. Dec. 393; *Ingersoll v. Mangum*, 84 N. Y. 622; *Shaeffer v. Gates*, 2 B. Mon. 453; 38 Am. Dec. 164. But a voluntary appearance is equivalent to personal service: *Disbrow v. Folger*, 5 Abb. Pr. 53. The appointment of a guardian on the petition of an infant over fourteen years of age, together with an appearance and answer by such guardian, is held sufficient to give jurisdiction to the court without service of summons upon the infant: *Shriver v. Shriver*, 86 N. Y. 575.

An infant defendant cannot waive the objection that there is no guardian: *Fairweather v. Satterly*, 7 Rob. (N. Y.) 546.

An application for appointment may be made *ore tenus* in open court as well as in writing: *Emeric v. Alvarado*, 64 Cal. 529. A person cannot be appointed on his own nomination without the infant's consent, if the latter is over fourteen: *E. B. v. E. C. B.*, 28 Barb. 299. A guardian *ad litem* may be appointed for an infant party on motion of either party to a suit: *Ralston v. Lahee*, 8 Iowa, 17; 74 Am. Dec. 291. Plaintiff should apply to have a guardian appointed for an infant defendant who fails to appear: *Peck v. Shusted*, 21 Ill. 137; 74 Am. Dec. 83.

Guardian *ad litem* should be appointed on application of general guardian for leave to sell: *Loyd v. Malone*, 23 Ill. 43; 74 Am. Dec.

179. A mother may present the petition for appointment of a guardian to sell real estate: *Matter of Whitlock*, 32 Barb. 48. Where an appointment of a guardian *ad litem* was made on the same day on which an order of sale was entered, the court declined to hold that this vitiated the proceedings: *Stuart v. Allen*, 16 Cal. 504; 76 Am. Dec. 551.

The infant may apply after the time provided if no guardian has been appointed: *McConnell v. Adams*, 3 Lans. 728. A guardian for an infant defendant cannot be appointed *nunc pro tunc*: *Boyle v. McAvoy*, 29 How. Pr. 278.

The appointee should be the person most likely to protect the infant's rights: *Grant v. Van Schoonhoven*, 9 Paige, 255; 37 Am. Dec. 393; and must not be one who may have an adverse interest: *In re Fritz*, 2 Paige, 374; and a guardian named by an adverse party will not be appointed: *Knickerbocker v. De Freest*, 2 Paige, 304. One cannot be appointed against his consent: *Leopold v. Meyer*, 10 Abb. Pr. 40. An infant cannot be appointed as guardian for an infant; and if this is done, the ward having no knowledge of the guardian's infancy, the irregularity is not waived by pleading to the merits: *Wolford v. Oakley*, 1 Sheldon, 261. A copy of the order appointing the guardian should be served with the answer: *Barnard v. Heydrick*, 32 How. Pr. 97. An answer filed by a guardian *ad litem* is proof of notice to him of the appointment and of his acceptance: *Beeler v. Bullitt*, 13 Am. Dec. 161; 3 A. K. Marsh. 280. The regularity of the order or its service cannot be questioned after judgment: *Barnard v. Heydrick*, 32 How. Pr. 97. The appointment of a guardian *ad litem* is a traversable fact, and must be pleaded: *Crawford v. Neal*, 56 Cal. 321.

**All persons interested must be parties.**

§ 143. [13.] All persons interested in the cause of action, or necessary to the complete determination of the question involved, shall, unless otherwise provided by law, be joined as plaintiffs when their interest is in common with the party making the complaint, and as defendants when their interest is adverse to the plaintiff; *provided*, that where good cause exists, which shall be made to appear in the complaint, why a party who should be a plaintiff cannot, from a want of consent on his part or otherwise, be made such plaintiff, he shall be made a defendant.

**Refusal to join as plaintiff.** — Where one partner sues for an injury to the partnership property, and makes his copartner a defendant for want of his consent to join as plaintiff, the recovery must be entire for the whole injury. The law will not tolerate the division of a joint right of action into several actions; the whole cause of action must be determined in one, and thus avoid a multiplicity of suits. In such case the partner recovering is liable to account to his copartner defendant: *Nightingale v. Scannell*, 6 Cal. 509; 18 Cal. 322.

See other cases making a non-consenting partner a party defendant: *Hill v. Marsh*, 46 Ind. 218; *Allen v. Miller*, 11 Ohio St. 374, 378.

So also a non-consenting assignee of part of

an insurance policy: *Great Western Compound Co. v. Aetna Ins. Co.*, 40 Wis. 373.

**All parties interested should be joined.**

— No binding order can be made upon a person not in any way made party to the suit; every person is entitled to a day in court: *Madison v. Madison*, 1 Wash. 60; *Coombs v. Davis et al.*, 2 Wash. 466; *Weisbach v. Arnold*, 3 Wash. 111. It is the constant aim of a court of equity to do complete justice, by deciding upon and settling the rights of all parties interested in the subject of the suit. For this purpose, all persons materially interested, either legally or beneficially, in the subject-matter of the suit, ought generally to be made parties thereto, either as plaintiffs or defendants, so that there

may be a complete degree which shall bind them all: Mitt. Pl., 6th Am. ed., 189; 1 Daniell's Ch. Pl. & Pr. 40; Story's Eq. Pl., sec. 72; *People v. Morrill*, 26 Cal. 360, 361. The rule, as stated and illustrated in *King v. Berry's Executors*, 3 N. J. Eq. 52, is, that all persons legally or beneficially interested in the subject-matter and result of a suit must be parties; and to the same effect are the following cases: *Mechanics' Bank v. Seton*, 1 Pet. 306; *Caldwell v. Taggart*, 4 Pet. 190; *Marshall v. Beckerly*, 5 Wheat. 313; *Connecticut v. Pennsylvania*, 5 Wheat. 424; *Williams v. Russell*, 19 Pick. 165. This rule was not rigidly enforced

where its observance would have been attended with great inconvenience, and answer no substantially beneficial purpose. It was modified or partially dispensed with, in the discretion of the court, as justice and the exigencies of the case required: *Wilson v. Castro*, 31 Cal. 427, 428.

Where the mortgagors of realty, together with the mortgagee, take a bond from a third person for his construction of a building on the mortgaged premises, the mortgagors and mortgagee may unite as plaintiffs in an action on the bond: *Daley v. Cunningham*, 60 Cal. 530.

### *When one party may represent numerous parties.*

§ 144. [14.] When the question is one of common or general interest to many persons, or where the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

**Parties numerous, one suing for all.** — This section was intended to apply to equitable actions only: *Andrews v. Mokelumne Hill Co.*, 7 Cal. 333.

In equity, the strict rule that all persons materially interested must be parties was always dispensed with where it was impracticable or very inconvenient, as in case of a very numerous association in a joint concern, — in effect a partnership: *Cockburn v. Thompson*, 16 Ves. 321; Story's Eq. Pl., sec. 135; *Gorman v. Russell*, 14 Cal. 540; and so *Warth v. Ruddle*, 18 Abb. Pr. 396; *Keller v. Tracy*, 11 Iowa, 530; *Stewart v. Erie & W. T. Co.*, 17 Minn. 372.

Where the plaintiff sued on behalf of himself and others, residents and property holders of the city of Oakland, to set aside certain conveyances operating as a cloud upon the title to a tract of land occupied by the city, and to obtain an injunction, etc., and the court below entered a judgment declaring the conveyances fraudulent and void, and enjoining the defendants from future alienations in respect to the land of the plaintiff, the relief in this particular being confined to the plaintiff alone, the supreme court held that there was no such community of interest between the plaintiff and those whom he represented in the action as entitled him to an injunction in their favor:

*Gibbons v. Peralta*, 21 Cal. 632, 633. It is noticeable that there are two classes of cases in which one may sue on behalf of others, viz.: 1. Where there is a common or general interest; and 2. Where the parties are numerous, and it would be impracticable to unite them. While these classes are marked, it seldom happens that the cases belong wholly to either one; they usually partake of the features of both. But it is not necessary in order to maintain a suit under the first that the parties should be numerous; nor to maintain a suit under the second that the parties should have a general or common interest: See Pomeroy on Remedies, secs. 389, 391.

The above section applies to an action by a creditor on behalf of all to compel an assignee for their benefit to carry out the assignment: *Greene v. Breck*, 10 Abb. Pr. 42; *Brooks v. Peck*, 38 Barb. 519; *Petrie v. Lansing*, 66 Barb. 357; *Gouclier v. Foret*, 4 Minn. 13. So also may a legatee or distributee sue for all: *McKenzie v. L'Amoureux*, 11 Barb. 516; *Towner v. Tooley*, 38 Barb. 598; *Dawson v. Dawson*, 25 Ohio St. 443; and see Pomeroy on Remedies, sec. 258, note 1.

As to the effect of this provision upon the rights of parties not actually before the court, see Pomeroy on Remedies, sec. 396.

### *Actions by assignees — Counterclaim in such actions.*

§ 145. Any assignee or assignees of any judgment bond, specialty, book-account, or other chose in action, for the payment of money, by assignment in writing, signed by the person authorized to make the same, may, by virtue of such assignment, sue and maintain an action or actions in his or her name, against the obligor or obligors, debtor or debtors, therein named, notwithstanding the assignor may have an interest in the thing assigned; *provided*, that any debtor may plead in defense a counterclaim or an offset, if held by him against the original owner, against the debt assigned, save that no counterclaim or offset shall be pleaded against negotiable paper assigned before due, and



where the holder thereof has purchased the same in good faith and for value, and is the owner of all interest therein. [*Feb. 25, 1891, § 2.*]

**Effect of assignment of choses in action upon defenses thereto.** — This section, taken with § 134, *ante*, while it changes the practice so that the assignee of a chose in action may sue on it in his own name, does not work any alteration of the actual rights of the parties; the defendants are still entitled to the same defenses against the assignee who sues, which they would have had if the former rule had continued to prevail, and the action had been brought in the name of the assignor, but to no other or different defenses. Pomeroy on Remedies, sec. 156; *Beckwith v. Union Bank*, 9 N. Y. 211; *Myers v. Davis*, 22 N. Y. 489. The rule as to what defenses are available is stated by Wright, J., in *Callanan v. Edwards*, 32 N. Y. 483, as follows: "An assignee of a chose in action not negotiable takes the thing assigned, subject to all the rights which the debtor had acquired in respect thereto prior to the assignment, or to the time notice was given of it, when there is an interval between the execution of the transfer and the notice." To the same effect, see *Ingraham v. Disbrow*, 47 N. Y. 421; *Andrews v. Gillespie*, 47 N. Y. 487. And this includes both set-off and other kinds of defenses. These rules do not apply between the original assignor and assignee only, but affect subsequent assignees who took without notice of equities between the original assignor and assignee. The doctrine that the equities of the original assignor, under the circumstances thus stated, are latent, and cannot prevail against the title of the second assignee, is held to be unsound, though some courts have sustained the doctrine: *Bush v. Lathrop*, 22 N. Y. 535; *Anderson v. Nicholas*, 28 N. Y. 600, approved by Woodruff, J., in *Reeves v. Kimball*, 40 N. Y. 311; *Mason v. Lord*, 40 N. Y. 476, 487, per Daniels, J.; *Williams v. Thorn*, 11 Paige, 459; *McNeil v. Tenth Nat. Bank*, 55 Barb. 59, 68; *Schafer v. Reilly*, 50 N. Y. 67; *Mangles v. Dixon*, 3 H. L. Cas. 702. But the owners of some kinds of things in action not technically negotiable, but which, in the course of business customs, have acquired a semi-negotiable character as a matter of fact, may assign or part with them for a special purpose, and at the same time may clothe the assignee or person to whom they have been delivered with such apparent *indicia* of complete ownership and power to dispose of them as to estop himself from setting up against a second assignee, to whom the securities have been transferred in good faith and for value, the fact that the title of the first assignee or holder was not absolute and perfect, as, for example, in the case of certificates of stock: *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325.

If an assignment is made before the opposing demand becomes mature, and the latter does not thus become actually due and payable until after the transfer, the debtor's right of set-off is destroyed by the mere fact of the as-

ignment, and no notice thereof to him is necessary to produce that effect: *Beckwith v. Union Bank*, 9 N. Y. 211; *Adams v. Rodarmel*, 19 Ind. 339; *Walker v. McKay*, 2 Met. (Ky.) 294; *Martin v. Kunzmüller*, 37 N. Y. 396; *Watt v. Mayor etc.*, 1 Sand. 23; *Jones v. Chalfant*, 55 Cal. 505. If an insolvent holder of a claim not yet matured assigns the same before maturity, and the debtor, at the time of this transfer, holds a similar claim against the assignor, which is then due and payable, his right of set-off against the assignee, when the latter's cause of action arises, is preserved and protected, this doctrine being based upon considerations of equity, and intended to prevent one party from losing his own demand on account of the insolvency of his immediate debtor, and from being at the same time compelled to pay the debt originally due from himself to that insolvent; *Morrow v. Bright*, 20 Mo. 298; *Walker v. McKay*, 2 Met. (Ky.) 294. An unauthorized assignment by an agent cannot give the assignee a right of right of action against defendant, nor can such assignment be subsequently ratified, so as to create the right of action not existing when suit was brought: *Wittenbrock v. Bellmer*, 57 Cal. 12. Nor will a supplemental complaint remedy the defect: *Wittenbrock v. Bellmer*, 57 Cal. 12.

In *McCabe v. Grey*, 20 Cal. 509, it was held that a demand against an assignor, which was obtained by the debtor, or accrued in his favor, before notice of the assignment, although in fact subsequent to the assignment itself, might be set off against the cause of action in the hands of the assignee. But Pomeroy, in his work on remedies, section 166, denies this ruling, and claims that the New York cases prove the contrary.

**Defenses against negotiable instruments.** — The rules above stated do not apply to negotiable instruments. A transferee in good faith, before maturity, takes the instrument freed from such defenses: *Payne v. Bensley*, 8 Cal. 260; *Naglee v. Lyman*, 14 Cal. 450; *Robinson v. Smith*, 14 Cal. 94. But when negotiable paper is transferred after maturity, the maker has the same right to avail himself of a claim against the assignor, as a set-off, that he would have if the demand assigned was not negotiable: *Norton v. Foster*, 12 Kan. 44, 47, 48; *Levenson v. Lafontaine*, 3 Kan. 523, 526; *Harris v. Burwell*, 65 N. C. 584; *Richards v. Darby*, 34 Iowa, 427. An indorsee after maturity takes the same subject to defenses existing between the maker and payee: *Folsom v. Bartlett*, 2 Cal. 163; *Vinton v. Crowe*, 4 Cal. 309; *Fuller v. Hutchings*, 10 Cal. 526; 70 Am. Dec. 746; *Hayward & Co. v. Stearn*, 39 Cal. 58. But an indorsee after maturity, from one who acquired the note before maturity, is not affected by equities existing between the original parties: *Bank of Sonoma v. Gove*, 63 Cal. 355.

*Persons severally liable on same obligation may be sued severally or jointly.*

§ 146. [16.] Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory

notes, may all, or any of them, be included in the same action, at the option of the plaintiff.

**Persons severally liable on same obligation or instrument.** — This section changes the common-law rule that one or all, and not any intermediate number, may be sued: *People v. Love*, 25 Cal. 520. It does not relate to cases of a joint liability, but to those that are several: *Kamm v. Harker*, 3 Or. 210; *Carman v. Plass*, 23 N. Y. 287, where it is said: "It relates in terms to cases where a plurality of persons contract several obligations on the same instrument." It has been held applicable to joint and several liabilities: *People v. Love*, 25 Cal. 520; *People v. Evans*, 29 Cal. 429; *Graham v. Hoy*, 38 N. Y. Sup. Ct. 506; *Cridler v. Curry*, 66 Barb. 336; *Decker v. Trilling*, 24 Wis. 610; for the promisee or obligee may treat the agreement as several: Pomeroy on Remedies, sec. 408. Insurance companies uniting in a policy for separate amounts may be joined: *Bernero v. Ins. Co.*, 65 Cal. 386. The survivor and personal representative of a deceased obligor severally liable on an instrument may be joined: *Hauck v. Craighead*, 67 N. Y. 432; *Eaton v. Alger*, 47 N. Y. 345; *Barker v. Cassidy*, 16 Barb. 177; *Churchill v. Trapp*, 3 Abb. Pr. 306. A principal and his guarantor cannot be sued as co-defendants under this section, their obligations being distinct and not arising on the same instrument; and this is true though the guaranty be written on the same paper that it secures: *Tyler v. T. of T. A. & P. U.*, 14 Or. 485; *Carman v. Plass*, 23 N. Y. 286; *Cole v. Merchants' Bank*, 60 Ind. 350; *Bondurant v. Bladen*, 19 Ind. 160; *Graham v. Ringo*, 67 Mo. 324; *Phalen v. Dingee*, 4 E. D. Smith, 379; *Tibbets v. Percy*,

24 Barb. 39; *Allen v. Fosgate*, 11 How. Pr. 218; *Virden v. Ellsworth*, 15 Ind. 144; *Ridder v. Schermerhorn*, 10 Barb. 638; as a lease with a guaranty below it: *Tibbitts v. Percy*, 24 Barb. 39; *Phalen v. Dingee*, 4 E. D. Smith, 379.

An action cannot be maintained under this section against the maker and guarantor of a note: *Barton v. Speis*, 5 Hun, 60; *Brewster v. Silence*, 8 N. Y. 207. If the case was one in which the parties were actually made liable by the same instrument, they might be joined: Pomeroy on Remedies, sec. 410; *Carman v. Plass*, 23 N. Y. 286; *Decker v. Gaylord*, 8 Hun, 110. Thus on a note two signers may be sued as makers, though one adds to his name the word "surety": *Hoyt v. Mead*, 13 Hun, 327. A lessor and surety who join in a lease may be sued together: *Carman v. Plass*, 23 N. Y. 286; *Decker v. Gaylord*, 8 Hun, 110.

The section applies only to written instruments or obligations: *Cridler v. Curry*, 44 How. Pr. 345; *Field v. Van Cott*, 15 Abb. Pr., N. S., 349; and every written agreement or undertaking on which parties may become liable is embraced: *Brainard v. Jones*, 11 How. Pr. 569. Though several parties have been joined under this section, the plaintiff may go to trial without serving all, and may dismiss as to some, and take judgment as to those served and proceeded against: *Powell v. Powell*, 48 Cal. 234. The judgment in actions under this section must follow the nature of the liability of each defendant; the effect of the section is not to render their liability joint: *Decker v. Trilling*, 24 Wis. 610; *Kelsey v. Bradbury*, 21 Barb. 531; *Farmers' Bank v. Blair*, 44 Barb. 641.

### Action not to abate by disability.

§ 147. [17.] No action shall abate by the death, marriage, or other disability of the party, or by the transfer of any interest therein, if the cause of action survive or continue; but the court may at any time within one year thereafter, on motion, allow the action to be continued by or against his representatives or successors in interest.

**When action does not abate.** — This section abrogates the common-law rule that an action abated by the termination or transfer of the plaintiff's interest therein *pendente lite*: *Elliott v. Teal*, 5 Saw. 188. This section applies to actions in the United States courts: *Barker v. Ladd*, 3 Saw. 44. The representative may have leave to continue the suit, but he is not compelled to do so: *Bain v. Pine*, 1 Hill, 615. An administrator may have leave to continue an action if it is of the class that survives, without regard to the merits of the action: *Wing v. Ketcham*, 3 How. Pr. 385. The objection that the cause does not survive is available on the trial: *Arthur v. Griswold*, 60 N. Y. 143.

The substitution may be made on a suggestion of the death of the former party, and satisfactory proof on an *ex parte* motion of the appointment and qualification of the administrator; and if the court unguardedly permits a person to prosecute who has not given satis-

factory evidence of his right to do so, it possesses the means of preventing any mischief from the inadvertence, and will undoubtedly employ those means: *Wilson v. Cadmon*, 3 Cranch, 193; *Taylor v. Western Pacific R. R. Co.*, 45 Cal. 337.

It is regular and proper to suggest the death of a party to an action in any court and at any stage of the proceedings. The death of a party occurring before appeal taken may be shown in the supreme court by affidavit of the fact: *Judson v. Love*, 35 Cal. 463; *Shartzer v. Love*, 40 Cal. 96. A decree reciting that "this action having been continued, in consequence of the death of the plaintiff, by his executor, Samuel Webb, and the jury having found a verdict for the plaintiff, it is now ordered," etc., clearly shows the suggestion of the death of the original plaintiff, and a continuance of the cause or a revival of it in the name of the executor. At all events, any irregularity in this respect cannot be attacked collaterally:



*Gregory v. Haynes*, 13 Cal. 591; 21 Cal. 445.

Unless the motion is made within a year, it is barred: *Matter of Bainbridge*, 67 Barb. 293. But while the motion must be made within a year, the application is in time if this is done, though the order be not made until after the expiration of the year: *Dick v. Kendall*, 6 Or. 166. If the action is not continued, it may be dismissed on motion of the other party: *Banta v. Marcellus*, 2 Barb. 373. An appeal lies from an order refusing to continue the action in the name of the representative: *Wood v. Reynolds*, 25 Hun, 385; but an order refusing to continue it in the name of an assignee is not appealable: *McGown v. Leavenworth*, 2 E. D. Smith, 24. But see *Beach v. Reynolds*, 53 N. Y. 1.

Death of the defendant will dissolve an attachment: *Myers v. Mott*, 29 Cal. 367; *Hensley v. Morgan*, 47 Cal. 622; *Ham v. Cunningham*, 50 Cal. 365, 367. The appearance of an infant by a guardian *ad litem*, who is already before the court by his general guardian, is a substitution, and not an intervention: *Temple v. Alexander*, 53 Cal. 3. Infant successors of a deceased defendant in an action of partition may be substituted for such defendants on motion without issuance of a summons to bring them in, and they may appear by their general guardian or by a guardian *ad litem*: *Emeric v. Alvarado*, 64 Cal. 529.

Substituted parties take up the controversy in the condition in which they find it: *Temple v. Alexander*, 53 Cal. 3. If pending an action one of the defendants dies, and on plaintiff's motion his executor is substituted as defendant in his place, and no notice of this fact is served on the executor, and he does not appear or answer, or adopt the answer of his testator as his own, and the testator is named in the judgment, the rights of the executor are not affected by the trial and judgment, and a judgment rendered is a nullity so far as he is concerned: *McCreery v. Everding*, 44 Cal. 284.

*Transfer of interest.* — Where, pending an

action of ejectment against a tenant, his landlord sells and conveys the land to a person, that person is, under this section, entitled to continue the defense of the action in the name of the tenant, or to cause himself to be substituted in the tenant's place as defendant: *Mastick v. Thorp*, 29 Cal. 446. So if pending an action in ejectment, the plaintiff parts with the title of the demanded premises, the action may be continued in his name, unless the grantee applies to be substituted as plaintiff: *Camarillo v. Fenlon*, 49 Cal. 203. So far as relates to substitution on transfer of interest under this section, the plaintiff or his vendee is the party to move in the matter; he is, as against the defendant, entitled to stay in court until his case has been tried; and if defendant desires to take advantage of the transfer for any purpose, he must do so by supplemental answer: *Moss v. Shear*, 30 Cal. 467; *Barstow v. Newman*, 34 Cal. 90; *Hestres v. Brennan*, 37 Cal. 388. Substitution of a different plaintiff will not be allowed where it will result in injury to any right of the defendant: *Skewes v. Dunn*, 3 Utah, 186.

The bankruptcy of an appellant, though adjudicated before the taking of the appeal, will not prevent its prosecution in his name, nor will the respondent be heard to object on that ground. The appeal may be prosecuted in the name of the bankrupt, or in that of his assignee: *O'Neil v. Dougherty*, 46 Cal. 575.

A successor in office may be substituted as party to the action on suggestion to the court that the party's term of office has expired: *Jordan v. Hubert*, 54 Cal. 260; *Ex parte Tinkum*, 54 Cal. 201. And the change in the incumbency must be suggested, if judgment against the successor is desired: *Lindsey v. Auditor*, 3 Bush, 231; *Ex parte Tinkum*, 54 Cal. 201. But an action cannot be conducted by or prosecuted against a successor in office, if the right accrued or liability attached to the individual, and not to the office: *Lament v. Haight*, 44 How. Pr. 1.

*Action for personal injury survives to wife or child.*

§ 148. [18.] No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine by reason of such death if he have a wife or child living, but such action may be prosecuted, or commenced and prosecuted, in favor of such wife, or in favor of the wife and children, or if no wife, in favor of such child or children.

Compare §§ 138 and 703.

**Abatement of actions.** — See notes to § 147.

*Parties and judgment in actions for purchase price of land.*

§ 149. [19.] In any action brought for the recovery of the purchase-money against any person holding a contract for the purchase of lands, the party bound to perform the contract, if not the plaintiff, may be made a party, and the court in a final judgment may order the interest purchaser to be sold or transferred to the plaintiff upon such terms as may be just, and may also order a specific performance of the con-

tract in favor of the complainant, or the purchaser in case a sale be ordered.

*When court may determine rights of all parties — New parties may be brought in.*

§ 150. [20.] The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall cause them to be brought in.

**Bringing in new parties.** — The equitable power of protecting the rights of others interested in the proceeding, but not parties thereto, is preserved by this section: *Buck v. Webb*, 7 Col. 212. The sentence "when a complete determination of the controversy cannot be had without the presence of other parties," means when there are persons who are not parties whose rights must be settled before those of the parties to the suit can be determined: *McMahon v. Allen*, 12 How. Pr. 39. If the action or proceeding can be determined without them, other parties cannot be brought in: *Tichenor v. Coggins*, 8 Or. 270; *Albany City Savings Bank v. Burdick*, 87 N. Y. 40; and especially in this the case where defendants are sought to be brought in and the plaintiff objects: *Sawyer v. Chambers*, 11 Abb. Pr. 110. It is the duty of the court to bring in other parties when a complete determination cannot be had, even after appeal: *Shaver v. Brainard*, 29 Barb. 25; *Davis v. Mayor*, 2 Duer, 663; *Tonnelle v. Hall*, 3 Abb. Pr. 205; *Waring v. Waring*, 3 Abb. Pr. 246. But see *Davis v. Mayor*, 14 N. Y. 506, where it is held that new parties should not be brought in after trial, though without them the controversy cannot be determined.

When an agreed controversy has been submitted by some parties, the court cannot order others to be brought in: *Hobart College v. Fitzhugh*, 27 N. Y. 130. It was held that proceedings could go on in a creditor's suit, where the

judgment debtors were not made parties, but by stipulation consented to be bound by the judgment, and released their interest in the subject of the action: *Cowing v. Greene*, 45 Barb. 585. When a husband conveys the bare title to a third person in trust for his use to prevent the marital rights of the wife from attaching thereto, such third person is a proper party to a divorce proceeding in which the wife seeks her share of the property: *Wetmore v. Wetmore*, 5 Or. 469. A claim to the ownership and possession of a wharf cannot be tried in an action between third parties for wharfage: *Kelsey v. Murray*, 18 Abb. Pr. 294. In an action against stockholders on their statutory liability, it was held that all must be brought in: *Strong v. Wheaton*, 38 Barb. 616. The court will not compel plaintiff's assignor to be brought in to procure an accounting: *Allen v. Smith*, 16 N. Y. 415. An assignee for the benefit of creditors is not entitled to interplead in an attachment suit against a debtor: *Tichenor v. Coggins*, 8 Or. 270; or in a judgment creditor's action, except it be to protect his right to the surplus: *N. S. of Mexico v. Duncan*, 6 N. Y. Week. Dig. 271.

The statute of limitations is a defense to one thus brought in, if the bar attached after commencement of the suit, but before the time of bringing him in: *Newman v. Marvin*, 12 Hun, 236. See application of this section to an action to restrain the diversion of water: *Lytle Creek Water Co. v. Perdue*, 65 Cal. 447.

*New party entitled to service of summons.*

§ 151. [21.] When a new party is introduced into an action as a representative or successor of a former party, such new party is entitled to the same summons, to be served in the same manner, as required for defendants in the commencement of an action.

*Substitution of party in action to recover personal property.*

§ 152. [22.] A defendant against whom an action is pending upon a contract, or for specific real or personal property, at any time before answer, upon affidavit that a person not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, may apply to the court for an order to substitute such person in his place, and discharge him from liability to either party on his



depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct; and the court may in its discretion make the order.

*Parties to actions of interpleader.*

§ 153. Any one having in his possession, or under his control, any property or money, or being indebted, where more than one person claims to be the owner of, entitled to, interested in, or to have a lien on such property, money, or indebtedness, or any part thereof, may commence an action in the superior court against all or any of such persons, and have their rights, claims, interest, or liens adjudged, determined, and adjusted in such action. [February 19, 1890, § 1.]

**Interpleader.**—It is held that this is merely a summary means of obtaining relief in cases specified in the section where a bill of interpleader would lie. It introduces no new cases, and except as expressly provided, is governed by the same rules as equitable interpleader: *Vosburgh v. Hamilton*, 15 Abb. Pr. 254; *Taunton v. Groh*, 4 Abb. App. 358; *Johnson v. Maxey*, 43 Ala. 521; *Nelson v. Goree*, 34 Ala. 565; *Patterson v. Perry*, 14 How. Pr. 505; *St. Louis Life Ins. Co. v. Alliance Mut. L. Ins. Co.*, 23 Minn. 7; *Delaney v. Murphy*, 24 Hun, 503. This statutory remedy of interpleader does not oust courts of equity of their jurisdiction to proceed by bill of interpleader. The remedy is merely concurrent and cumulative: *Oriental Bank Corp. v. Nicholson*, 3 Jur., N. S., 857; *Beck v. Stephani*, 9 How. Pr. 193; *Board of Education v. Scoville*, 13 Kan. 17.

The application is an appeal to the equitable jurisdiction of the court: *Pustel v. Flannelly*, 60 How. Pr. 67. It is discretionary with the court to grant or refuse leave to interplead: *Barry v. Mut. L. I. Co.*, 53 N. Y. 536; and the order on the motion is therefore not appealable: *Id.*

The nature of the allegations necessary are: 1. That two or more persons have preferred a claim against him; 2. That they claim the same thing; 3. That he has no beneficial interest in the thing claimed; and 4. That he cannot determine without hazard to himself to which of the claimants the thing of right belongs: *Atkinson v. Manks*, 1 Cow. 691; *Shaw v. Coster*, 8 Paige, 339; 35 Am. Dec. 690. The thing to which adverse claim is made must be one and the same thing: *Pfister v. Wade*, 56 Cal. 43. To entitle the defendant to relief, the affidavit must show that the whole controversy can be tried in the suit with the substituted defendant: *Sherman v. Partridge*, 4 Duer, 646; *Nelson v. Goree*, 34 Ala. 565; that he is indifferent to the claims of either party: *Marvin v. Ellwood*, 11 Paige, 365; *Oppenheim v. Wolfe*, 3 Sand. Ch. 171; *Van Buskirk v. Roy*, 8 How. Pr. 325; *Pfister v. Wade*, 56 Cal. 43; that he claims no beneficial interest in the subject of the contro-

versy: *Atkinson v. Manks*, 1 Cow. 691; *Anderson v. Wilkinson*, 10 Smedes & M. 601; that he is ignorant of the rights of the adverse claimants: *Bell v. Hunt*, 3 Barb. Ch. 391. He cannot be substituted as to part and defend as to the rest: *Bender v. Sherwood*, 15 How. Pr. 258. He must deny collusion with either party: *Shaw v. Coster*, 8 Paige, 339; 35 Am. Dec. 690; *Marvin v. Ellwood*, 11 Paige, 365; *Atkinson v. Manks*, 1 Cow. 691; but collusion with the party to whose rights plaintiff succeeded, and the claimant, is not ground for refusal of interpleader, if the applicant was not a party thereto: *Wehle v. Bowery Savings Bank*, 40 N. Y. Sup. Ct. 97. The applicant must not be a wrong-doer, or in default as to either defendant: *N. Y. & N. H. R. R. Co. v. Hows*, 35 N. Y. Sup. Ct. 372; *Shaw v. Coster*, 8 Paige, 339; 35 Am. Dec. 690; *McGaw v. Adams*, 14 How. Pr. 461. He must not by his own act have placed himself in the position to be sued: *United States v. Victor*, 16 Abb. Pr. 153; and if a liability is claimed against him, he cannot have such relief: *Patterson v. Perry*, 14 How. Pr. 505; nor can he be substituted as to part of a claim and defend as to the rest: *Bender v. Sherwood*, 15 How. Pr. 258. He is not entitled to the relief if he can be protected in any other way: *N. Y. & N. H. R. R. Co. v. Hows*, 35 N. Y. Sup. Ct. 372. The relief ought not to be granted where it clearly appears on the face of the papers that the claim of the third party is frivolous and without validity: *Pustel v. Flannelly*, 60 How. Pr. 67; or that it is impossible for one of the claimants to succeed: *Wilson v. Duncan*, 8 Abb. Pr. 354; or if the defendant is not in position to deposit the property in court: *Vosburgh v. Huntington*, 15 Abb. Pr. 254. The defendant is not bound to withdraw, it is held, after obtaining an order substituting another person as defendant, but may go on and defend the action: *Neill v. Wuest*, 17 Abb. Pr. 319, note.

As to equitable interpleader, see the extended note to *Shaw v. Coster*, 35 Am. Dec. 695-712.

*Plaintiff may disclaim and deposit disputed property.*

§ 154. In all actions commenced under the preceding section, the plaintiff may disclaim any interest in the money, property, or indebtedness, and deposit with the clerk of the court the full amount of such



money or indebtedness, or other property, and he shall not be liable for any costs accruing in said action. And the clerks of the various courts shall receive and file such complaint, and all other officers shall execute the necessary processes to carry out the purposes of this act, free from all charge to said plaintiff, and the court, in its discretion, shall determine the liability for costs of the action. [February 19, 1890, § 2.]

"This act" comprises §§ 153-155 of this code.

*Court may protect interest of all claimants.*

§ 155. Either of the defendants may set up or show any claim or lien he may have to such property, money, or indebtedness, or any part thereof, and the superior right, title, or lien, whether legal or equitable, shall prevail. The court, or judge thereof, may make all necessary orders, during the pendency of said action, for the preservation and protection of the rights, interests, or liens of the several parties. [February 19, 1890, § 3.]

*Interventions.*

§ 156. [23.] Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either party, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by a complaint setting forth the grounds upon which the intervention rests, filed by leave of the court or judge on the *ex parte* motion of the party desiring to intervene.

**Intervention comes from civil law:** See Pomeroy on Remedies, sec. 416; *Hyman v. Cameron*, 46 Miss. 726; *Horn v. Volcano Water Co.*, 13 Cal. 62.

**Who may intervene:** See extended note to *Brown v. Saul*, 16 Am. Dec. 181-184. The interest mentioned in the code which entitles a person to intervene in a suit between other parties "must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment": *Horn v. Volcano Water Co.*, 13 Cal. 62. "The interest must be that created by a claim to the demand, or some part thereof, in suit, or a claim to or lien upon the property, or some part thereof, which is the subject of litigation": *Horn v. Volcano Water Co.*, 13 Cal. 62. So also *Gasquet v. Johnson*, 1 La. 431. The amount of the interest is immaterial: *Coffey v. Greenfield*, 55 Cal. 382. It makes no difference that the intervenor may or may not protect his interest in some other way: *Coffey v. Greenfield*, 55 Cal. 382. The interest must be made to appear from the intervenor's pleadings by proper allegation: *Coffey v. Greenfield*, 62

Cal. 602. A mortgagee has the right of intervention, when the mortgagor has been sued and the mortgaged property attached, for the purpose of showing that the mortgage lien is prior to that of the attachment: *Langert v. Brown*, 3 Wash. 102.

**Intervention has been allowed in the following cases:** A prior mortgage of premises sought to be charged with a mechanic's lien: *Walker v. Hauss-Hijo*, 1 Cal. 183; the wife of the mortgagor may intervene in an action to foreclose a mortgage on the homestead: *Sargent v. Wilson*, 5 Cal. 504; *Moss v. Warner*, 10 Cal. 296; *Dillon v. Byrne*, 5 Cal. 456; *Marbury v. Ruiz*, 58 Cal. 11; so may a purchaser under foreclosure sale of mortgaged premises in a suit to compel conveyance by the mortgagor to the plaintiff: *Coffey v. Greenfield*, 55 Cal. 382; a mortgagee in a suit to set aside a sale on which the mortgagor's title was based: *Webb v. Keller*, 26 La. Ann. 596; or a subsequent mortgagee in foreclosure proceedings on a prior mortgage barred by the statute of limitations, and may plead the statute: *Coster v. Brown*, 23 Cal. 142. A mortgagee of personalty entitled by the terms of the mortgage to immediate

possession may intervene in an action by a third person to recover the specific property, and this right is not affected by the plaintiff's taking possession and giving bond as provided by the code: *Martin v. Thompson*, 63 Cal. 5; a claimant of a debt garnished: *Daniels v. Clark*, 38 Iowa, 556; a claimant of money collected by a sheriff on execution: *Cobb v. Depue*, 22 La. Ann. 244; persons claiming to be owners of the property in controversy between the plaintiff and defendant, and as against both: *Brooks v. Hager*, 5 Cal. 281; *Haydel v. Batemen*, 2 La. Ann. 755; *Baldree v. Davenport*, 7 La. Ann. 857; *Brown v. Brown*, 22 La. Ann. 475; sureties of the defendant in a replevin suit where the defendant is insolvent and the action is not being defended in good faith: *Coburn v. Smart*, 53 Cal. 742; one who has assigned to the plaintiff the note in controversy, but retains some interest: *Gradwohl v. Harris*, 29 Cal. 150; one who claims the note sued on adversely to both parties: *Stich v. Dickinson*, 38 Cal. 608; a county may intervene to recover taxes on money, subject-matter of the action: *Yuba Co. v. Adams*, 7 Cal. 37.

In attachment suits, judgment creditors of the defendant may intervene and have it set aside if void as them: *Davis v. Eppinger*, 18 Cal. 378. So also may subsequent attaching creditors intervene and show that there was no debt due the plaintiff in prior suit from the defendant: *Speyer v. Ihmels*, 21 Cal. 280; *Coghill v. Marks*, 29 Cal. 673.

It is not an intervention, but a substitution, where minors, already in court by their mother, file a complaint by their guardian *ad litem* setting up the same facts: *Temple v. Alexander*, 53 Cal. 3.

Intervention in mechanic's lien suits: See *Mars v. McKay*, 14 Cal. 127; *Hocker v. Kelley*, 14 Cal. 164; *Van Winkle v. Stow*, 23 Cal. 457.

Intervention was not allowed in the following cases: Mere creditors cannot intervene: *Horn v. Volcano Water Co.*, 13 Cal. 62; *Pierre v. Masse*, 7 Martin, N. S., 196. Upon the right of creditors to intervene, it is said, in a note to *Brown v. Saul*, 16 Am. Dec. 177, 181, that they will be allowed to intervene only where they have acquired some lien upon the property in controversy; and the California cases of *Davis v. Eppinger*, *Speyer v. Ihmels*, and *Coghill v. Marks*, above cited, are referred to. In ejectment, one cannot intervene who alleges title in himself paramount to both plaintiff and defendant: *Porter v. Garrissino*, 51 Cal. 559; nor can one intervene in ejectment to have quieted his title to a tract of land not in dispute between the plaintiff and defendant: *Rosecrans v. Ellsworth*, 52 Cal. 509. One tenant in common cannot intervene in an action by a co-tenant to recover possession and damages for the ouster: *Donner v. Palmer*, 23 Cal. 40; 31 Cal. 500; 45 Cal. 180; 51 Cal. 629. Nor can one who claims adversely to both parties intervene in a forcible entry and detainer suit. *Warren v. Kelly*, 17 Tex. 549. Nor can one claiming to have made an application to purchase land from the state intervene after judgment entered in proceedings to determine the right of contestants to purchase: *Langenour v. Shanklin*, 57 Cal. 70; *Cunningham v. Shanklin*, 60 Cal. 118.

**Application to intervene, and some questions of practice.** — See next section, *infra*. The application or petition of an intervenor must be treated as a complaint, and it must affirmatively show such facts as entitle petitioner to intervene: *People v. Talmadge*, 6 Cal. 256; *Clapp v. Phelps*, 19 La. Ann. 461. That it need not be verified is declared in *Smith v. Allen*, 28 Tex. 501. The objection that an intervention does not state facts sufficient to entitle petitioner to intervene cannot be raised by one who agrees that petitioner's right shall be determined according to a stipulated state of facts: *Donner v. Palmer*, 51 Cal. 629. The motion for leave to file an intervention is addressed to the discretion of the court: *Scheidt v. Sturgis*, 10 Bosw. 606; and may be granted *ex parte*: *Spanagel v. Reay*, 47 Cal. 468. It presents a judicial question, which will not be reviewed by an appellate court on a petition for a writ of *mandamus*: *People v. Sexton*, 37 Cal. 532. And if answers of intervention are filed in the court below, without objection to the right of the petitioner to intervene, such objection cannot be raised for the first time in the appellate court: *McKenty v. Gladwin*, 10 Cal. 227; *Smith v. Penny*, 44 Cal. 161.

The application to intervene must be made before the trial of the cause: Note to *Brown v. Saul*, 16 Am. Dec. 179; *Van Buren v. Geer*, 12 Tex. 15; *Wright v. Neathery*, 14 Tex. 211; *Ah Goon v. Superior Court*, 61 Cal. 555; and must be denied, if after trial has been commenced: *Fearing v. Ball*, 6 La. 685; or after judgment rendered in a contest concerning the right to purchase public land: *Langenour v. Shanklin*, 57 Cal. 70. See also *Carey v. Brown*, 58 Cal. 180. It may be made before issue joined: *Brooks v. Hager*, 5 Cal. 281; *Coburn v. Smart*, 53 Cal. 742. It was held that leave to intervene was properly refused where the suit had been pending a long time, and judgment was about to be taken: *Hocker v. Kelley*, 14 Cal. 164. A trial before service of the complaint in intervention is premature. *Ah Goon v. Superior Court*, 61 Cal. 555.

The court may grant the petition to intervene made *ex parte*, and afterwards dismiss the complaint in intervention: *People v. Pfeiffer*, 60 Cal. 89. But the motion to dismiss must call the attention of the court to the precise ground therefor: *Poehlmann v. Kennedy*, 48 Cal. 201; and will not be granted where the issues raised on the intervention are pending, notwithstanding the dismissal of the original complaint: *Poehlmann v. Kennedy*, 48 Cal. 201.

If a demurrer to the intervention, on the ground of no right to intervene, is sustained, the right of immediate appeal exists: *Stich v. Dickinson*, 38 Cal. 608. So sureties whose application to intervene has been denied may appeal: *Coburn v. Smart*, 53 Cal. 742; or where an intervention filed on an *ex parte* order has been dismissed: *People v. Pfeiffer*, 60 Cal. 89. Formerly, appeal did not lie from an order denying a motion for leave to intervene: See *Wenborn v. Boston*, 23 Cal. 321.

Where an intervenor and the defendant take separate appeals from the judgment in favor of the plaintiff, the appellate court may affirm the judgment on the defendant's appeal, and



reverse it and grant a new trial on the appeal of the intervenor: *Donner v. Palmer*, 45 Cal. 180.

For other questions arising out of this feature of the new procedure, including the rights and liabilities of intervenors, "intervenors

must not delay the suit," and "must accept the suit as he finds it," see the note to *Brown v. Saul*, 16 Am. Dec. 177, 184; Pomeroy on Remedies, sec. 411; notes to *Fleming v. Shields*, 99 Am. Dec. 722; *Horn v. Volcano Water Co.*, 73 Am. Dec. 573.

### *Proceedings under intervention.*

§ 157. [24.] When leave is given to intervene, a copy of the intervenor's complaint shall be served upon the parties to the action or proceedings who have not appeared, or publication of a notice of the intervention containing a brief statement of the nature of the intervenor's demand shall be made in all cases where there are absent or non-resident defendants. The notice shall be published in the same manner and for the same length of time as prescribed in this act for publication of summons. And the complaint shall also be served upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an original complaint. The court shall determine upon the rights of the intervenor at the same time the action is decided, and if the claim of the party intervening is not sustained, he shall pay all costs incurred by the intervention; *provided*, that no intervention shall be cause for delay in the trial of an action between the original parties thereto beyond the term to which the action is brought.

**Practice in intervention.** — See notes to preceding section.

## CHAPTER III.

### OF THE PLACE OF TRIAL.

- § 158. Actions to be commenced where the subject is situated.
- § 159. Actions to be commenced where cause arose.
- § 160. Venue of actions against corporations.
- § 161. Venue in cases not before specified.
- § 162. Proceeding when action is commenced in wrong county.
- § 163. Grounds of demand for change of venue.
- § 164. To what county venue changed — Only one change for either party.
- § 165. Change of venue to newly created county.
- § 166. Transmission of record upon change of venue — Costs of change.
- § 167. Venue changed by stipulation.
- § 168. Party procuring change of venue may lose benefit thereof by neglect.
- § 169. Change is complete when.
- § 170. Clerk must certify entries with transcript.

### *Actions to be commenced where the subject is situated.*

§ 158. [47.] Actions for the following causes shall be commenced in the county in which the subject of the action, or some part thereof, is situated:—

1. For the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on, or for the determination



of all questions affecting the title or for any injuries to real property.

2. All questions involving the right to the possession or title to any specific article of personal property; in which last-mentioned class of cases damages may also be awarded for the detention and for injury to such personal property.

**Venue is jurisdictional.** — All actions for causes mentioned in this section must be commenced in the county where the subject-matter is situated. The venue is jurisdictional: *Wood v. Mastick*, 2 Wash. 64; *Stiles v. James*, 2 Wash. 194.

**Illustrations of the rule.** — In New York, under a statute substantially similar to this, it was held that an action for waste on land in another state would not lie: *Cragin v. Lovell*, 88 N. Y. 258; and it was also held in that state that the right to use water running over land in an ancient channel is not an interest in realty: *Thompson v. Attica Water Co.*, 1 Civ. Proc. Rep. 368. But in California it was held that it is such an interest, and that the action must be brought in the county where the right is claimed: *Lower King's R. D. Co. v. King's River & F. C. Co.*, 60 Cal. 408. Actions for diverting water from a ditch which runs through more than one county may be brought in either: *Lower King's R. D. Co. v. King's River & F. C. Co.*, 60 Cal. 408. A proceeding to enforce a tax lien should be brought in that county in which the realty affected is situated, rather than in the county of the defendant's residence: *People v. Plumas M. Co.*, 51 Cal. 566. An action to set aside a conveyance of realty as fraudulent need not be commenced in the county where the land is situated: *Beach v. Hodgdon*, 66 Cal. 187. An action to set aside a decree for partition should be brought in the county where the land lies: *Bent v. Maxwell Co.*, 3 West Coast Rep. 8 (N. M.). An action brought by beneficiaries, to procure the removal of trustees, the appointment of others, and the appointment of a receiver pending the proceedings, is not an action "for the recovery of the possession of real estate": *More v. Superior Court*, 64 Cal. 345. So an action to enforce a trust on both real and personal property may be brought in the county where the trustee resides, although the property is in another county: *Le Breton v. Superior Court*, 66 Cal. 27. On an application for *mandamus* to compel the execution of a sheriff's deed, the court held that the awarding of the *mandamus* could not determine rights or in any respect affect the interest of third parties, and the proceeding did not involve the determination of a right or interest in real estate: *McMillan v. Richards*, 9 Cal. 421; 70 Am. Dec. 655.

Title to land must be tried in the county where the land lies: *Beverly v. Burke*, 54 Am. Dec. 351; and a suit, the subject of which is local, must be commenced by the state in the county of its locality, unless a special statute authorizes it to be commenced elsewhere: *People v. City of St. Louis*, 48 Am. Dec. 339.

In an action to recover personal property, the complaint is defective if it fails to allege that the property, or a part of it, is in the county where the action is brought; but the

defect is cured where the sheriff's return on file shows that the property is within the court's jurisdiction: *Stiles v. James*, 2 Wash. 194.

An action for the reformation of a contract of sale of land must be tried in the county where the land is situated, and cannot be changed therefrom to the place of the defendant's residence: *Franklin v. Dutton*, 79 Cal. 605. An action to restrain a threatened injury to real property is an action for an "injury to real property," and must be tried in the county where the property is situated: *Drinkhouse v. Water Works*, 80 Cal. 308. Any action for the determination of a right or interest in real property is an action affecting the title, within the meaning of this section, and must be tried in the county where the property is situated: *Franklin v. Dutton*, 79 Cal. 605.

**Objection, how taken.** — When an action for real property is commenced in the wrong county, a motion to change the venue, and not demurrer, is the proper remedy. And in such case there is no discretion in the court, the change being a matter of right: *Watts v. White*, 13 Cal. 321; *O'Neil v. O'Neil*, 54 Cal. 187. The amendment of the complaint and setting out of new averments cannot take away the right to a change of venue which had accrued to him by his motion made at the time of demurring to the original complaint: *Buell v. Dodge*, 57 Cal. 645. But the defendant may waive this right expressly or by implication: *Pearkes v. Freer*, 9 Cal. 642; *O'Neil v. O'Neil*, 54 Cal. 187. Under this section it is not necessary to mention the residence of the parties, or either of them, in the complaint. The statute only provides for the trial of actions in certain counties; and with reference to actions to recover real property, the situation of the premises, and not the residence of the parties, determines the county: *Doll v. Feller*, 16 Cal. 433. And it is held that each of several defendants has the right of trial in the proper county. *O'Neil v. O'Neil*, 54 Cal. 187, was an action involving the right to realty situated partly in Sacramento County and partly in Sutter County, and was commenced in San Francisco County against several defendants. One of their number moved to change the place of trial to Sacramento County; the motion was denied below on the ground that all the defendants should have united in making it, but the order was reversed on appeal. The supreme court said that a "defendant to such an action as the one under consideration is entitled, as a matter of right, to have the action tried in the county where the land is situated. There is nothing in the provisions which require all the defendants to join in claiming such right. It is a right which belongs to each defendant. . . . Each defendant may waive it for himself, but the waiver of one cannot be used to prejudice or destroy the right of another."

*Actions to be commenced where cause arose.*

§ 159. [48.] Actions for the following causes shall be tried in the county where the cause, or some part thereof, arose:—

1. For the recovery of a penalty or forfeiture imposed by statute;
2. Against a public officer, or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command or in his aid, shall do anything touching the duties of such officer.

**Actions for penalties.** — An action against a corporate officer to recover a debt of the corporation under a statute allowing such recovery where the officer signed a false report is an action for a penalty within the sense of this section: *Veeder v. Baker*, 83 N. Y. 156.

**Actions against public officers.** — This section does not apply to acts of an officer which his office gives him no authority to perform, but only to those acts as an officer, and within his authority, which it is alleged he performed improperly: *Brown v. Smith*, 24 Barb. 419. This applies only to affirmative acts of the officer by which, in the execution of process, or otherwise, he interferes with the property or rights of third persons, and not to mere omissions or neglect of official duty: *McMillan v. Richards*, 9 Cal. 420; 70 Am. Dec. 655; *Elliot v. Cronks*, 13 Wend. 35; *Hopkins v. Heywood*, 13 Wend. 265. The action against a

public officer must be commenced in the county in which the cause of action arose. After issue joined, a motion to change the venue because an impartial trial cannot be had is proper, but not before that time: *People v. Kinsgley*, 8 Hun, 233. The benefit of the statute may be waived by failing to raise the objection: *Howland v. Willetts*, 5 Sand. 219; 9 N. Y. 171. The provision applies though the officer has gone out of office when the suit is brought: *People v. Tweed*, 13 Abb. Pr., N. S., 419.

The warden or superintendent of a prison was held a public officer within the meaning of the section: *Porter v. Pillsbury*, 11 How. Pr. 240; *Cowen v. Quinn*, 13 Hun, 344. In an action against a sheriff and attaching creditors, to compel a determination of conflicting claims to goods, the sheriff is entitled to remove the action to his own county, where the levy was made: *Wintjen v. Verges*, 10 Hun, 576.

*Venue of actions against corporation.*

§ 160. [49.] An action against a corporation may be brought in any county where the corporation has an office for the transaction of business, or any person resides upon whom process may be served against such corporation, unless otherwise provided in this code.

See notes to next section.

*Venue in cases not before specified.*

§ 161. In all other cases the action must be tried in the county in which the defendants, or some of them, reside at the time of the commencement of the action, or may be served with process, subject, however, to the power of the court to change the place of trial, as provided in sections one hundred and sixty-two and one hundred and sixty-three of this code. [February 25, 1891, § 1.]

See §§ 162, 163.

*Proceeding when action is commenced in wrong county.*

§ 162. If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and demurs or answers, files an affidavit of merits, and demands that the trial be had in the proper county. [February 25, 1891, § 1.]

**"At the time he appears."** etc. — The specification in this section of the code in which the defendant is required to demand the

change of venue at the time he appears, etc., is exclusive; he is not required to make the demand at the time he appears and answers or



demurs, unless the ground of the demand is, that the action is not commenced in the proper county: *Cook v. Pendergast*, 61 Cal. 72. See note to next section.

**Change of venue in various actions.** — The right of the defendant in an action for the recovery of a penalty or forfeiture to have the place of trial changed to the county where the cause of action arose, when the venue is laid in another, is an absolute one, and cannot be defeated by the plaintiff on the ground of the convenience of witnesses. In such a case the proper practice seems to be to order the change upon defendant's motion, and then if plaintiff desires a change upon any of the grounds authorized by § 163 of this code, he must make his motion: *Veedes v. Baker*, 83 N. Y. 156; and that where the place of trial has been changed by the court under this section, and subdivision 1 of § 163, the plaintiff may, after issue joined, move to change it back or to some other county, under a subdivision 3 of the next succeeding section: *Id.*

**Residence.** — Under this section, residence of the defendant in another county is good cause for removal: *Watkins v. Degener*, 63 Cal. 500. The action is properly commenced in the county where some of the defendants reside, and to procure a change of venue, all the defendants must unite in the motion: *Remington v. S. M. Co.*, 62 Cal. 311. A change of the place of trial to the county in which most of the defendants reside may be had where all the defendants who are served or have appeared unite in the demand: *Rathgeb v. Tiscornia*, 66 Cal. 96. The fact that plaintiff is a non-resident, and that the only defendant who appears is a resident of another county, does not give a right to change the place of trial, if one defendant resides in the county where the venue is laid: *Forehand v. Collins*, 1 Hun, 316.

Injuries to character are transitory, and the action may be brought where defendant is found: *Hull v. Vreeland*, 42 Barb. 543. In *quo warranto*, the place of trial may be laid in any county: *People v. Cook*, 6 How. Pr. 448. The right to the benefit of this section may be waived: *Duche v. Buffalo G. S. Co.*, 63 How. Pr. 516; *Raney v. McKee*, 60 Am. Dec. 660; and the court will presume that defendant has done so unless he insists upon the privilege which the statute gives him, and makes his objection at the proper time: *Kenney v. Greer*, 54 Am. Dec. 439. In an action for false imprisonment, the defendant has a right to have

the case transferred to the county of his residence: *Ah Fong v. Sternes*, 79 Cal. 30; and where the complaint states two causes of action, upon one of which defendant is entitled to a change of venue, but not as to the other, the case will be transferred: *Id.* An order changing the place of trial will be presumed to have been properly made when the record on appeal from the order fails to contain any papers identified as having been used in the lower court on the hearing of the motion to change: *McAulay v. Truckee Ice Co.*, 79 Cal. 50. Defendant's right to have the place of trial changed to the county of his residence is not affected by the joinder of another defendant, who is not a necessary party, and against whom no cause of action is stated: *Sayward v. Houghton*, 82 Cal. 628.

**An affidavit of merits** must show that the affiant has "fully and fairly stated the facts of the case to his counsel before the advice of the latter would amount to a *prima facie* showing of merits on" the affiant's behalf: *Buel v. Dodge*, 63 Cal. 553; *Nickerson v. California Raisin Co.*, 61 Cal. 268. The following formulas have been held good: "The case had been fully and fairly represented to counsel": *Woodward v. Backus*, 20 Cal. 137. "That he had fully and fairly stated the facts of the case to his counsel": *Nickerson v. California Raisin Co.*, 61 Cal. 268. "That he had fully and fairly stated the case to his counsel": *Buel v. Dodge*, 63 Cal. 553. "That they [his counsel] informed me that I had a good and valid defense upon the merits to said action, and to all of it, all of which I verily believe to be true," was upheld in *Rowland v. Coyne*, 55 Cal. 1. The following was held bad: "That he had fully and fairly stated his defense in this action to his counsel": *Nickerson v. California Raisin Co.*, 61 Cal. 268; *People v. Larue*, 67 Cal. 526. Although see *Bailey v. Taaffe*, 29 Cal. 426. "That he is advised that he has a good defense" is good: *Reidy v. Scott*, 53 Cal. 72.

**Application made too soon.** — An affidavit of merits and demand for change, filed before answer or demurrer, is premature: *Nicoll v. Nicoll*, 4 West Coast Rep. 219.

The affidavit of merits may be made by one of the co-defendants for the benefit of all: *Rowland v. Coyne*, 55 Cal. 1.

**Hearing of motion to change the venue to the county of defendant's residence** cannot be ordered postponed until defendant file his answer: *Heald v. Hendy*, 65 Cal. 321.

### *Grounds of demand for change of venue.*

§ 163. [51.] The court may, on motion, in the following cases, change the place of trial, when it appears by affidavit or other satisfactory proof,—

1. That the county designated in the complaint is not the proper county; or

2. That there is reason to believe that an impartial trial cannot be had therein; or

3. That the convenience of witnesses or the ends of justice would be forwarded by the change; or



4. That from any cause the judge is disqualified; which disqualification exists in either of the following cases: In an action or proceeding to which he is a party, or in which he is interested; when he is related to either party by consanguinity or affinity within the third degree; when he has been of counsel for either party in the action or proceeding.

**Change of venue, generally.**— The place of trial of an action cannot be changed from the county in which it was commenced for any reasons other than those specified in the statute: *Birmingham I. Co. v. Hatfield*, 43 N. Y. 224; and therefore, where the reason is one for which the statute does not allow a change of venue, the parties cannot give jurisdiction by appearing in the court to which the cause is taken on an illegal order: *Johns v. Johns*, 17 Fla. 806. But where a statute provides that on application and showing in certain cases a party may have a change of venue, if the party brings himself within the statutory requisites, he is entitled thereto as a matter of right: *Mendenhall v. Gately*, 18 Ind. 148; *Hession v. Pressley*, 80 Ind. 494; *Clark v. People*, 2 Ill. 117; *Freleigh v. State*, 8 Mo. 206; *People v. Yorkum*, 53 Cal. 566. Though parties cannot by consent give a court jurisdiction of the subject-matter of an action where it has none by law, yet, the court having jurisdiction, they may waive venue: *Leach v. Western etc. R. R. Co.*, 65 N. C. 486; *Brennan v. People*, 15 Ill. 511; *People v. Scates*, 3 Scam. 451. Objections made by a party to a change of venue are not waived by going to trial in a court to which the case is sent: *Bennett v. Carey*, 57 Iowa, 221. But see *Yater v. State*, 58 Ind. 299; and *Schaeffner's Estate*, 45 Wis. 614, where it is held that a general appearance in the court to which the cause is taken will waive any objection thereto.

A corporation is entitled to a change of venue equally with a natural person, and the affidavit therefor, where required, may be made by its authorized officer: *Commercial Ins. Co. v. Mehlman*, 48 Ill. 313; *McGovern v. Keokuk L. Co.*, 61 Iowa, 265. A foreign corporation cannot obtain a change of venue on the ground of residence, for it has no residence in any county in the state: *Thomas v. Placerville G. Q. M. Co.*, 65 Cal. 600.

The court is not bound, of its own motion, to make the order changing the place of trial: *Watts v. White*, 13 Cal. 324. The application must be made as early as possible, and laches may operate as a waiver of the party's right to the change: *Haskins v. People*, 14 Ill. App. 198; *Peoria etc. Ry Co. v. Mitchell*, 74 Ill. 394; *Hoffman v. Spurling*, 12 Hun, 83; *Quinn v. Van Pelt*, 12 Hun, 633; and a party cannot wait until a cause is on trial, and until the court has intimated an opinion on the merits of the case from the evidence, and then obtain a change of venue: *Richards v. Green*, 78 Ill. 525; and after a trial before a referee, and report made by him, it is too late to apply for the change: *Cairns v. O'Brien*, 40 Wis. 469. It has been held in Iowa that a change of venue may be granted pending an application for a new trial: *Gibbs v. Buckingham*, 48 Iowa, 96. A motion to change the place of trial, pending

the decision upon a demurrer, is not proper, first, because the statute of this state (the next section) provides that the motion cannot be made until after issue of fact has been joined; and secondly, for the reason that the decision on the demurrer might end the case: *Moore v. Pillsbury*, 43 How. Pr. 142.

Where there are several defendants or plaintiffs, some of whom reside in the county where the action is brought, all on one side must usually unite in the application for a change of venue, and if the application is granted, all are bound thereby: *Krutz v. Howard*, 70 Ind. 174; *Sailly v. Button*, 6 Wend. 508; *Rupp v. Swineford*, 40 Wis. 28; *Remington S. M. Co. v. Cole*, 62 Cal. 311; *Welling v. Sweet*, 1 How. Pr. 156; *Hanna v. People*, 86 Ill. 243; *Legg v. Dorsheim*, 19 Wend. 700; but the application may sometimes be made by less than all; *Mairs v. Remsen*, 2 Code Rep. 138; *Welling v. Sweet*, 1 How. Pr. 156. If made by part of the defendants, it must be upon notice to the others, unless they are in default for not pleading: *Chace v. Benham*, 12 Wend. 200; *Welling v. Sweet*, 1 How. Pr. 156.

The court has power to grant the motion, conditioned on payment of costs: *Armstrong v. Superior Court*, 63 Cal. 410; but see § 166, *post*.

The application for a change of venue ordinarily raises an issue, and when it does, counter-affidavits, or contest by other means, of the right of the party applying to have the change, may properly be made: *Lander v. Miles*, 3 Or. 35; *Maton v. People*, 15 Ill. 536; *Pittsburg etc. R. R. Co. v. Applegate*, 21 W. Va. 172; *State v. Peterson*, 2 La. Ann. 921; *Musk v. State*, 32 Miss. 405; *Cook v. Pendergast*, 61 Cal. 76.

In some cases the party is entitled to a change of venue as a matter of right. In all other cases, the action of the trial judge in granting or refusing a change of venue will not be interfered with unless there has been a clear abuse of power: *Clumpitt v. State*, 9 Tex. App. 27. Where the court did not formally pass upon a motion for change of venue, but dismissed the action, it was held that this was equivalent to a refusal to transfer the action: *People v. De la Guerra*, 24 Cal. 75. If the court grant the motion, although no sufficient ground therefor appears from the affidavit, the place of trial thereby becomes changed: *People v. Sexton*, 24 Cal. 78. The proceedings of the court to which a change is made are not invalidated by an error in deciding upon the county to which the venue should have been changed: *Kennedy v. Commonwealth*, 78 Ky. 447. Where a change of venue has been refused, but subsequently the court intimates to the party that he renew his application therefor, and he declines to do so, he cannot take advantage on appeal of the failure to grant the first application: *People v. Plummer*, 9 Cal. 298. An order

denying a change of venue will not be reversed when the complaint fails to state a cause of action: *Felt v. Judd*, 3 West Coast Rep. 276 (Utah).

**Action not commenced in proper county.** — If the action is not brought in the proper county, an application for change to the proper county is not addressed to the discretion of the court, but is a matter of right: *Houck v. Lasher*, 17 How. Pr. 521; *Watts v. White*, 13 Cal. 321; *O'Neil v. O'Neil*, 54 Cal. 187; *Estrada v. Orena*, 54 Cal. 407; *Starks v. Bates*, 12 How. Pr. 465; *Christy v. Kiersted*, 47 How. Pr. 467.

"The proper county" is the county in which actions are required by statute to be commenced and tried: *Cook v. Pendergast*, 61 Cal. 72. Whether or not a motion to change the place of trial because of the county not being the proper county can be resisted by the plaintiff on the ground that it will be for the convenience of witnesses and promote justice to retain the cause was raised, but not decided, in *Cook v. Pendergast*, 61 Cal. 72. In *Hanchett v. Finch*, 47 Cal. 192, a cause was retained in a county not that of the defendant's residence on the showing of the plaintiff that it would promote the convenience of witnesses. In *Moore v. Gardner*, 5 How. Pr. 243, and *Park v. Carnley*, 7 How. Pr. 355, it is held that a motion for change of venue because the county is not the proper county cannot be opposed on the ground of convenience of witnesses, but that after the defendant secures a change to the proper county, the plaintiff may have the cause moved back to suit convenience of witnesses.

It is the county, and not the distance, that decides whether a cause shall be removed or not: *Hull v. Hull*, 1 Hill, 671; *Beardsley v. Dickerson*, 4 How. Pr. 81; *People v. Wright*, 5 How. Pr. 23.

**Disqualification of judge.** — In some of the states it is held that the court has no discretion when challenged on this ground, and that the granting of a change of venue is an imperative duty: *Goldsby v. State*, 18 Ind. 147; *Mershon v. State*, 44 Ind. 598; *Krutz v. Griffith*, 68 Ind. 444; *Seehaver v. Milwaukee*, 39 Wis. 409; *Bachman v. Milwaukee*, 47 Wis. 435; but in other states, and probably in any state in the absence of express statute, the court is competent to pass on the alleged disqualification, and allow or refuse the change. In such case a clear showing must be made of the cause of disqualification: *Lombard v. Hayner*, 5 Ill. App. 560; *Emporia v. Vohner*, 12 Kan. 622; *Hughes v. People*, 5 Col. 436; *Davis v. Rivers*, 49 Iowa, 435; *Barnhart v. Fulkerth*, 59 Cal. 130. The bias and prejudice of a judge against a corporation defendant, and its officers, is not a ground of disqualification warranting a change of the place of trial: *Bulwer Con. Mfg. Co. v. Standard Con. Mfg. Co.*, 83 Cal. 613. Where the judge has been former counsel in a cause, he is not competent to act: *Van Rensselaer v. Douglass*, 2 Wend. 290. *Mandamus* will lie to remove a cause from the court of a judge who is party to the cause: *Livermore v. Brundage*, 64 Cal. 299. If the judge holding court when the motion is made is not disqualified, though the one usually sitting is not competent, the motion may still be refused, and the

supreme court will not interfere: *Paige v. Carroll*, 61 Cal. 215.

**Impartial trial impossible.** — The fact that an impartial trial cannot be had must be clearly established: *Messenger v. Holmes*, 12 Wend. 203; *Cook v. Pendergast*, 61 Cal. 75; and a mere statement under oath that the party believes that a fair and impartial trial cannot be had on account of popular excitement and false reports is insufficient: *People v. McCauley*, 1 Cal. 379; *People v. Bodine*, 7 Hill, 147; *Myers v. People*, 26 Ill. 173; *McNealy v. State*, 17 Fla. 198; *People v. Mahoney*, 18 Cal. 180; *State v. Windsor*, 5 Harr. (Del.) 512; *State v. Lawry*, 4 Nev. 161; *Wormeley v. Commonwealth*, 10 Gratt. 658. Though in *Taylor v. Gardiner*, 11 R. I. 182, on the contrary, it is said that if the party simply allege that "by reason of local prejudice and the feeling entertained by the people, the petitioner cannot have a full and impartial trial," this will be sufficient, and particular facts going to show the prejudice and feeling need not be shown, as such facts are naturally too vague to require particularity. Proof of great excitement, threats by a mob, and the like, show such a feeling as would probably prevent a fair trial: *State v. Greer*, 22 W. Va. 800. And see *Honeycut v. State*, 8 Baxt. 371.

Where the allegation is that of local prejudice, the judge may of his own motion examine as to public feeling and receive the sworn statements of reputable citizens to aid him in exercising his discretion: *Ward v. Moorey*, 1 Wash. 104; *Anderson v. State*, 28 Ind. 22. An affidavit on information and belief that the sheriff, his deputies, and the people of the county were all opposed to the party is not sufficient: *People v. Shuler*, 28 Cal. 490. An affidavit that a fair jury cannot be obtained shows good cause for a change of venue, if the affidavit can be substantiated: *People v. Baker*, 1 Cal. 403. In *State v. Nash*, 7 Iowa, 347, it is held that the full and decisive affidavits of three disinterested and reputable persons make out a strong *prima facie* case, only to be overcome by strong negative testimony. So in a turnpike case, the fact that the people are opposed to turnpikes does not prove such prejudice as will prevent a fair trial: *Turnpike Co. v. Wilson*, 3 Caines, 127. The mere fact that the county in which the suit is brought is a party plaintiff does not of itself prove that a fair and impartial trial cannot be had therein: *State v. Merrihew*, 47 Iowa, 112; *Conley v. Chedic*, 7 Nev. 336. So, also, it is held that the inference that a fair and impartial trial cannot be had is not raised by the fact that the majority of the people differ from the objecting party in their politics: *Zobieski v. Bauler*, 1 Caines, 488; *Bowman v. Ely*, 1 Caines, 487; *Turnpike v. Wilson*, 3 Caines, 127; that the editorials in the county newspaper show prejudice against the party: *State v. Barton*, 8 Mo. App. 15; that two trials have been already had without a verdict: *Sommer Camp v. Cutlow*, 1 Idaho, 716; that some few people have contributed to employ an attorney to prosecute the moving party: *People v. Graham*, 21 Cal. 261; *State v. Williams*, 2 McCord, 383; though it is held that where one hundred people contributed for that purpose, there was a general feeling



against the party that would prevent a fair trial: *People v. Lee*, 5 Cal. 353.

Applications for change on this ground are addressed to the discretion of the court: *Hubbard v. State*, 7 Ind. 160; *Weeks v. State*, 31 Miss. 490. In *Sloan v. Smith*, 3 Cal. 412, it is said that if this was regarded as a discretionary power, and was coupled with the fact that the cause was then on the calendar for trial, and that this was the second application for a change of venue, the court held that the application was properly overruled: *People v. Fisher*, 6 Cal. 155. An issue is raised by the allegation that a fair and impartial trial cannot be had, and counter-affidavits are receivable: *Hyde v. Harkness*, 1 Idaho, 601; *Hall v. Burnes*, 82 Ill. 228; *Anderson v. State*, 28 Ind. 22; *Dupree v. State*, 2 Tex. App. 613. A motion to change the place of trial for this cause is immature if made before issue of fact has been joined: *Cook v. Pendergast*, 61 Cal. 75. In *Cook v. Pendergast*, *supra*, the court say: "So plainly does it appear that a motion on this ground should be made after answer, that the practice of attempting to secure a jury before passing on the motion has been approved. It has even been held that nothing less than an actual experiment by way of trial or attempt to impanel a jury, and a consequential failure, will be sufficient to show that a fair and impartial trial cannot be had"; citing *Messenger v. Holmes*, 12 Wend. 203; *Patchin v. Sands*, 10 Wend. 570. In some cases it is held unnecessary to experiment in attempting to impanel a jury: *People v. Webb*, 1 Hill, 179; *Badge v. Northam*, 20 How. Pr. 248; while in others it is said that nothing less than such attempt and a consequent failure to get a jury will be sufficient to show that a fair and impartial trial cannot be had: *Hunter v. State*, 43 Ga. 483; *Messenger v. Holmes*, 12 Wend. 203; *Patchin v. Sands*, 10 Wend. 570; *Cook v. Pendergast*, 61 Cal. 75; *People v. Wright*, 5 How. Pr. 23. Notwithstanding an affidavit that an impartial trial cannot be had, if it appears to the court that a fair and impartial jury can be impaneled, the court may deny the motion for change of venue, and the fact that a fair jury is secured is an answer to the affidavit, and the party must go to trial: *Wright v. Commonwealth*, 33 Gratt. 880; *Hunter v. State*, 43 Ga. 483; *State v. Gray*, 19 Nev. 212; *Watson v. Whitney*, 23 Cal. 378. There is certainly no error in postponing the consideration of a motion to so change the venue until an attempt is made to impanel a jury: *People v. Plummer*, 9 Cal. 298. The failure to get a jury on a particular day is not such a confirmation of an affidavit of general prejudice as to authorize change of venue: *People v. Mahoney*, 18 Cal. 180. But where two ineffectual attempts were made to obtain a jury, this was held good ground: *Messenger v. Holmes*, 12 Wend. 203.

**Convenience of witnesses.** — In the affidavit on a motion for change of venue on the ground of convenience of witnesses, the number of witnesses should be set out, and the opposing party may contest the removal by showing the number and value of his witnesses: *Lander v. Miles*, 3 Or. 35; *Du Bois v. Frouk*, 3 Caines, 95; but the mere preponderance of the number of witnesses on one side or the other will not necessarily be decisive of the

application: *Weed v. Halladay*, 1 How. Pr. 73; *Jordan v. Garrison*, 6 How. Pr. 6; *Goodrich v. Vanderbilt*, 7 How. Pr. 467; *Benedict v. Hibberd*, 5 Hill, 509; *Hanchett v. Finch*, 47 Cal. 192; *Clanton v. Ruffner*, 78 Cal. 268. Such an application is addressed to the sound legal discretion of the court, and the order made thereon will not be reversed unless for abuse of discretion: *Clanton v. Ruffner*, 78 Cal. 268. The court will look beyond the mere number of witnesses, and the affidavits of the parties to the pleadings and issues to be tried, and the value of witnesses' testimony: *Lynes v. Eldred*, 47 Wis. 426; *King v. Vanderbilt*, 7 How. Pr. 385; *Hanchett v. Finch*, 47 Cal. 192; *Piper v. Centinela L. Co.*, 56 Cal. 173. The facts and circumstances connected with the investigation have a more controlling influence than the mere number of witnesses: *Cook v. Pendergast*, 61 Cal. 72; and it has been held that if a showing were made that the convenience of witnesses would be better served by retaining the cause, that the court would so do: *Hanchett v. Finch*, 47 Cal. 192.

The application ought to state the names of the witnesses: *Loehr v. Latham*, 15 Cal. 418; *Anonymous*, 6 Cow. 389; and their residences: *Pierce v. Gunn*, 3 Hill, 445; *Bleecker v. Smith*, 37 How. Pr. 28; and so it must be shown that what is expected to be proved by the witnesses for whose convenience the cause is removed is material to the case: *Hubbard v. Insurance Co.*, 2 How. Pr. 152; *People v. Hayes*, 7 How. Pr. 149; *American Exchange Bank v. Hill*, 22 How. Pr. 29; *Price v. Fort Edward W. W.*, 16 How. Pr. 51; *Anonymous*, 3 Wend. 425; *Constantine v. Dunham*, 9 Wend. 431; *Anonymous*, 1 Hill, 668; and that the applicant for the change cannot safely proceed to trial without such witnesses: *Anonymous*, 3 Wend. 425; *Constantine v. Dunham*, 9 Wend. 431. In the absence of any showing as to the materiality of witnesses, or any challenge by the opposing party as to their materiality, or other cause moving the court, the party having the greatest number of witnesses will probably prevail on hearing of the motion: *Sherwood v. Steele*, 12 Wend. 295; *Hull v. Hull*, 1 Hill, 671; *Wood v. Bishop*, 5 Cow. 414; *Austin v. Hinkley*, 13 How. 576. Resident witnesses only are considered, and a cause will not be removed for the convenience of witnesses out of the state: *N. J. Zinc Co. v. Blood*, 8 Abb. Pr. 147; *Rathbone v. Harman*, 4 Wend. 208; *Williams v. Fellows*, 9 Wend. 451; *Hull v. Hull*, 1 Hill, 671.

An offer to pay all expenses of the witnesses has sometimes been held ground for denying the change: *Worthy v. Gilbert*, 4 Johns. 492; but this would not be the rule in every case: *Rathbone v. Harman*, 4 Wend. 208. In *Met. L. I. Co. v. McCoy*, 11 Rep. 747, 12 Week. Dig. 100, 3 N. Y. St. Rep. 781, it was held that the motion for change will not be refused, though the opposite party admits the chief facts offered to be proved. But the practice in courts is to refuse the change if all the facts sought to be proved by the witnesses are admitted.

It is not necessary to first move to change to the proper county before a motion can be made to change the place of trial for convenience of witnesses: *Hinchman v. Butler*, 7 How. Pr. 462.



Neither party can be heard to advance this cause for changing the place of trial until after an issue of fact has been joined: *Cook v. Pendergast*, 61 Cal. 79; *Thomas v. Placerville G. Q. M. Co.*, 65 Cal. 600; *Merrill v. Grinnell*, 10 How. Pr. 32.

**Motion made for delay.** — Where the motive for the application is clearly delay, and the application is not made in good faith, it may be denied: *Smith v. Prior*, 9 Wend. 499; *Veeder v. Baker*, 83 N. Y. 156; *Kilbourne v. Fairchild*, 12 Wend. 293; *Garlock v. Demkle*, 22 Wend. 615; *Haywood v. Thayer*, 10 Wend. 571.

For extended note on change of venue, see *Shattuck v. Myers*, 74 Am. Dec. 241. See notes to § 51, above.

**Time of demanding change.** — The demand for a change of venue under subdivision 2, 3, or 4 of this section may be made after demurrer or answer. It is only in cases arising under subdivision 1 that the demand must be made simultaneously with demurrer or answer: *Cook v. Pendergast*, 61 Cal. 72.

And when the motion is made under subdivision 3, — convenience of witnesses, — it is premature if made before an issue of fact is joined: *Cook v. Pendergast*, 61 Cal. 72.

*To what venue changed — Only one for either party.*

§ 164. [52.] If the motion for a change of the place of trial be allowed, the change shall be made to the county where the action ought to have been commenced, if it be for the cause mentioned in subdivision one of section one hundred and sixty-three, and in other cases to the most convenient county where the cause alleged does not exist. Neither party shall be entitled to more than one change of the place of trial, except for causes not in existence when the first change was allowed.

**Only one change.** — After the venue has once been changed, the party is not entitled to a second change unless for a cause which did not exist at the time of granting the first change: *Fenelon v. Butts*, 53 Wis. 344; *Hutts v. Hutts*, 62 Ind. 240; *Herbert v. Beathard*, 26 Kan. 746; *Schaengten v. Smith*, 48 Iowa, 359; *State v. McGegan*, 27 Ohio St. 284.

**Change to most convenient county.** — A statute providing that on changing venue

the cause must be moved to the nearest county free from obstacles imports that the judge is to decide what is such county: *Ex parte Hodges*, 59 Ala. 305; *Gage v. Downey*, 79 Cal. 140; and his selection of a county seat most readily accessible, though not the nearest in distance, whether erroneous or not, will not render the final judgment in the case void upon collateral attack: *Gage v. Downey*, 79 Cal. 140.

*Change of venue to newly created county.*

§ 165. Any party in a civil action pending in the superior court in a county out of whose limits a new county, in whole or in part, has been created, may file with the clerk of such superior court an affidavit setting forth that he is a resident of such newly created county, and that the venue of such action is transitory, or that the venue of such action is local, and that it ought properly to be tried in such newly created county; and thereupon the clerk shall make out a transcript of the proceedings already had in such action in such superior court, and certify it under the seal of the court, and transmit such transcript, together with the papers on file in his office connected with such action, to the clerk of the superior court of such newly created county, wherein it shall be proceeded with as in other cases. [February 25, 1891, § 2.]

*Transmission of record upon change of venue — Costs of change.*

§ 166. [54.] When an order is made transferring an action or proceeding for trial, the clerk of the court must transmit the pleadings and papers therein to the court to which it is transferred. The

costs and fees thereof, and of filing the papers anew, must be paid by the party at whose instance the order was made, except in the cases mentioned in subdivision one, section one hundred and sixty-three, in which case the plaintiff shall pay costs of transfer. The court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein.

*Venue changed by stipulation.*

§ 167. [55.] Notwithstanding the provisions of section one hundred and sixty-three, all the parties to the action by stipulation in writing or by consent in open court entered in the records may agree that the place of trial be changed to any county of the state, and thereupon the court must order the change agreed upon.

*Party procuring change of venue may lose benefit thereof by neglect.*

§ 168. [56.] If such papers be not transmitted to the clerk of the proper court within the time prescribed in the order allowing the change, and the delay be caused by the act or omission of the party procuring the change, the adverse party, on motion to the court or judge thereof, may have the order vacated, and thereafter no other change of the place of trial shall be allowed to such party.

*The change is complete when.*

§ 169. [57.] Upon the filing of the papers with the clerk of the court to which the cause is transferred, the change of venue shall be deemed complete, and thereafter the action shall proceed as though it had been commenced in that court.

*Clerk must certify entries with transcript.*

§ 170. [58.] The clerk of the court must also transmit with the original papers, where an order is made changing the place of trial, a certified transcript of all record entries up to and including the order for such change.

## CHAPTER IV.

### OF THE MANNER OF COMMENCING ACTIONS.

- § 171. Actions commenced by filing complaint.
- § 172. Summons, when to be issued and what must contain.
- § 173. Summons, how served.
- § 174. Who may serve summons.
- § 175. Service of summons by publication.
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- § 178. Proof of service of summons.
- § 179. Filing complaint gives jurisdiction.
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- § 181. What constitutes appearance.
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#### *Actions commenced by filing complaint.*

§ 171. Civil actions in the superior courts shall be commenced by filing a complaint with the clerk of the court. The clerk shall, at the time the complaint is delivered to him to be filed, indorse thereon a certificate of the filing thereof, showing the date of such filing. [February 26, 1891, § 1.]

See § 188, as to what complaint must contain.

#### *Summons when to be issued, and what must contain.*

§ 172. At any time after the complaint is filed, the clerk must, upon request of the plaintiff, issue a summons. The summons shall run in the name of the state of Washington, shall be directed to the defendant, shall set forth the name of the court in which the action is commenced, and the name[s] of the parties plaintiff and defendant, and shall require the defendant to appear in said court and answer the complaint, and contain a notice that unless the defendant appear and answer within the time prescribed by law, the plaintiff will apply to the court for the relief demanded in the complaint. It shall be signed by the clerk, and have the seal of the court affixed. It may be substantially in the following form:—

In the Superior Court of the State of Washington, for the County of —

—, Plaintiff, }  
                   vs. }  
 —, Defendant. }

The State of Washington to —, greeting:

You are hereby required to appear in the superior court of the state of Washington for the county of —, within twenty days after the day of service of this summons upon you, if served in said county of —, or if served in any other county then within thirty



days after the day of service, and answer the complaint of the above-named plaintiff now on file in the office of the clerk of said court, a copy of which complaint is herewith delivered to you; and unless you so appear and answer, the plaintiff will apply to the court for the relief demanded in said complaint.

Witness my hand and the seal of said court this — day of —, 18—.

[February 26, 1891, § 2.]

[L. S.]

—, Clerk of said court.

**Requisites of summons.** — A summons must contain all that is required by statute, whether deemed needful or not: *Ward v. Ward*, 59 Cal. 139; *Lyman v. Milton*, 44 Cal. 630. In *Osborn v. McCloskey*, 55 How. Pr. 345, the court say that the provisions of such a statute as this, concerning what the summons must contain, are mandatory. Compare, however, with *Shinn v. Cummins*, 65 Cal. 97, where a liberal construction of this section was adopted.

A summons must state the names of all the parties to the action. This provision is not merely directory, but mandatory. Where there are several parties defendant, it is not sufficient to give the name of one in the summons, followed by the words "et al": *Lyman v. Milton*, 44 Cal. 630. It is an irregularity in a summons not to state the name of the wife of one of the defendants, where she is a party to the action, and is only described as the wife of the defendant: *Weil v. Martin*, 24 Hun, 645. A party sued in a representative character must be described in the summons as such: *Blanchard v. Strait*, 8 How. Pr. 83.

Omitting the name of the court will render the summons void: *Walker v. Hubbard*, 4 How. Pr. 154; *James v. Kirkpatrick*, 5 How. Pr. 241. A summons not naming the county in which a

trial is desired will be set aside as irregular and void: *Osborn v. McCloskey*, 55 How. Pr. 345. The notice in the summons must be to appear in the court where the judgment is sought: *Smith v. Ellendale Mfg. Co.*, 4 Or. 70; *Trullinger v. Todd*, 5 Or. 36.

The summons authorized by this section is not "process," and need not run in the name of the state: *Bailey v. Williams*, 6 Or. 71.

It is not necessary that a summons be subscribed in the handwriting of the attorney. A printed signature issued by him is just as effectual: *Mayor v. Eister*, 2 N. Y. Civ. Proc. 125; *Barnard v. Heydrick*, 49 Barb. 62; *Mut. L. I. Co. v. Ross*, 10 Abb. Pr. 260, note. One who has not been admitted as an attorney cannot sign as such: *Weir v. Slocum*, 3 How. Pr. 397.

A summons which instead of directing defendant to appear on the return day requires him to appear and answer forthwith is void: *Hunsaker v. Coffin*, 2 Or. 107; and a judgment by default entered before the return day prescribed by the statute will be reversed on appeal: *Burt v. Scranton*, 1 Cal. 416.

It has been held that a summons cannot be amended except by permission of the court: *McCrane v. Moulton*, 3 Sand. 736.

### *Summons, how served.*

§ 173. The summons shall be served by delivering a copy thereof, certified by plaintiff's attorney or the sheriff, together with a copy of the complaint, certified by the plaintiff's attorney or the clerk of the court, as follows:—

1. If the action be against any county in the state, to the county auditor; if against the state, to the governor;
2. If against any town or incorporated city in this state, to the mayor or president thereof;
3. If against a school district, to the clerk thereof;
4. If against a railroad corporation, to any station, freight, ticket, or other agent thereof within this state;
5. If against a corporation owning or operating sleeping-cars or hotel-cars, to any person having charge of any of its cars, or any agent found within the state;
6. If against any insurance company, to any agent authorized by such company or corporation to solicit insurance within the state;
7. If against a company or corporation doing any express business,

to any agent authorized by said company or corporation to receive and deliver express matters and collect pay therefor within this state;

8. If the suit be against a company or corporation other than those designated in the preceding subdivisions of this section, to the president or other head of the company or corporation, secretary, cashier, or managing agent thereof;

9. If the suit be against a foreign corporation or non-resident joint-stock company or association, doing business within this state, to any agent, cashier, or secretary thereof;

10. If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother, guardian, or if there be none within this state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed, if such there be;

11. If against any person for whom a guardian has been appointed for any cause, then to such guardian;

12. In all other cases, to the defendant personally, or if he be not found, to some suitable person, a member of the family of such defendant, at the dwelling-house or usual place of abode of such defendant.

[February 26, 1891, § 3.]

**Service of summons, generally.** — The return must show that a copy of the complaint was delivered: *Cardwell v. Sabichi*, 59 Cal. 490; or the service will not be valid: *McMillan v. Reynolds*, 11 Cal. 373; *Reynolds v. Page*, 35 Cal. 209. Courts have power to determine whether the service of process was sufficient: *Borden v. State*, 11 Ark. 519; 54 Am. Dec. 217. A recital in the record of proper service is conclusive, and cannot be collaterally attacked: *Watkins v. Davis*, 61 Tex. 414.

Where no mode for service is specified by statute or otherwise, personal service by summons is good: *People v. Hulbert*, 5 How. Pr. 446. Service upon a convict in a state prison is good. He cannot sue, but can be sued: *Davis v. Duffie*, 3 Keyes, 606; *Phelps v. Phelps*, 7 Paige, 150.

Service of summons to be effective must have been intended as such, and the defendant must know that service was intended: *Heatherly v. Hadley*, 2 Or. 276; *Beekman v. Cutter*, 2 Code Rep. 51; *Niles v. Vanderzee*, 14 How. Pr. 547; *Darison v. Baker*, 24 How. Pr. 39.

It is doubtless competent for each state to adapt its own mode of bringing parties into court, but its laws can only operate within its own territory; they cannot be extended beyond the limit of the state, nor operate upon citizens of other states unless they voluntarily come within its limits: *Bimeler v. Dawson*, 4 Scam. 542; 39 Am. Dec. 430; *Pennoyer v. Neff*, 95 U. S. 727; *Peabody v. Hamilton*, 106 Mass. 220; *Rape v. Heaton*, 9 Wis. 332. And therefore a service of summons to be effective must be made within the state or district, or the party must have come into the jurisdiction voluntarily, and submitted himself thereto: *Wanzer v. Bright*, 52 Ill. 41; *New York L. Ins. Co. v. Bangs*, 103 U. S. 439; *Pennoyer v. Neff*, 95 U. S. 714; *Union Sugar Co. v. Muthiesson*,

2 Cliff. 304; *Picquet v. Swan*, 5 Mason, 35; *Lincoln v. Tower*, 2 McLean, 473; *Parker v. Hotchkiss*, 1 Wall. Jr. 269; *Bimeler v. Dawson*, 4 Scam. 536; 39 Am. Dec. 430; *Dearing v. Bank of Charleston*, 5 Ga. 497; 48 Am. Dec. 300; *Ewer v. Coffin*, 1 Cush. 23; 48 Am. Dec. 587; *Downer v. Shaw*, 22 N. H. 277; *Welch v. Sykes*, 3 Gilm. 197; 44 Am. Dec. 689; *Norris v. Beach*, 2 Johns. 294; *Carpenter v. Spooner*, 2 Sand. 718; *Williams v. Bacon*, 10 Wend. 238; *Newcomb v. Peck*, 17 Vt. 302; 44 Am. Dec. 340. Therefore if a non-resident defendant is actually within the jurisdiction personal service is properly made on him: *Grautern v. Rosecierrance*, 27 Wis. 488. Service on board of a foreign vessel after arrival at the dock, but before mooring of the vessel, has been held to be a service within the state or district: *Reeder v. Holcomb*, 105 Mass. 93; *Peabody v. Hamilton*, 106 Mass. 217.

It is a rule that admits of no exception, that in cases where jurisdiction depends upon the party, it is the party named in the record: *Governor v. Madrazo*, 1 Pet. 122. A court does not acquire jurisdiction to render judgment against a party served where the summons is addressed to or issued against a person of a different name: *Elliot v. Holmes*, 1 McLean, 466; *Bates v. State Bank*, 7 Ark. 394; 46 Am. Dec. 293; *McCrary v. Cox*, 24 Ark. 574. And therefore a judgment by default, when the record does not show that process was served on the person mentioned in the statute, is erroneous: *Willamette F. Co. v. Williams*, 1 Or. 112. If the initials of the defendant's name are improperly given in the process, jurisdiction is not acquired thereby: *Fanning v. Krayfl*, 61 Iowa, 417. Where a party believes process to be improperly issued against him by reason of a mistake in identity, he should appear and so prove, or the court will acquire jurisdiction over him, and a judgment against



him will be operative: *Frazer v. Sibley*, 50 Ga. 96.

The remedy for defective service is not by answer or demurrer, but by motion to set the proceedings aside: *Nones v. Hope M. I. Co.*, 8 Barb. 541. For defects in the service of summons are waived by answering and appearing: *N. Y. & Brooklyn M. Co. v. Gill*, 7 Col. 100.

**Fraud or deceit in service.** — Where a defendant is brought into the territorial jurisdiction of the court by force, or induced to come within the jurisdiction by deceitful or fraudulent practices, for the purposes of having him served with process therein, such service is not good, and will not confer jurisdiction, but will be set aside: *Blair v. Tuttle*, 1 McCrary, 372; 5 Fed. Rep. 394; *Steiger v. Bonn*, 59 How. Pr. 496; *Wanzer v. Bright*, 52 Ill. 41; *Union Sugar Ref. Co. v. Mathiesson*, 2 Cliff. 309; *Peel v. January*, 35 Ark. 331; 37 Am. Rep. 27; *Hill v. Goodrich*, 32 Conn. 588; *Dunlop v. Cady*, 31 Iowa, 260; 17 Am. Rep. 129; *Wood v. Wood*, 78 Ky. 624; *Cook v. Brown*, 125 Mass. 503; 28 Am. Rep. 259; *Williams v. Reed*, 29 N. J. L. 355; *Snelling v. Watrous*, 2 Paige, 315; *Carpenter v. Spooner*, 2 Sand. 717; *Metcalf v. Clark*, 41 Barb. 47; *Baker v. Wales*, 14 Abb. Pr., N. S., 331; 45 How. Pr. 137; *Goupil v. Simonson*, 3 Abb. Pr. 474; *Lagrange's Case*, 14 Abb. Pr., N. S., 343, 344; *Hevener v. Heist*, 9 Phila. 274; *Steele v. Bates*, 1 Aiken, 338; 16 Am. Dec. 740; *Townsend v. Smith*, 47 Wis. 623; 32 Am. Rep. 793. One comes within the meaning of a person decoyed into the state, and is not subject to service of process, where he is brought within the jurisdiction by means of a false correspondence: *Wanzer v. Bright*, 52 Ill. 41; or telegrams: *Steiger v. Bonn*, 59 How. Pr. 496; *Hevener v. Heist*, 9 Phila. 274. A request to a person to come and defend a suit is not fraud so as to avoid the jurisdiction, if he comes in response to the request: *Duringer v. Moschino*, 93 Ind. 495. It is ground for avoidance of process that an arrest on a criminal charge was made for the purpose of detaining the prisoner until civil process could be served on him: *Byler v. Jones*, 79 Mo. 261; *Brenninghoff v. Oswell*, 37 How. Pr. 235. A person extradited may be served with civil process and bound thereby, but if the extradition was at the instance of the party plaintiff in the civil suit, the service is fraudulent, and not sufficient to confer jurisdiction: *Underwood v. Fetter*, 6 N. Y. Leg. Obs. 66; *Lagrange's Case*, 14 Abb. Pr., N. S., 336; *Adriance v. Lagrave*, 59 N. Y. 110; 17 Am. Rep. 317; reversing *Adriance v. Lagrave*, 11 Hun, 689; 4 Thomp. & C. 215; *Compton v. Wilder*, 40 Ohio St. 130; *Addicks v. Bush*, 1 Phila. 19. Where a defendant is brought into the jurisdiction by force, or on a criminal charge, one having no connection therewith may legally serve him with process while he is in the jurisdiction: *Nichols v. Goodheart*, 5 Ill. App. 574; *Williams v. Bacon*, 10 Wend. 636; *Union Sug. Ref. Co. v. Mathiesson*, 2 Cliff. 304. Service of summons upon a man who is so drunk that he cannot comprehend may be considered in its nature fraudulent, and set aside: *Murphy v. Loos*, 104 Ill. 514; so service by laying a summons on the body of a man too sick to understand it is not valid: *People v. Superior Judge*, 38 Mich. 310. A trick depriving a defendant

of fair notice that an action has been commenced is a fraud. Thus if one departing for a foreign country, when on the steamer, which is about to start, is handed a sealed package containing the summons, and she has no reasonable opportunity to discover its contents before leaving, the service is not good: *Bulkley v. Bulkley*, 6 Abb. Pr. 307.

One claiming process to be fraudulent because he was decoyed into the state must so show, and apply to have the service set aside: *Peel v. January*, 35 Ark. 331; 37 Am. Rep. 27. But see *Clark v. Brown*, 125 Mass. 503; 28 Am. Rep. 259; *Townsend v. Smith*, 47 Wis. 623; 32 Am. Rep. 793. Where one has voluntarily and legitimately come within the jurisdiction, the fact that service is obtained upon him afterward by fraud, trick, or device is not necessarily ground for holding such service invalid: *Atlantic & P. T. Co. v. Baltimore etc. R. R. Co.*, 46 N. Y. Sup. Ct. 377.

**Exemption or privilege from service of summons.** — In many cases one who is in attendance on a court under subpoena or process cannot be served with civil process so as to confer jurisdiction: *Brooks v. Farrell*, 2 N. J. Eq. 220; *Parker v. Hotchkiss*, 1 Wall. Jr. 272; *Halsey v. Stewart*, 4 N. J. L. 366; *Matthews v. Tufts*, 87 N. Y. 568; 62 How. Pr. 508; *Miles v. McCullough*, 1 Binn. 77; *Hayes v. Shields*, 2 Yeates, 222. And this privilege, where it exists, extends during the period of time necessarily involved in going to, attending on, or returning from the court or place where it is held: *Dungan v. Miller*, 37 N. J. L. 182; *Halsey v. Stewart*, 4 N. J. L. 366; *Parker v. Hotchkiss*, 1 Wall. Jr. 269. This rule applies as well where one attends before an officer of the court as an arbitrator or master in chancery, as where one attends on a court itself: *Dungan v. Miller*, 37 N. J. L. 182; *Snelling v. Watrous*, 2 Paige, 315; *United States v. Edme*, 9 Serg. & R. 147; *Huddeson v. Prizer*, 9 Phila. 65. Among the class who are privileged within this rule are non-resident witnesses: *Atchison v. Morris*, 11 Biss. 191; *Dungan v. Miller*, 37 N. J. L. 183; *Muller v. Higgins*, 13 Abb. Pr., N. S., 297; *Seaver v. Robinson*, 3 Duer, 622. While service upon a resident witness, voluntarily attending as such, may not be void: *Jenkins v. Smith*, 57 How. Pr. 171; the court may, nevertheless, give relief against such service of process by setting aside, if it sees fit: *Massey v. Colville*, 45 N. J. L. 119; 46 Am. Rep. 754; and service on a witness in a courtroom is held to be void, and is certainly a contempt of the court, and punishable as such: *Bridges v. Sheldon*, 18 Blatchf. 507; *In re Healey*, 53 Vt. 694; 38 Am. Rep. 713.

It was held in *Jenkins v. Smith*, 57 How. Pr. 171, that immunity from service is limited to witnesses, and does not extend to parties. But this probably applies to resident parties. In *Matthews v. Tufts*, 87 N. Y. 568, it was held that a summons could not be served on a non-resident party while in the state for the purpose of attending the trial of his cause; and likewise in *Juneau Bank v. McSpedan*, 5 Biss. 64; *Parker v. Hotchkiss*, 1 Wall. Jr. 269; but in Connecticut this is held not to apply to non-resident plaintiffs: *Bishop v. Vose*, 27 Conn. 1.

It has been held that a judge engaged in his judicial duties is privileged from service of



process: *Lyell v. Goodwin*, 4 McLean. 29. So a member of the legislature is, in some states, entitled to a similar privilege: *King v. Coit*, 4 Day, 129; *Tillinghast v. Carr*, 4 McCord, 152; and such is the rule in this state. In some states, it has been held that a person attending or returning from a military muster cannot be served: *Greening v. Sheffield*, Minor, 276; *Williams v. McGrade*, 13 Minn. 174; *Gregg v. Summers*, 1 McCord, 461.

Where a party claims a privilege, he should appear and move to set it aside with all possible promptness: *Pollard v. Union Pac. R. R. Co.*, 7 Abb. Pr., N. S., 70.

**Service upon corporations, generally.** — The service must be upon the persons mentioned in the statute. The individual shareholders or members are not entitled to notice: *Pierce v. Somerset*, 10 N. H. 369; and notice, even if given to the individuals, would not amount to notice to the corporation so as to hold it to trial: *Rand v. Proprietors*, 3 Day, 441; *De Wolf v. Mallett*, 1 Dana, 214; and this is the rule, though no officers have been elected for many years: *Bache v. Nashville Hort. Soc.*, 10 Lea, 436. Where there is a contest for the offices, and service is attempted to be made on the officer named in the statute, it will be good only if made upon those in possession of the offices and exercising control over the property and affairs of the corporation, and service on those not in possession, but claiming to be the officers, is not notice to the corporation: *Berriam v. Methodist Soc.*, 5 Abb. Pr. 424. And see *Ecl. R. Nav. Co. v. Struver*, 41 Cal. 616. A corporation cannot avoid service of process by an acceptance of the resignations of the officers on whom service is regularly made: *Evarts v. Killingworth Mfg. Co.*, 20 Conn. 447. Where a corporation is in the hands of a receiver, the agents and employees are subordinate and subject to the orders of the receiver, cease to be agents for the corporation, and therefore cannot be served with process for the corporation: *Tom v. Meth. Epis. Church*, 19 Wend. 25. Where service is made on the proper officer, though he never notified the corporation, it is bound and held to have had notice: *Boyd v. Chesapeake & O. C. Co.*, 17 Md. 195; 79 Am. Dec. 646; *Emerson v. McCormick H. M. Co.*, 51 Mich. 5. The return of service should always show the character in which service was made on the party: *Powder Co. v. Oakdale C. & M. Co.*, 14 Phila. 166; *Jones v. Hartford Ins. Co.*, 88 N. C. 499. A question was raised as to the regularity of a judgment by default, on a service of the summons upon one M. as president, and C. as secretary, without proof, beyond the mere return, that those persons were such officers. The court held that as the statute expressly authorized a service upon the corporation by serving the summons on their officers, and as the practice had been to take judgment by default upon similar returns, they would not hold it erroneous: *Rowe v. Table Mountain W. Co.*, 10 Cal. 444. The statute in this state requires service upon one class of persons, but if they cannot be found, upon other persons. This being the case, the return should show the absence of the first class of persons, to authorize proof of service on the other class: *St. Louis & C. Co. v. Dorsey*, 47 Ill. 288. Service upon merely *de facto* officers is sufficient:

*McCall v. Byram Manufacturing Co.*, 6 Conn. 428.

**Managing agent.** — The statute allows service upon the president, or head officer, managing agent, etc. Whether one is such an officer, to justify a service upon him as such, depends upon the fact whether he is such an officer as has a general supervision of the corporate affairs, and whose knowledge would be that of the corporation: *Newby v. Colt's Pat. F. A. Co.*, L. R. 7 Q. B. 296; *Weight v. Liverpool L. & G. Ins. Co.*, 30 La. Ann. 1186; *Brewster v. Michigan Central R. R. Co.*, 5 How. Pr. 183; *Upper Miss. T. Co. v. Whittaker*, 16 Wis. 220; *Carr v. Commercial Bank*, 19 Wis. 222; as a director: *Boyd v. Chesapeake etc. Co.*, 17 Md. 195; 79 Am. Dec. 646; or a supervising agent: *Adams Express Co. v. St. John*, 17 Ohio St. 641; but not a mere solicitor: *Parke v. Commonwealth I. Co.*, 44 Pa. St. 422; or a ticket seller of a railroad: *Doty v. Mich. Cent. R. R. Co.*, 8 Abb. Pr. 429.

**Agent.** — Where service is to be made on an "agent" generally, any one appointed or acting as such with authority of the corporation or its proper officers may be served as such: *Hagerman v. Empire State Co.*, 97 Pa. St. 534; *Farmers' Ins. Co. v. Highsmith*, 44 Iowa, 330; *Centennial etc. Ass'n v. Walker*, 50 Iowa, 75; *Chicago etc. R. R. Co. v. Fell*, 22 Ill. 333; *Peoria Ins. Co. v. Warner*, 28 Ill. 429.

**Service on foreign corporations.** — A corporation doing business in another state invokes the comity of the state for the transaction of its business, and thereby waives the right to object to the mode of service which the laws of such state provide for: *Merchants' Mfg. Co. v. Grand Trunk R'y Co.*, 63 How. Pr. 459; *Railroad Co. v. Harris*, 12 Wall. 65; *Railroad Co. v. Whitton*, 13 Wall. 270; *Ex parte Schollenberger*, 96 U. S. 369; overruling *Day v. Newark I. R'y Co.*, 1 Blatchf. 628; *Pomeroy v. New York & N. H. R. R. Co.*, 4 Blatchf. 121; *Myers v. Dorr*, 13 Blatchf. 22; and *Hunee v. Pittsburg etc. R'y Co.*, 8 Biss. 31; *Knott v. Southern L. Ins. Co.*, 2 Woods, 479; *Hartford Ins. Co. v. Carrugi*, 41 Ga. 671; *Bawknight v. Liverpool L. & G. I. Co.*, 55 Ga. 195; *National Bank v. Huntington*, 129 Mass. 444; *National Condensed Milk Co. v. Brandenburg*, 40 N. J. L. 111; *Barnett v. Chicago & L. H. R. R. Co.*, 4 Hun, 114; *Newby v. Colt's Pat. F. A. Co.*, L. R. 7 Q. B. 293. And statutes are constitutional and just which provide that if foreign corporations engage in business in the state, they shall be there suable, in regard to such business transacted; and service of process on its managing officers there will be service on the corporation, and will give the court jurisdiction: *Moulin v. Ins. Co.*, 24 N. J. L. 234.

Where a foreign corporation has neither an agent nor property within the state, there is no means of reaching it by process, and the fact that its officer casually happens to come within the state, when process is served on him, will not confer jurisdiction, it being deemed that his character as officer of the corporation does not accompany him to another state: *Moulin v. Ins. Co.*, 24 N. J. L. 234; *McQueen v. Middleton Mfg. Co.*, 6 Johns. 6; *Peckham v. North Parish*, 16 Pick. 286; *Newell v. Great Western R'y Co.*, 19 Mich. 345; *Latimer v. Union Pac. R'y Co.*, 43 Mo. 105; *State v. Ramsey*, 26 Minn. 234; *Middlebrooks v. Spring-*

*feld Ins. Co.*, 14 Conn. 301; *March v. Eastern Ry Co.*, 40 N. H. 548; 77 Am. Dec. 732; *Mil-land Ry Co. v. McDermid*, 91 Ill. 170; but if his presence is more than casual, and he comes on the business of the corporation, he can be served with process: *McQueen v. Middleton Mfg. Co.*, 16 Johns. 5; *Porter v. Chicago etc. R. Co.*, 1 Neb. 14; *Moulin v. Trenton Ins. Co.*, 25 N. J. L. 57; *Pope v. Terre Haute C. & M. Co.*, 24 Hun, 238; 60 How. Pr. 419; 87 N. Y. 137.

Where process is regularly made on a foreign corporation, by service of its agent, such service may be authorized by statute to be the basis of a judgment in personam: *McNichol v. United States Mercantile Ry Ag.*, 74 Mo. 457; *Lafayette Ins. Co. v. French*, 18 How. 404; *Gibbs v. Queen Ins. Co.*, 63 N. Y. 114; *Nashville & C. R. Co. v. McMahon*, 70 Ga. 586; and by a judgment on such service, it has been held that the property in the state is certainly bound: *Brewster v. Michigan Cent. R. R. Co.*, 5 How. Pr. 153; *Barnett v. Chicago & L. H. R. R. Co.*, 4 Hun, 114; *Barckright v. Liverpool L. & G. Ins. Co.*, 55 Ga. 195. But compare *Pennoyer v. Jeff*, 95 U. S. 714; *Paxton v. Daniell*, 23 Pac. Rep. 441.

**Service upon minors.** — To sustain a service of summons on minors, the court will presume, unless the contrary appears, that the minors were over the age of fourteen years: *Emerie v. Alvarado*, 64 Cal. 529. If father is plaintiff, it is unnecessary to serve him: *Brown v. Lanson*, 51 Cal. 615.

**Personal service, etc.** — A court having authority to issue process *prima facie* acquires jurisdiction of the person of the defendant by a personal service of such process in the manner required by law: *Barnes v. Harris*, 4 N. Y. 375; *Sheldon v. Comstock*, 3 R. I. 84. Personal service out of the state or district does not confer jurisdiction: *Lung Chung v. North Pacific R. R. Co.*, 19 Fed. Rep. 254; 10 Saw. 17; and such service will have no greater effect than knowledge brought home to the party in any other way: *Lutz v. Kelly*, 47 Iowa, 307.

Where a personal service is required, no other services will be sufficient, and no jurisdiction will be acquired without such service: *White v. Douglass*, 3 Barb. 554; and service on defendant's agent, except as prescribed by statute, is not legal process: *Bowman v. Newman*, 13 Iowa, 546; nor is defendant bound by service on any person with whom there is no evidence to connect him: *Adams v. Town*, 3 Cal. 247. The personal service of writs and process can only be made by delivering a copy to the party upon whom the service is required. Independently of the statute, the mode would be by showing the original under the seal of the court, and delivering a copy: *Edmondson v. Mason*, 16 Cal. 388.

Substituted service of process must show the facts which confer jurisdiction: *Caro Bros. v. O. & C. R. R. Co.*, 10 Or. 510; as that the party cannot be found, and that therefore service is made on his wife: *Hass v. Sedlak*, 9 Or. 462; *Settlemier v. Sullivan*, 97 U. S. 444. Service at the dwelling of defendant, a male over fourteen years of age, "who resides with the family," is service on such a male person "of the family": *Carland v. Heineborg*, 2 Or. 75.

**Defending after judgment.** — An allegation that plaintiff did not try to find defendant's address may be considered upon a motion to open the decree: *Smith v. Smith*, 3 Or. 363.

**Service and return of summons.** — In serving a summons, strict compliance with the statute is required: *Heatherly v. Hadley*, 4 Or. 1. Where the statute was not strictly complied with, and the rights of a *feme covert* were involved, there was held to be no proof of service: *McMillan v. Reynolds*, 11 Cal. 378. A sheriff or constable may serve his own writ: *Bennett v. Fuller*, 4 Johns. 486; *Putnam v. Mun*, 3 Wend. 202; 20 Am. Dec. 686. A summons is not directed to the officer or person by whom it is to be served, but it is directed to the defendants, and is required to be returned with proof of service. After service of summons upon defendants who were found in one county, plaintiff may deliver it to the sheriff of another county for service. The statute does not require that a separate summons shall issue to each county in which any of the defendants may reside. It is competent for the court to order it, when returned, to be delivered to the plaintiff for further service: *Hancock v. Pruess*, 40 Cal. 577. Proof of service must be made in the court in which the process is returnable: *Heatherly v. Hadley*, 4 Or. 2; and an admission of service should state the time and place thereof: *Id.*

A return showing service upon "A." P. does not show service upon "Arthur" P.: *Waterman v. Phinney*, 1 Wash. 415. Return must show that service was made in the county of the sheriff making the service: *Id.*

A sheriff may be compelled to perfect a defective return, but a court has not the power to make him alter a return regular on its face. If he make a false return, the party injured has his right of action against him for damage: *Washington Mill Co. v. Kinnear*, 1 Wash. 99.

It is not error for the appellate court, on appeal from a judgment rendered by justice of the peace, to refuse to allow the officer serving summons or notice to amend his return in aid of the justice's jurisdiction: *Knoff v. Puget Sound etc. Colony*, 24 Pac. Rep. 27. Objection to form of summons comes too late when first made in the supreme court on appeal, after judgment by default in the lower court, without objection: *Baker and Wife v. Prewitt*, 3 Wash. 595.

### Who may serve summons.

§ 174. In all cases, except when service is made by publication as hereinafter provided, the summons shall be served by the sheriff of the county wherein the service is made, or by his deputy, or by a citizen of the state of Washington over twenty-one years of



age who is competent to be a witness in the action, other than the plaintiff. [*February 26, 1891, § 4.*]

Provisions for service by publication: See § 175. How proof of service is made: See § 173.

*Service of summons by publication.*

§ 175. In case service of summons cannot be made as provided in the last preceding section, by reason of the absence of the defendant, the summons may be served by publication thereof in a weekly newspaper printed and published in the county in which the court is held, and of general circulation in that county, or if there be no such newspaper printed and published in that county, then in a newspaper printed and published in the state and of general circulation in such county. The summons published shall set forth the name of the court in which the action is commenced, the names of the parties plaintiff and defendant, a brief statement of the nature and object of the action, and a notice to the defendant that he is required to appear and answer the complaint within sixty days from the day of the first publication, which day shall be stated in the summons. Immediately after the first publication of the summons, the plaintiff shall cause a copy of the summons and complaint to be deposited in the post-office, the postage thereon being prepaid, directed to the defendant at his place of residence, unless it shall appear that such place of residence is not known to the plaintiff and cannot by reasonable diligence be ascertained by him or his attorney; and before the hearing of the action the court or judge shall be satisfied by affidavit or other proof that service could not be made as provided in the last preceding section because of the absence of the defendant, and that all the provisions of this section have been complied with. [*February 26, 1891, § 5.*]

**Service by publication, generally.** — The procedure provided by this section is constitutional: *Eitel v. Foote*, 39 Cal. 441; *Pennoyer v. Neff*, 95 U. S. 714; *Hart v. Sansome*, 110 U. S. 151. It is doubtless competent for each state to adopt its own mode of bringing parties into court. While it cannot compel persons out of its territorial jurisdiction to appear and submit themselves, it has jurisdiction over their property in the state, and may, in its discretion, provide for notice by publication, or other constructive notice, in aid of a seizure of such property, or of some proceeding respecting such property: *Pennoyer v. Neff*, 95 U. S. 727; *Cooper v. Reynolds*, 10 Wall. 319. And it is proper that a state should be able to so subject property of the non-resident within its jurisdiction, to the satisfaction of the claims of its citizens. Every state owes protection to its own citizens, and when non-residents deal with them it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-resident to satisfy the claims of its citizens; it is by virtue of the state's jurisdiction over the property of the non-resident within its limits, that its tribunals

can inquire into the obligations of non-residents to its citizens: *Belcher v. Chambers*, 53 Cal. 640; *Pennoyer v. Neff*, 95 U. S. 723; *Smith v. Montoya*, 1 West Coast Rep. 152. (N. Mex.). Service by publication only, against a non-resident who has no property within the state, is void: *Pooton v. Daniell*, 23 Pac. Rep. 441; *Pennoyer v. Neff*, 95 U. S. 714.

**Strict compliance with statute necessary.** — Statutes providing for notice by publication in place of personal citation are in derogation of the common law, and must be strictly construed and strictly followed: *Northcut v. Lemery*, 5 Or. 316; *Odell v. Campbell*, 9 Or. 298; *Gallpin v. Page*, 18 Wall. 364; *Israel v. Arthur*, 7 Col. 5; *Brown v. Tucker*, 7 Col. 30; *Boylard v. Boyland*, 18 Ill. 551; *Fontaine v. Houston*, 58 Ind. 316; *Bradley v. Jamison*, 46 Iowa, 68; *Boylard v. Vaughan*, 13 La. Ann. 405; *Stewart v. Steinger*, 41 Mo. 400; *Scorpion S. M. Co. v. Mackinnon*, 10 Nev. 370; *Wheeler v. Cobb*, 75 N. C. 21; *Pollard v. Wegener*, 13 Wis. 569; *Zachary v. Rogers*, 1 Smedes & M. 584; 40 Am. Dec. 111; *Jordan v. Gillin*, 12 Cal. 100; *Evertson v. Thomas*, 5 How. Pr. 45; *Kendall v. Washburn*, 14 How. Pr. 380; *Cohn v. Kember*, 47 How. Pr.



145. And where the statute thus provides a method by which property can be reached, it is not only to be strictly followed, but must also be followed to the exclusion of any other method not clearly provided: *Grigsby v. Bart*, 14 Bash, 333; *Cooper v. Reynolds*, 10 Wall. 319; *Pennoyer v. Neff*, 95 U. S. 723; *Houg v. Bass*, 63 Ala. 391; *Fontaine v. Houston*, 58 Ind. 316. And the fact that the statute has been strictly followed must be proved, no presumption of jurisdiction being indulged in: *Galpin v. Page*, 18 Wall. 364; *Copfield v. McClelland*, 16 Wall. 531; *Fletcher v. Powell*, 6 Wheat. 126; *Gray v. Larrimore*, 4 Saw. 638; *Jordan v. Giddin*, 12 Cal. 160; *Ricketson v. Richardson*, 26 Cal. 149; *McMinn v. Whelan*, 27 Cal. 300. Thus if the statute provides that the court is deemed to have acquired jurisdiction from the time of service of summons, and the defendant dies before publication is completed, the court acquires no jurisdiction, and can proceed no further in the action: *Auerbach v. Maynard*, 26 Minn. 423.

*Conclusiveness of service and judgment thereon.*—The constitution of the United States and the constitution of this state both provide that no person shall be deprived of life, liberty, or property without due process of law. If the judgment was intended by the code to be final under all circumstances, the constitutionality of the section might admit of very grave doubt. But such was not the intention of the legislature. The affidavit is only *prima facie* evidence of the facts. If untrue in point of fact, the defendant can at any time take steps to set aside the judgment; but when defendant in fact conceals himself to avoid the service of process, he cannot complain of the want of such service: *Ware v. Robinson*, 9 Cal. 111.

Non-residents served with process by publication can only be considered in the court for the purposes stated or necessarily arising out of the object of the bill as stated in the order of publication: *For v. Reynolds*, 50 Md. 572. If the original complaint before service of summons be superseded by a supplemental complaint, the publication of the original summons is ineffectual to give the court jurisdiction of the persons of absent defendants: *McMinn v. Whelan*, 27 Cal. 312; *Lawrence v. Bolton*, 3 Paige, 295; *Scudder v. Voorhis*, 1 Barb. 55.

The summons and proof of service are necessary parts of the record, and if they are absent therefrom, no presumption as to jurisdiction will arise: *Carrer v. Carrer*, 64 Ind. 196. To sustain service by publication, and judgment thereon, the facts necessary under the statute to authorize such service must appear on the record: *Neff v. Pennoyer*, 3 Saw. 274; *Northcut v. Lemery*, 8 Or. 316; *Caro v. O. & C. R. R. Co.*, 10 Or. 510; *Ladd v. Ramsby*, 10 Or. 207.

Upon collateral attack, recitals in the judgment of service upon the defendant are conclusive of the question of jurisdiction of the person, when the judgment is rendered by a court of superior jurisdiction: *McCullough v. Fulton*, 44 Or. 359. It was insisted that a judgment could not be questioned collaterally, for the reason that the jurisdiction of a court of general or superior jurisdiction will be presumed correct in the absence of evidence on

the face of the record to the contrary. But the court doubted if a case could be found which sanctioned any intendment of jurisdiction over the person of the defendant, when the same was to be acquired by a special statutory mode, without personal service of process. If jurisdiction of the person of the defendant was to be acquired by publication of the summons in lieu of personal service, the mode prescribed must be strictly pursued; and if it appear that the court never had jurisdiction over the person of the defendant, the judgment will be pronounced a nullity, whether it come directly or collaterally in question: *McMinn v. Whelan*, 27 Cal. 312.

*Contents of affidavit.*—The court or judge acts judicially, and can know nothing about the facts upon which the publication is made, except from the affidavit: *Ricketson v. Richardson*, 26 Cal. 154. The probative facts set out in the affidavit, however, must be sufficient to justify the court in being satisfied of the existence of the ultimate facts required by the statute before it has jurisdiction, in case of service of summons by publication: *Little v. Currie*, 5 Nev. 90; *Royce v. Whitford*, 9 Nev. 372; *Scorpion S. M. Co. v. Marsano*, 10 Nev. 383; *Victor M. & M. Co. v. Justice's Court*, 18 Nev. 21. Where the affidavit upon service by publication follows the language of the statute, and the proceedings in other respects are regular, jurisdiction of the defendant is properly obtained: *State v. Adams*, 56 Wis. 137.

Ordinary diligence to obtain personal service must be shown, to entitle one to service by publication: *Trullinger v. Todd*, 5 Or. 36; and therefore it has been held that the affidavit should state what diligence has been used to obtain a personal service, and an allegation that plaintiff has used due diligence, and has returned the summons unserved, is held insufficient: *Victor M. & M. Co. v. Justice's Court*, 18 Nev. 21; but see, *contra*, *Byrne v. Roberts*, 31 Iowa, 319; *Sutcliffe v. Sir*, 25 Wis. 357. An affidavit for an order for the publication of the summons, upon the ground of the absence of the defendant, which stated that the defendant could not, after due diligence, be found in the county where the action was pending; that affiant had inquired of a person named, who was an intimate friend of defendant, as to his whereabouts; that the person inquired of was unable to inform him, and that plaintiff did not know where defendant could be found within the state,—was held insufficient, as it did not show that defendant had left the state, or that any diligence had been used to ascertain his whereabouts beyond inquiry of a single individual, and there was no pretense that he was concealing himself to avoid service: *Serain v. Chase*, 12 Cal. 285.

An affidavit upon publication on information and belief is held sufficient: *Steinle v. Bell*, 12 Abb. Pr., N. S., 171. In North Carolina it is held that an affidavit stating that the party is a non-resident, but not stating that he has property in the state, is insufficient: *Spies v. Haksted*, 71 N. C. 209.

*On whom service may be made.*—Temporary absence from the state, of a defendant, in a manner, does not authorize proceedings against him as a non-resident by publication: *McMinn v. Odom*, 3 Bland, 407; but see *Collinson v.*

*Teal*, 4 Saw. 241, where it is held that a United States consul residing at Honolulu merely for the purpose of his office is such a non-resident.

It has been held that service by publication may be made upon a lunatic non-resident: *Sturges v. Longworth*, 1 Ohio St. 544; or a non-resident infant: *Emeric v. Alvarado*, 64 Cal. 529; *Hodges v. Wise*, 16 Ala. 514; but see, *contra*, *Bailey v. Whalen*, 14 Rich. 82. Such service has been held sufficient to bring in the unknown heirs of a decedent: *Otis v. Dargan*, 53 Ala. 178.

*Divorce*. — In divorce proceedings, plaintiff being a resident citizen, a court may acquire jurisdiction, and render a valid judgment as to the *status* of the parties, although the defendant never was a resident of the state, or within the jurisdiction of the tribunal: *Ditson v. Ditson*, 4 R. I. 109; *Harrison v. Harrison*, 19 Ala. 504; *Thompson v. State*, 28 Ala. 14; *Maguire v. Maguire*, 7 Dana, 181; *Harding v. Alden*, 9 Me. 151; 23 Am. Dec. 556; but see *Prosser v. Warner*, 47 Vt. 669; 19 Am. Rep. 132. The decree of divorce operates, not upon the person, but upon the relation: *Harding v. Alden*, 9 Me. 140; 23 Am. Dec. 549; and hence a decree on constructive service by publication is valid: *Harrison v. Harrison*, 19 Ala. 499; *Thompson v. State*, 28 Ala. 12; *Maguire v. Maguire*, 7 Dana, 181; *Ditson v. Ditson*, 4 R. I. 97; but so far as such a decree provides for the payment of alimony, it is void: *Prosser v. Warner*, 47 Vt. 669; 19 Am. Rep. 132; *Maguire v. Maguire*, 7 Dana, 181.

*Evading process*. — It must appear that the departure or concealment is with the intention of evading service or suit: *Towsley v. McDonald*, 32 Barb. 604. Openly avoiding service by eluding the officer is not keeping concealed: *Van Rensselaer v. Dunbar*, 4 How. 151.

*Manner of service by publication*. — Strict compliance with the statute is requisite to make a valid service of summons by publication: *Israel v. Arthur*, 7 Col. 5; *Brown v. Tucker*, 7 Col. 30; *Victor Mill & M. Co. v. Justice's Court*, 18 Nev. 21. See this last decision for a statement of the necessity of setting forth in the affidavit whether or not the defendant's residence is known. Service without the mailing of a copy of the summons is insufficient: *Victor M. & M. Co. v. Justice's Court*, 18 Nev. 21; *Wilson v. Basket*, 47 Miss. 637; *Odell v. Campbell*, 9 Or. 298. Where mailing is required, sending to the post-office of defendant is not a sending to defendant at his post-office: *Holly v. Bass*, 63 Ala. 391; *Scorpion S. M. Co. v. Marsano*, 10 Nev. 383; so the residence of defendant being shown as Goodwin, Holmes County, sending to Goodwin is not sufficient: *Paulling v. Creagh*, 63 Ala. 401; *Smith v. Wells*, 69 N. Y. 602.

The publication must be for the full period mentioned: *Jordan v. Giblin*, 12 Cal. 100.

Publishing summons against wrong person or against a person under the wrong name, as where the wrong initials of the name are used, gives no jurisdiction: *Fanning v. Krapfl*, 61 Iowa, 417.

### *Alias summons may be issued.*

§ 176. Whenever it shall appear by the return of the sheriff, or his deputy, or the person appointed to serve a summons, that he has not served it upon the defendant, the plaintiff may have another summons issued, and so on till service be had, or the plaintiff may proceed by publication in the manner hereinbefore provided, at his election. [February 26, 1891, § 6.]

### *Proceeding when only part of defendants are served.*

§ 177. When the action is against two or more defendants upon a joint contract or liability, and one or more of the defendants cannot be served, the plaintiff may proceed to judgment against the defendant or defendants served, and at any time thereafter while such judgment remains unsatisfied, the plaintiff or his attorney may have summons issued to the defendant or defendants not served, and upon service thereof upon such defendant or defendants, the same proceedings may be had as if he or they had been originally served. When the action is against defendants liable severally, or jointly and severally, the plaintiff may proceed against the defendants served, in the same manner as if they were the only defendants. [February 26, 1891, § 7.]



**Parties not served.** — A personal judgment cannot be rendered against both of two defendants where only one was served with process; and this though they were alleged to be partners: *McCoy v. Bell*, 20 Pac. Rep. 595.

### *Proof of service of summons.*

§ 178. Proof of service shall be as follows:—

1. If served by the sheriff or his deputy, the return of such sheriff or his deputy indorsed upon or attached to the summons;

2. If by any other person, his affidavit thereof indorsed upon or attached to the summons; or

3. In case of publication, the affidavit of the printer, publisher, foreman, principal clerk, or business manager of the newspaper, showing the same, together with a printed copy of the summons as published; or

4. The written admission of the defendant.

5. In case of personal service out of the state, the affidavit of the person making the service, sworn to before a notary public, with a seal attached, or a clerk of a court of record. In case of service otherwise than by publication, the return, admission, or affidavit must state the time, place, and manner of service. [*February 2, 1888, § 8. In effect immediately.*]

**Proof of service actual and constructive.** — Proof of service can only be made by one of the class of persons named in the statute: *Odell v. Campbell*, 9 Or. 298. A return by the sheriff must be in the name of the sheriff. Where the return of the service of the summons issued in an action for taxes was signed, "Elijah T. Cole, D. S.," it was held that this return was insufficient to give the court jurisdiction, or to authorize it to enter a judgment by default: *Joyce v. Joyce*, 5 Cal. 449; *Rowley v. Howard*, 23 Cal. 403; and see *Leese v. Thompson*, 3 Cal. 266.

Proof of publication can be made only by a person holding one of the positions mentioned in subdivision 3 of the above section: *Odell v. Campbell*, 9 Or. 298; *Hahn v. Kelly*, 34 Cal. 391. In an affidavit of publication deponent described himself as "principal clerk," etc., and then the affidavit proceeded, "deposes," etc. It was held that affiant deposed to nothing except the matter set forth after the word "deposes"; his naming himself as principal clerk was not swearing that that was his position in fact: *Steinbach v. Leese*, 27 Cal. 298; *Ex parte Bank of Monroe*, 7 Hill, 178; *Cunningham v. Goelet*, 4 Denio, 71; *Staples v. Fairchild*, 3 N. Y. 44; *Payne v. Young*, 8 N. Y. 158. Proof of constructive service is made by an affidavit of the printer, etc., setting forth the fact that summons has been published, where and how long it has been published, and the manner of publication. And there must be an affidavit showing a deposit of a copy of the summons in the post-office: *Hahn v. Kelly*, 34 Cal. 391. And a judgment obtained after

service by publication will be void if the statutory requisites are not complied with: *Montgomery v. Manning*, 1 Wash. 434.

An acknowledgment of service is only sufficient when reduced to writing and subscribed by the party. A verbal acknowledgment to the sheriff will not suffice: *Montgomery v. Tutt*, 11 Cal. 314. It was held that when the proof of service of process consists of the written admissions of defendants, such admissions, to be available in the action, should be accompanied with some evidence of the genuineness of the signature of the parties; and that in the absence of such evidence the court could not notice them: *Alderson v. Bell*, 9 Cal. 321; *Litchfield v. Burwell*, 5 How. Pr. 346. Where S. & B. admitted "due service" in an action against them and others, it was held that the court thereby acquired jurisdiction of them, and as to them the judgment was valid. It did not appear that the signatures were verified: *Sharp v. Brunnings*, 35 Cal. 528. An acceptance of service out of the state is of no avail unless there is an appearance: *Morrell v. Kimball*, 4 Abb. Pr. 352; *Goldman v. Monds*, 1 City Ct. Rec. 97; *Litchfield v. Burwell*, 5 How. Pr. 341; *Scott v. Noble*, 72 Pa. St. 115; 13 Am. Rep. 663.

**Conclusiveness of return.** — In cases of substituted service of process, the inability of the officer to find the defendant is a fact which must be affirmatively stated in his return. A recital in the judgment that defendant was "duly served with process" does not supply the omission in the return of the sheriff. Such recital must be read in connection with



that part of the record which sets forth, as prescribed by statute, the proof of service. The official evidence prescribed by statute must prevail over such recital. Where the record shows service upon the wife of de-

fendant, instead of him, other service will not be presumed from its assumption in a recital in the entry of a default: *Settlemier v. Sullivan*, 97 U. S. 444; *Trullenger v. Todd*, 5 Or. 36.

*Filing complaint gives jurisdiction.*

§ 179. The action shall be deemed commenced, and the court shall have obtained jurisdiction of the action, from the time the complaint is filed with the clerk, and shall have control of all subsequent proceedings. [*February 2, 1888, § 9. In effect March 1, 1888.*]

*Voluntary general appearance equivalent to service.*

§ 180. A voluntary general appearance of defendant shall be equivalent to personal service. [*February 2, 1888, § 10. In effect March 1, 1888.*]

*What constitutes appearance.*

§ 181. [72.] A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings, of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him unless he is imprisoned for want of bail.

**Appearance.** — To constitute an appearance, party must answer, demur, or give plaintiff written notice; or if an attorney appears, he must give notice of his appearance. A mere corporal presence of the defendant or his agent is not enough: *McCoy v. Bell*, 20 Pac. Rep. 595. Filing a demurrer is an appearance: *Walla Walla etc. Co. v. Budd*, 2 Wash. 336. Waiving service of motion to perfect transcript, without protest, is an appearance generally: *Yesler v. Oglesbee*, 1 Wash. 604. But filing a brief in the supreme court, and notifying opposite party of intention to move for a dismissal of an appeal, is not such an appearance: *Wilson v. Wald*, 2 Wash. 376. Jurisdiction of defendant cannot be questioned after appearance and pleading to the merits: *Meigs v. Keach*, 1 Wash. 305. Appearance of defendant in lower court cures any irregularity in preliminary proceedings at chambers: *County of Clarke v. Bruce*, 1 Wash. 199. Such appearance gives the court full jurisdiction over his person: *Meigs v. Keach*, 1 Wash. 305. Defects in service of process are cured by appearance of parties and filing demurrer: *Williams & Co. v. Miller & Co.*, 1 Wash. 88. And parties once in court must take notice at their peril of all orders and pleadings filed by order of court. *Id.*

Judgment rendered by default on service, by publication against a non-resident who afterwards comes into court and moves to vacate the judgment, is not an appearance such as gives the court jurisdiction over the person of defendant, the action being *in personam*: *Paxton v. Daniell*, 23 Pac. Rep. 441.

**Appearance — Effect to waive service of summons.** — It is a general rule that if jurisdiction is not conferred upon a tribunal by law, it cannot be conferred by consent of the parties: *Michales v. Hine*, 3 Iowa. 470. Therefore, when want of jurisdiction over the subject-matter of the action appears from the record, the defect cannot be supplied by submission of the party: *Perkins v. Perkins*, 7 Conn. 558; 18 Am. Dec. 121. But where a court has jurisdiction of the subject-matter of an action, a voluntary general appearance waives all defects in process or in the service thereof, and confers jurisdiction over the parties: *Gracie v. Palmer*, 8 Wheat. 699; *White v. N. W. Stage Co.*, 5 Or. 99; *Hays v. Shattuck*, 21 Cal. 51; *Desmond v. Superior Court*, 59 Cal. 274; *New York & B. Mfg. Co. v. Gail*, 8 Col. 100; *Gardner v. Teller*, 2 How. Pr. 241; *Mulkins v. Clark*, 3 How. Pr. 27; *Dix v. Palmer*, 5 How. Pr. 233; *People v. Baucker*, 5 N. Y. 106; *In re Macaulay*, 27 Hun, 577; *Crystal v. Kelly*, 88 N. Y. 285; *Catlin v. Rick*, 91 N. Y. 638.

But an appearance, to confer jurisdiction, must be clearly a general and not a special appearance: *Muller v. Higgins*, 13 Abb. Pr. 297. An appearance of a party in a cause, save for the purpose of taking advantage of a want of jurisdiction, is a general appearance: *Foote v. Richmond*, 42 Cal. 443; *Aultman v. Steinman*, 8 Nev. 112; *Bank of Valley v. Bank of Berkeley*, 3 W. Va. 386; *Coad v. Coad*, 41 Wis. 26. Within the meaning of the general appearance comes any motion which calls into action the powers of the court for any purpose except to decide upon its own jurisdiction: *Wood v.*

*Young*, 38 Iowa, 106; *Cropsey v. Wiggerhorn*, 3 Neb. 116; that is to say, any motion which asks for relief which can be granted only on the hypothesis that the court has jurisdiction of the cause and of the person: *Coud v. Coud*, 41 Wis. 26. Coming in to move for a continuance has been held a general appearance: *Sargeant v. Flaid*, 90 Ind. 501; *Stockdale v. Buckingham*, 11 Iowa, 45; *Harvey v. Skipwith*, 16 Gratt. 410; *Marye v. Strouse*, 5 Fed. Rep. 494 (Nev.). So with a motion for a change of venue: *Taylor v. Atlantic & P. R. R. Co.*, 68 Mo. 397; the filing of a demurrer: *Kepp v. Wehlen*, 10 Ind. 550; *Slauter v. Hollowell*, 90 Ind. 286; plea in bar: *Ponder v. Mosley*, 2 Fla. 207; 48 Am. Dec. 194; plea of the statute of limitations: *Miller v. Whitehead*, 66 Ga. 283; or plea or answer on the merits: *Mac v. People*, 106 Ill. 425; *Freu v. Taylor*, 106 Ill. 159; *Curdell v. Lee*, 3 Gill & J. 504; 22 Am. Dec. 350; *McKee v. Metran*, 31 Minn. 429. An appearance and motion to set aside execution and judgment will cure a defect of non-service of summons: *Anderson v. Colburn*, 27 Miss. 558. A party by taking an appeal submits himself to the jurisdiction, and waives error in return or service of process, and likewise with one prosecuting a writ of error: *Culton v. Commonwealth*, 9 Bush, 703; *Seurer v. Horst*, 31 Minn. 479; *Mobile & O. R. R. Co. v. Dale*, 61 Miss. 206; *Berkeley v. Koles*, 13 Mo. App. 502; *Hene v. Morrison*, 13 Mo. App. 590; *Shawney v. Loe*, 15 Neb. 142; *Sawkins v. Sackey*, 6 Mon. 70.

*Special appearance.* — A special appearance is an appearance solely for the purpose of testing the jurisdiction: *Baily v. Schrada*, 34 Ind. 261; *Huff v. Shepard*, 58 Mo. 246. Where a party appears specially to object to the jurisdiction, he should confine his motion to that question alone; he may test the question of jurisdiction, but thereafter must either go to trial or quit the field altogether; he cannot occupy an ambiguous attitude: *Tower v. Moore*, 52 Mo. 120; *Porter v. Chicago etc. Ry. Co.*, 1 Neb. 15. If a person specially appear, his withdrawal without pleading to the merits does not leave him subject to the jurisdiction of the court, but leaves the matter as though there had been no appearance: *Graham v. Spencer*, 14 Fed. Rep. 603.

An appearance for the sole purpose of moving to quash a writ or summons or the service thereof is a special appearance, and will not waive service of process, or defects in the writ, or service or return thereon: *Lung Chong v. Northern Pacific R. R. Co.*, 10 Saw. 17; *Lynum v. Motor*, 44 Cal. 635; *Sinclair v. F.*, 47 Cal. 615; *Kent v. West*, 50 Cal. 185; *Southern Pacific Ry. Co. v. Kern Co.*, 59 Cal. 471. So with a motion to dismiss for want of issuance of summons within the proper time: *Linden G.*

*M. Co. v. Sheplar*, 53 Cal. 245; or because of want of service within the proper time: *Nye v. Liscomber*, 26 Pick. 266; or because of objection to the manner of service of process: *Crany v. Barbur*, 1 Col. 174. A petition for removal of the cause to a federal court is not a general appearance: *Snall v. Montgomery*, 17 Fed. Rep. 865; nor is an appearance for the purpose of setting aside a default: *Gray v. Hanes*, 8 Cal. 562; or assessing damages: *Briggs v. Sneyhan*, 45 Ind. 18.

*Who may appear.* — Any person named as defendant may voluntarily appear: *Hopps v. Rockwell*, 2 Duer, 652; either at law or in equity: *Nelson v. Moon*, 3 McLean, 320. A person may appear by attorney, and when he is so represented the court will presume that such attorney was authorized to appear for the party, but the party may appear and prove the contrary; and if proved, the appearance will not confer jurisdiction: *Graham v. Spencer*, 14 Fed. Rep. 603; *Clark v. Willitt*, 35 Cal. 540. Non-residents may appear so as to confer jurisdiction: *McLean v. Lafayette Bank*, 3 McLean, 587. One privileged from service of process may appear generally, and thereby waive his privilege, and pleading to the merits is such a waiver: *Harrison v. Harrison*, 20 Ala. 629; 56 Am. Dec. 227. The voluntary appearance of the state confers jurisdiction: *Clark v. Bernard*, 108 U. S. 436; and so of the United States: *Johnson v. Stinich*, 89 N. Y. 117. Corporations may appear as well as individuals: *Attorney-Gen. v. Guardian M. L. I. Co.*, 77 N. Y. 274. Infants or lunatics may probably appear by their guardians or guardians *ad litem*.

*Effect of waiving process by appearance.* — A general appearance confers such a jurisdiction that it matters not whether the summons issued was good, or whether any process was issued: *Baldwin v. Murphy*, 87 Ill. 489; *Wason v. Cone*, 86 Ill. 47. The appearance will have no retrospective effect as a waiver, but will operate only from the time it is made. Thus it will not waive the bar of the statute of limitations which attached before the appearance: *Etheridge v. Woodley*, 83 N. C. 13; nor will it waive time to plead: *Hark v. Faba*, 2 Or. 89; *Maul v. Wear*, 55 Cal. 25.

*Withdrawal of appearance.* — An appearance can only be withdrawn by permission of a court exercising a sound legal discretion: *Rock Island v. Massachusetts*, 12 Pet. 760; *New Albany & S. Ry. Co. v. Combs*, 13 Ind. 490; *Croighton v. Kerr*, 20 Wall. 13. Allowing the appearance to be withdrawn operates to allow the plea of the party to be also withdrawn: *Croighton v. Kerr*, 20 Wall. 13; but merely allowing a plea to be withdrawn does not allow the withdrawal of the appearance: *Croighton v. Kerr*, 20 Wall. 13; *Eldred v. Beal*, 17 Wall. 551.

### *Open default, in case of service by publication.*

§ 182. [67.] The defendant against whom publication is made, or his personal representatives, on application and sufficient cause shown at any time before judgment, shall be allowed to defend the action; and the defendant against whom publication is made, or his representatives, may in like manner, upon good cause shown, and upon such

terms as may be proper, be allowed to defend after judgment, and within one year after the entry of such judgment, on such terms as may be just; and if the defense be successful, and the judgment or any part thereof have been collected or otherwise enforced, such restitution may thereupon be compelled as the court shall direct. But the title to property sold upon execution issued on such judgment to a purchaser in good faith shall not be thereby affected.

*Notice of pendency of action.*

§ 183. [61.] In an action affecting the title to real property, the plaintiff at the time of filing the complaint, and the defendant at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may file with the auditor of the county in which the property is situated a notice of the pendency of the action, containing the names of the parties to and the object of the action, and a description of the property in that county affected thereby; and the defendant may also in such notice state the nature and extent of the relief claimed in the answer. From the time of filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and this notice shall be recorded by the auditor as deeds and other conveyances are recorded.

**Lis pendens.** — A notice of *lis pendens* must appear of record: *Head v. Fordyce*, 17 Cal. 149. If it is recorded, purchasers, during the pendency of the suit, are estopped by the judgment: *Caldenwood v. Teris*, 23 Cal. 335; *Horn v. Jones*, 28 Cal. 194. The object of the notice is to give the opportunity of defense, and also to notify third persons of the litigation. The general rule is, that one not a party to a suit is not affected by the judgment. The commencement of a suit and the filing of notice of it are constructive notice to all the world of the action, and purchasers or assignees, afterwards

becoming such, are mere volunteers, and bound by the judgment: *Richardson v. White*, 18 Cal. 102; *Ault v. Gassaway*, 18 Cal. 205. But a purchaser who has actual notice is as much bound by the judgment as if the above section had been complied with: *Sampson v. Ohlyer*, 22 Cal. 212; *Sharp v. Lumley*, 34 Cal. 615.

In an action to enforce the lien of a tax by the sale of the property, it is not necessary to file a *lis pendens*. The lien of a tax extends back to the assessment, and the assessment creates a lien which is not extinguished until the tax is paid: *Reeve v. Kennedy*, 43 Cal. 644.



## CHAPTER V.

## OF PLEADINGS.

- § 185. Forms of pleading abolished — Sufficiency of, how determined.
- § 186. What pleadings there shall be.
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- § 198. Plaintiff may demur to the answer.
- § 199. The reply of plaintiff.
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- § 202. Court must, by rule, fix times of pleading.

*Forms of pleading abolished — Sufficiency of, how determined.*

§ 185. [73.] All the forms of pleadings heretofore existing in civil actions inconsistent with the provisions of this code are abolished, and hereafter the forms of pleading and the rule by which the sufficiency of the pleadings is to be determined shall be as herein prescribed.

**Forms of pleading.** — The old rules of common-law pleading are superseded: *Cordier v. Schloss*, 12 Cal. 147; *Kimball v. Lohmas*, 31 Cal. 158; *White v. Joy*, 13 N. Y. 90. And the forms of pleading are exclusively those prescribed by this code: *Hentsch v. Porter*, 10 Cal. 558; *Jones v. Cortes*, 17 Cal. 497. Where the old forms contain the allegations necessary to support any particular cause of action, they may be used, provided they comply with the provisions of the code, and state the facts constituting the cause of action in ordinary and concise language; but they frequently do not comply with these provisions, and are therefore unreliable. Usually, too, they contain surplusage; and although this will be rejected as such in construing the pleading, if no objection be previously taken: *Darst v. Rush*, 14

Cal. 82; yet allegations of irrelevant and redundant matter are entirely at variance with the spirit of the code, and may be stricken out on motion: § 197. The cause of action or matter of defense is not affected in the least by the form in which it may be alleged: *Miller v. Van Tassel*, 24 Cal. 463. The facts constituting it must be alleged in any case: *De Witt v. Hays*, 2 Cal. 468; *Lupton v. Lupton*, 3 Cal. 121; *Sampson v. Schaeffer*, 3 Cal. 205; *Thayer v. White*, 3 Cal. 229; and so long as the pleadings contain facts (stated in ordinary and concise language) sufficient to constitute a cause of action or defense, they are good: *Grain v. Aldrich*, 38 Cal. 520. See Pomeroy on Remedies, secs. 506 et seq., where are explained the types of pleading in vogue when the reformed procedure was adopted, and the principles of the new system are stated.

*What pleadings there shall be.*

§ 186. [74.] The only pleadings on the part of the plaintiff shall be,—

1. The complaint; 2. The demurrer; 3. The reply.

And on the part of the defendant,—1. The demurrer; 2. The answer.

*First pleading is the complaint.*

§ 187. [75.] The first pleading on the part of the plaintiff shall be the complaint.

*What complaint must contain.*

§ 188. The complaint shall contain,—

1. The title of cause, specifying the name of the court, the name of the county in which the action is brought and the name of the parties to the action, plaintiff and defendant.

2. A plain and concise statement of facts, constituting the cause of action, without unnecessary repetition.

3. A demand for the relief which plaintiff claims; if the recovery of money or damages be demanded, the amount thereof shall be stated.

[February 26, 1891, § 1.]

**Sufficiency of complaints, generally.**—A complaint showing on its face that the demand for which suit is brought is barred by the statute of limitations is bad on demurrer: *Wilt v. Buehtel*, 2 Wash. 417. See § 189. Complaint not stating facts sufficient to constitute cause of action may be taken advantage of for the first time in the appellate court: *Macintosh v. Renton*, 2 Wash. 121; and the objection is not waived by a failure to demur: *Lyon v. Bond*, 3 Wash. 407. A complaint on a contract of sale failing to show either a sale or tender is bad: *Hawley v. Kennoyer*, 1 Wash. 609. The object of a complaint being to show title under the donation act, if it does not show compliance with the requirements of section 12 of that act, it fails to state facts sufficient to constitute a cause of action: *Shockley et al. v. Brown et al.*, 1 Wash. 463. A complaint not bad on demurrer may be faulty in other respects, such as pleading the common counts for goods sold and delivered, etc. Such objections may be reached by motion: *Renton et al. v. St. Louis*, 1 Wash. 215. A complaint asking equitable relief, primarily for the collection of indebtedness, must show that the creditor has reduced his claim to judgment, or that he has in some other manner obtained a lien upon property in regard to which he asks equitable aid; otherwise it is not sufficient: *Thompson v. Caton*, 3 Wash. 31. A complaint in ejectment failing to set out source of plaintiff's title, defendant under a general denial may introduce any equitable as well as legal defense: *Parker v. Dacres*, 24 Pac. Rep. 192. A complaint charging one person and forty-four others with nuisance in keeping disorderly houses, where liquor is sold and drunkenness promoted, along the line of a railroad, but designating no particular house, place, or locality, and seeking to enjoin such persons from keeping such house, is bad on demurrer: *Northern Pacific R. R. v. Whalen*, 3 Wash. 452. The sufficiency of a complaint cannot be attacked in the supreme court on appeal, when no objection thereto is reserved in the court below if it is sufficient to support the judgment: *United States v. Small*, 3 Wash. 478.

Every material fact upon which a party founds his right to recover must be alleged in his pleadings. A complaint against a corporation, without any averment as to its incorporation, or the members of the company, is bad on demurrer; but such defect may be cured by amendment, and when the defendant goes to trial without exception, this court, under the code, will regard the pleading as amended in the court below: *Tolmie v. Dean*, 1 Wash. 46.

Under a contract by which defendant was to convey to plaintiff certain lands to be paid for in wheat, and plaintiff delivered the wheat, but afterwards rescinded the contract, on account of defendant not having good title, the correct form of pleading under the code, in an action to recover the value of the wheat, is the common count for goods sold and delivered, omitting all reference to the original contract: *Ankeny v. Clark*, 20 Pac. Rep. 583.

**Caption.**—The caption includes the title of the court and cause and names of the parties. The caption is said to be part of the complaint, and is to be regarded as such in construing it: *King v. Bell*, 13 Neb. 409; *McCloskey v. Strickland*, 7 Iowa, 259.

**Name of court.**—The name of the court in which the action is brought should be stated in the complaint: *Hotchkiss v. Crocker*, 15 How. Pr. 336; though it was held that if the court was named in the summons, the omission thereof in the complaint would be a technical irregularity, and disregarded: *Van Namee v. People*, 6 How. Pr. 198. This was under the old New York code, the provision of which was the same as the present provision of the Oregon code. But if no court was named either in the complaint or summons, the omission would be fatal: *Ward v. Stringham*, 1 Code R. 118.

**Names of parties.**—The names of all the parties ought to be stated: *Hill v. Thatcher*, 2 Code R. 3. If the names are once stated, they need not be repeated; and where they are set forth in the title of a cause, they need not be repeated in the body of the complaint: *Stanley v. Campbell*, 8 Cow. 235; but they may be designated therein as "plaintiff" and "defendant": *Stanley v. Campbell*, 8 Cow. 235; *Lowry v. Dutton*, 28 Ind. 473.

A defendant being known by two names may be sued by either: *Engleston v. Son*, 5 Rob. (N. Y.) 640; or by the one by which he is generally known, though not his real name: *Copper v. Burr*, 45 Barb. 9; and where one's true name is not known, he may be sued by a fictitious name: See *Crandall v. Beach*, 7 How. Pr. 271; *Gardner v. Kraft*, 52 How. Pr. 499; *Morgan v. Thrift*, 2 Cal. 562.

Initials or middle names are not recognized in law: *Van Voorhis v. Budd*, 39 Barb. 479. It is not ground of demurrer that the christian name of one of the plaintiffs does not appear in the record. The court cannot judicially know that one of the plaintiffs had either a christian or a heathen name, or that it is necessarily untrue that he has forgotten it if he had: *Nelson and Doile v. Highland*, 13 Cal. 75.



"Junior" is no part of the name: *People v. Cook*, 14 Barb. 259; 8 N. Y. 67.

One suing or being sued in a representative capacity should be named as such, as well as be shown by averment to be such: *Scranton v. Farmers' Bank*, 33 Barb. 527; 24 N. Y. 424; *Smith v. Lerious*, 8 N. Y. 472; *Fowler v. Westcott*, 17 Abb. Pr. 59.

A defendant sued by a wrong name cannot move to set aside the proceedings, but must plead in abatement: *Miller v. Stettiner*, 7 Bosw. 692; 22 How. Pr. 518. *Contra*, *Elliot v. Hart*, 7 How. Pr. 25; *Dole v. Mandry*, 11 How. Pr. 158; *Gardner v. Clark*, 21 N. Y. 399; reversing 6 How. Pr. 449. A mere misnomer is a formal error, which may be amended before or at the trial, or afterwards: *Barnes v. Perine*, 9 Barb. 292; affirmed 15 Barb. 249; affirmed 12 N. Y. 18; *Towner v. Eighth Ave. R. R. Co.*, 6 Abb. Pr., N. S., 46; 3 Keyes, 497; *White v. Miller*, 7 Hun, 427; and will be disregarded on appeal: *Bank of Havana v. McGee*, 20 N. Y. 355; *Towner v. Eighth Ave. R. R. Co.*, 7 Hun, 427. Where a defendant was served by a wrong name, but judgment was entered in the right one, it was held to be without jurisdiction: *Moulton v. De McCarty*, 6 Rob. (N. Y.) 470.

**Date of Pleading.** — The complaint need not be dated, nor state the time when the action was commenced: *Maynard v. Talcott*, 11 Barb. 569; *Smith v. Holmes*, 19 N. Y. 271. Allegations of time relate to that of the commencement of the action, whether in form in the present or past tense: *Townshend v. Norris*, 7 Hun, 239. The words "her husband," in the caption of the complaint, relate to the time when the action was commenced: *Broome v. Taylor*, 9 Hun, 155.

**Statement of facts in complaint.** — By the provision that the complaint must contain a plain and concise statement of the facts constituting a cause of action, is meant the facts which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of those facts: *Wooden v. Strong*, 10 How. Pr. 48; *Dunning v. Thomas*, 11 How. Pr. 281; *Zimmerman v. Morrow*, 28 Minn. 367; *Clay County v. Simonsen*, 1 Dak. 403; *O'Donohue v. Hendrie*, 13 Neb. 255; *People v. Ryder*, 12 N. Y. 435; *Hyatt v. McAdison*, 25 Barb. 457. But this rule does not apply in an action in which all the facts to be stated and the evidence of them are synonymous: *Leopold et al. Mfg. Co. v. Taussig*, 5 N. Y. Civ. Proc. R. 69, 74.

And all the material facts constituting the cause of action should be alleged: *Hayden v. Steadman*, 3 Or. 550; *Stringer v. Davis*, 30 Cal. 320. It is said that every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, should be distinctly averred and set forth: *Clay County v. Simonsen*, 1 Dak. 403; *Allen v. Patterson*, 7 N. Y. 476; *Prindle v. Caruthers*, 15 N. Y. 425; *Brown v. Harmon*, 21 Barb. 508; *McKyring v. Bull*, 16 N. Y. 297; *McNab v. Lockhart*, 18 Ga. 495; *Griggs v. St. Paul*, 9 Minn. 246; *Gray v. Osborne*, 24 Tex. 157; *Biddle v. Boyce*, 13 Mo. 552; and this is important, for if it is not done the complaint will be bad on demurrer: *Green v. Palmer*, 15 Cal. 444; and a judgment founded on a complaint defective in this re-

spect will be reversed on appeal: *Benedict v. Brog*, 2 Cal. 256; even though no objection was taken below: *Russell v. Byron*, 2 Cal. 86; for an omission of a fact necessary to constitute a cause of action will not be cured by default or verdict: *Hentsch v. Porter*, 10 Cal. 555; though a defective allegation may be thus cured: *Russell v. Maser*, 12 Cal. 475; or even waived by joining issue upon it: *Davis v. Watt*, 12 Or. 425. The pleader should not aver conclusions of law in place of the facts: *Cook v. Warren*, 88 N. Y. 37; but should aver instead the facts as they exist, from which the court will draw the proper legal conclusions: *Cropsey v. Sweeney*, 27 Barb. 310; *Haight v. Child*, 34 Barb. 186; *Page v. Freeman*, 19 Mo. 421. The facts to be pleaded are physical facts: *Lawrence v. Wright*, 2 Duer, 673; which should be set out in such a manner as to permit a distinct traverse and a definite issue: *Cook v. Warren*, 88 N. Y. 37; *Miles v. McDermott*, 31 Cal. 271; and pleading fictions is improper: *Bush v. Prosser*, 11 N. Y. 352; *Lackey v. Vanderbilt*, 10 How. Pr. 155; *Dunning v. Thomas*, 11 How. Pr. 281. Value of goods in tortious action for damages for taking the same, brought against a sheriff, need not be alleged; the damages being alleged at a certain sum: *Lery v. Sheehan*, 23 Pac. Rep. 802.

**Ultimate facts to be alleged.** — The ultimate and not the probative facts should be pleaded, but it has been held that if facts are pleaded from which an ultimate fact necessarily results, it is the same as though such ultimate fact were specifically pleaded: *Osborne v. Clark*, 60 Cal. 622. But if probative facts or facts unnecessary to be proved are stated, they may be disregarded upon the trial or stricken out on motion: *Miles v. McDermott*, 31 Cal. 273; *Bedell v. Cull*, 33 N. Y. 581.

**Facts should be stated positively and concisely.** — The facts should certainly be stated positively and in traversable form: *Heathery v. Hadley*, 2 Or. 269; *Blake v. Eldred*, 18 How. Pr. 240; *Lewis v. Kendall*, 6 How. Pr. 50; *State v. Tufts*, 28 Ark. 502; *State Bank v. Oliver*, 1 Disn. 159; *Grant v. Bell*, 87 N. C. 41; and not hypothetically or in alternative form: *Ladd v. Ramsay*, 10 Or. 207; *Hamilton v. Hough*, 13 How. Pr. 14; *Wies v. Fanning*, 9 How. Pr. 543; *Commonwealth v. Abell*, 6 J. J. March, 480; *Jamison v. King*, 50 Cal. 132; but this does not prohibit the statement of facts upon information and belief: *Thackara v. Reid*, 1 Utah, 240; *Radwin v. Mather*, 5 Sand. 654; *Truscott v. Dale*, 7 How. Pr. 221; *St. John v. Beers*, 24 How. Pr. 377. But see *Williams v. First Presbyterian Society*, 1 Ohio St. 504; *New York etc. Iron Works v. Smith*, 4 Duer, 362.

A pleading should contain a concise statement, without unnecessary repetition, of the facts constituting the cause of action or defense, instead of the evidence from which such facts may be inferred: *Smith v. Foster*, 5 Or. 44. Counts have been held to be entirely unknown to the code system: *Shipperly v. Tron etc. R. R. Co.*, 9 How. Pr. 83; *Nash v. McCandry*, 9 Abb. Pr. 159; *Fern v. Vanderbilt*, 13 Abb. Pr. 72; *For v. Penn. R. R. Co.*, 2 Handy, 160; *Mays v. Lewis*, 4 Tex. 38; but in *Wilson v. Smith*, 61 Cal. 209, it is held that the plaintiff may set out his facts in different forms when there is a fair and reasonable doubt of



his ability to safely plead them in one mode only.

*Arguments, inferences, and matters of law* should not be stated. A legal conclusion states no facts, but merely matter of law: *Hatch v. Peet*, 23 Barb. 575; and a defect in this regard is fatal if the objection is properly raised by the adverse party: *Simpson v. Prather*, 5 Or. 86; *Ramsey v. Erie R. R. Co.*, 38 How. Pr. 193; 7 Abb. Pr., N. S., 156; *Van Schaick v. Winne*, 16 Barb. 89; *Campbell v. Taylor*, 3 Utah, 325; *Larimore v. Wells*, 29 Ohio St. 13; *Dial v. Tappan*, 20 S. C. 167, 176; *State v. Hudson*, 13 Mo. App. 61; *Garner v. McCullough*, 48 Mo. 318; *Tatum v. Tatum*, 19 Ark. 194; *Randall v. Shropshire*, 4 Met. (Ky.) 327; *Hershfield v. Aiken*, 3 Mont. 442; *Taylor v. Blake*, 11 Minn. 255. Among such are, an allegation that a certain act was illegal: *People v. Lothrop*, 3 Col. 428; or contrary to the statute: *Smith v. Lockwood*, 13 Barb. 209; that a party is entitled to a thing: *Drake v. Crofoot*, 10 How. Pr. 377; that it was one's duty to do, or not to do, a certain act: *City of Buffalo v. Holloway*, 7 N. Y. 493; that a party is indebted: *Merritt v. Millard*, 5 Bosw. 645; *Roberts v. Treadwell*, 50 Cal. 520; that a contract is void for want of sufficient consideration: *Hammond v. Earle*, 58 How. Pr. 428; and the like. It is not a legal conclusion to allege that title was derived by gift: *McCarty v. Tarr*, 83 Ind. 444; that a person is of unsound mind: *Charky's Estate*, 57 Cal. 274; *Riggs v. Am. Tract. Soc.*, 84 N. Y. 330; or that a covenant of seisin has been broken, and that defendant was not the true owner when he conveyed, and therefore was not seised: *Wooley v. Newcombe*, 58 How. Pr. 480; 87 N. Y. 603; or that the plaintiff is the owner of certain lands: *Commissioners v. Young*, 18 Kan. 445; *Railroad v. Leahy*, 12 Kan. 124.

A fact necessarily understood or implied need not be alleged: *Partridge v. Badger*, 25 Barb. 170; *Malcolm v. O'Reilly*, 89 N. Y. 156. Thus, that a deed was executed implies its delivery and acceptance, and these need not be alleged: *Thorp v. Keokuk C. Co.*, 48 N. Y. 253; that commercial paper was indorsed or made imports delivery: *Prindle v. Carruthers*, 15 N. Y. 425; *Lafayette Ins. Co. v. Rogers*, 30 Barb. 491; and so do the words "duly assigned" import delivery and acceptance: *Hoag v. Mendenhall*, 19 Minn. 335.

Facts which are judicially noticed are to be regarded as matters of law, and should therefore not be alleged: *Cook v. Tallman*, 40 Iowa, 133. Among such are public laws of a state or the United States: *Haight v. Child*, 34 Barb. 186; *Swinnerton v. Columbian Ins. Co.*, 37 N. Y. 174; *Hewitt v. Harvey*, 46 Mo. 368; *Brown v. State*, 11 Ohio, 276; *Brown v. Harmon*, 21 Barb. 508; *Platt v. Crawford*, 8 Abb. Pr., N. S., 297; *Morris v. Davidson*, 49 Ga. 361; *Bagly v. Chubb*, 16 Gratt. 284; *Butler v. Robinson*, 75 Mo. 192; matters of public history: *Swinnerton v. Columbian Ins. Co.*, 37 N. Y. 174; *Payne v. Treadwell*, 16 Cal. 220; *Rice v. Shook*, 27 Ark. 137; *Smith v. Stevens*, 82 Ill. 554; *Howard v. Moot*, 64 N. Y. 262; *Simmons v. Trumbo*, 9 W. Va. 358; *Williams v. State*, 67 Ga. 260; geography of the country: *Hinckley v. Beckwith*, 23 Wis. 328; *Winnipisogee Lake Co. v. Young*, 40 N. H. 420; *People v. Snyder*, 41 N. Y. 307; *Wright v. Hamkins*, 28 Tex. 452; *Gilbert v. Molnie*, 19 Iowa,

319; treaties or proclamations: *Lacroix v. Sarrazin*, 15 Fed. Rep. 489; *United States v. Reynes*, 9 How. 127; *Dole v. Wilson*, 16 Minn. 525; *Dunning v. New Albany etc. R. R. Co.*, 2 Ind. 437; *Perkins v. Rogers*, 35 Ind. 124; 9 Am. Rep. 639; and see *Hill v. Baker*, 32 Iowa, 302; 7 Am. Rep. 193; matters of science and art: *Luke v. Calhoun Co.*, 52 Ala. 115; *Adler v. State*, 55 Ala. 16; *State v. Goyette*, 11 R. I. 592; *Brown v. Piper*, 91 U. S. 37; *People v. Chee Kee*, 61 Cal. 404; *Clough v. Goggins*, 40 Iowa, 325; *Briffit v. State*, 58 Wis. 39; 46 Am. Rep. 631; seals of foreign states: *Lazier v. Westcott*, 26 N. Y. 146; *Lincoln v. Battelle*, 6 Wend. 475; *Stauglein v. State*, 17 Ohio St. 463; 106 U. S. 546; or public offices: *State v. Williams*, 5 Wis. 308; *Ragland v. Wynn*, 37 Ala. 32; *Dewees v. Colorado Co.*, 32 Tex. 570, etc. Courts will judicially notice their own records: *State v. Hoeflinger*, 35 Wis. 393; *State v. Bowen*, 16 Kan. 475; *Robinson v. Brown*, 82 Ill. 279; *State v. Schilling*, 14 Iowa, 455; and officers and their signatures: *Mackinnon v. Barnes*, 66 Barb. 91; *Masterson v. Le Claire*, 4 Minn. 163; *Norrell v. McHenry*, 1 Mich. 227; and see *Himmelman v. Hoadley*, 44 Cal. 213; but they will not take notice of municipal ordinances: *Harker v. Mayor etc.*, 17 Wend. 199; *Garrin v. Wells*, 8 Iowa, 286; *Porter v. Waring*, 69 N. Y. 250; *Lucker v. Commonwealth*, 4 Bush, 440; *Winona v. Burke*, 23 Minn. 254; nor of private statutes, as will be seen further in this note; nor of customs or usages: *Goldsmith v. Sawyer*, 46 Cal. 209; *Sullivan v. Heuse*, 2 Col. 424.

*Consistency in pleading.* — The allegations in a complaint should be consistent, and if not so, the pleading will be construed against the pleader: *Clark v. Dillon*, 97 N. Y. 370; *Hillebrant v. Booth*, 7 Tex. 501; *Building Association v. O'Connor*, 29 Ohio St. 655; *Butler v. Kaulback*, 8 Kan. 671. A complaint which seeks to affirm a contract and also to set it aside is bad for inconsistency: *Trimble v. Doty*, 16 Ohio St. 129; so is a complaint claiming for a conversion and also for redelivery of the property: *Maxwell v. Farnham*, 7 How. Pr. 236; a complaint for rent, and also for use and occupation: *Dean v. Leonard*, 9 Minn. 190; or seeking to recover on an express promise and also on an implied promise for the same thing: *Hewitt v. Brown*, 21 Minn. 163. If *Wilson v. Smith*, 61 Cal. 209, cited in one of the preceding subdivisions of this note is good law, some of these cases are not then law; for that case holds that facts constituting the cause of action may be set out in more than one form if there is fair or reasonable doubt of the pleader's ability to safely plead them in one mode only.

*Allegations of time.* — If time is material, it must be alleged: *Moxley v. Moxley*, 2 Met. (Ky.) 311; *People v. Ryder*, 12 N. Y. 433. It is not usually material, except when describing a written instrument bearing a written date: *Howland v. Davis*, 40 Mich. 545; or alleging performance of a condition precedent to a right of action: *Lockwood v. Bigelow*, 11 Minn. 113; *Vance v. Blair*, 18 Ohio, 532. When it is material and essential to the cause of action, it must be stated with precision and positively; an allegation that "on or about a certain day," etc., will not be sufficient: *Lockwood v. Bigelow*, 11 Minn. 113; and there is no presumption in favor of the pleader in regard to time: *Balch*

*v. Wilson*, 25 Minn. 289; *Williams v. Nesbit*, 65 Ind. 171.

*Allegations of place* are generally material if the matters pleaded are local in their nature: *Vermilya v. Beatty*, 6 Barb. 429. Thus if one contracts to do a certain thing at a particular place, an allegation of failure to do it at that place is necessary to a good complaint: *Clark v. Dukes*, 20 Barb. 42. Where a contract was void at the place where it was made, the place where it was made must be averred, to show its invalidity: *Thatcher v. Morris*, 11 N. Y. 437.

*Allegations of quantity or value.* — Great precision is not required in this regard: *Martin v. Kanouse*, 2 Abb. Pr. 330; and they generally need not be proved as alleged: *Chamblee v. McKenzie*, 31 Ark. 155. Strictness as it regards allegations of quantity is not generally required, unless the subject of the averment is a record, or written instrument, or an express contract: *Ginnel v. Phillips*, 3 Term Rep. 643; *Van Rensselaer v. Jones*, 2 Barb. 643. In an action for goods sold, or for services, the allegation of the value thereof in the complaint is held material: *Gregory v. Wright*, 11 Abb. Pr. 417; but in trover, where the damages are merely nominal, the averment of value is merely formal: *Woodruff v. Cook*, 25 Barb. 505.

*Demand, averment of.* — Where a demand is a prerequisite to bringing suit, it must be alleged in the complaint and proved on the trial: *Moore v. Hudson R. R. Co.*, 12 Barb. 156; *Boutwell v. O'Keefe*, 32 Barb. 434; *State v. Cowles*, 5 Ohio St. 87. And if it be expressly agreed by contract that neither party shall be liable for non-performance until after demand, a suit cannot be maintained without alleging demand: *Ferner v. Williams*, 37 Barb. 9. A demand before suit is necessary in an action for detention of property of which one became lawfully possessed: *Baird v. Walker*, 12 Barb. 298; *Gillett v. Roberts*, 57 N. Y. 28; *Simmons v. Lyons*, 55 N. Y. 671. It is a general rule that when the possession of property is originally acquired by a tort, no demand previous to the institution of suit for its recovery is necessary. It is only when the original possession is lawful, and the action relies upon the unlawful detention, that a demand is required: *Ledley v. Hays*, 1 Cal. 160; *Paige v. O'Neal*, 12 Cal. 495; *Ham v. Henderson*, 50 Cal. 367; *Sargent v. Sturm*, 23 Cal. 360. Thus if a sheriff takes personal property of one person, under a process against another, though in possession of that other, he takes it tortiously, and no demand is necessary: *Boulware v. Craddock*, 30 Cal. 190; *Wellman v. English*, 38 Cal. 583. Where the defendant contracted with a factor who was in his debt for certain goods, but before he took them away had notice, sufficient to put him on inquiry, that a portion of them belonged to another, his taking such portion was an unlawful assumption of ownership and a conversion of the property, and no demand was necessary previous to bringing suit: *Scriber v. Masten*, 11 Cal. 303. Certain personal property owned by plaintiff, but which was used by A. & G. under a contract of hire, was attached by the sheriff; plaintiff having made a demand for the property upon the sheriff, but not upon A. & G., it was held that the demand, if necessary at all, was made on the proper person: *Woodworth v. Knowlton*,

22 Cal. 164. And where persons fraudulently intend to procure goods without payment, the fraud is consummated when the possession of the goods is obtained without making payment on delivery, or on call, according to the terms of sale. A payment made after that time, though it might satisfy the debt for the price of the goods, would not remove the taint of fraud from the transaction by which the goods were obtained, and a demand for the goods before bringing suit is unnecessary: *Stewart v. Levy*, 36 Cal. 165.

A co-tenant must make a demand before suing to be admitted to possession, and a denial is proof of ouster by the co-tenant: *Miller v. Myers*, 46 Cal. 538, 539; *Hebrard v. Jefferson G. & S. M. Co.*, 33 Cal. 290. In ejectment by landlord against tenant, where the latter denies the plaintiff's title in his answer, no demand is necessary: *Smith v. Ogg Shaw*, 16 Cal. 90. A denial in the answer that the relation of trustee and *cestui que trust* exists between the parties dispenses with the necessity of averring in the complaint, or proving, a prior demand and refusal: *Parrott v. Byers*, 40 Cal. 614. If a vendor sells and conveys land with a verbal agreement that the vendee shall pay the purchase-money when demanded, no demand is necessary before bringing suit to enforce the vendor's lien: *Gallagher v. Mars*, 50 Cal. 23.

As to money claims, a party receiving money to the use of another is rightfully in possession, and cannot be sued until after the same is demanded: *Reina v. Cross*, 6 Cal. 31. In an action against an agent for not accounting, etc., a request to account and pay over the balance must be stated: 1 Ch. Pl., sec. 331, and the cases there cited; *Bushnell v. McCauley*, 7 Cal. 422. There is no necessity for a demand for damages in a suit against the sureties upon an injunction bond: *Brouner v. Davis*, 15 Cal. 11. In an action on a promissory note, payable on demand, it is not necessary to aver or prove an actual demand before bringing suit, the institution of the suit being a demand: *Zeil v. Dukes*, 12 Cal. 479. No averment of demand is necessary in an action on a note payable on demand: *Hirst v. Brooks*, 50 Barb. 334; *Howland v. Edmonds*, 24 N. Y. 307; *Herrick v. Woolverton*, 41 N. Y. 581; *Merritt v. Todd*, 23 N. Y. 28; 80 Am. Dec. 243, and see the extended note thereto: *Pierce v. Fothergill*, 2 Bing. N. C. 167; nor in an action upon contract to pay money absolutely: *East River Bank v. Rogers*, 7 Bosw. 493; *Lake Ontario etc. R. R. Co. v. Mason*, 16 N. Y. 451. The same rule is applied to other instruments for the payment of money: *Halleck v. Moss*, 22 Cal. 278; *Gibbs v. Southam*, 5 Barn. & Adol. 911; *Baughen v. Graham*, 1 How. 220; *Husbands v. Vincent*, 5 Harr. (Del.) 268; *Wyman v. Fowler*, 3 McLean, 467; *Dyer v. Rich*, 1 Met. 180. Where defendant agreed to pay a sum of money in grain at the market price on a certain day named, it was held that after the day named the plaintiff was under no obligation to receive payment in grain, and no demand of the grain by him was necessary. The amount became a debt in money from the time of default: *Marshall v. Ferguson*, 23 Cal. 69; *Goodwin v. Hollbrook*, 4 Wend. 377; *Peck v. Hubbard*, 11 Vt. 612; *Townsend v. Wells*, 3 Day, 327; 2 Parsons on Contracts, 163.



If a demand is necessary to fix the liability of sureties, it must be made before suit, and averred and proved: *Morgan v. Menzies*, 65 Cal. 243. Generally a demand of the principal debtor is necessary to fix the liability of the guarantor of a debt: *Milliken v. Byerly*, 6 How. Pr. 218. A promise by an indorser or guarantor, after maturity, to pay the note, with notice of the laches of the holder in not demanding payment of the payor, dispenses with the necessity of proving demand and notice: *Curtis v. Sprague*, 51 Cal. 239.

Concerning the form of demand, where the demand is required to be made in a particular form, the complaint should allege that it was made in such form: *Carpenter v. Brown*, 6 Barb. 147; *Bush v. Stevens*, 24 Wend. 156. In a case where there was a specific averment in the complaint that defendants were requested and refused to pay the amount, which fact was not denied by the answer, and the complaint was duly sworn to, the supreme court declined to allow any objection to be raised to the averment for the first time after verdict and judgment in the appellate court: *Mills v. Barney*, 22 Cal. 251. Where plaintiff averred that defendant had failed, refused, and neglected to return certain personal property to plaintiff, but had, since a day named, wrongfully kept and detained said property and the whole thereof from plaintiff, and still kept and detained the same, this was held not intended to be the averment of a special and formal demand and refusal to deliver, within the meaning of the law applicable to pleadings in this class of actions: *Campbell v. Jones*, 38 Cal. 509-511. A draft which does not specify the kind of money in which it is payable is payable in currency, whether drawn abroad or not; and a demand of payment thereof in gold coin by a notary, with a protest, etc., is not sufficient to charge the drawer: *Langenberger v. Krøger*, 48 Cal. 150. Where a demand is necessary, the mere fact that a greater sum is demanded than the party is entitled to will not defeat the action, unless the defendant shows that, upon such demand, he offered to pay the sum the plaintiff was really entitled to, and that it was refused: *Dudley v. Thomas*, 23 Cal. 370. Where a demand is made by attorney, the party has a right to require reasonable evidence of the authority of the individual to make it; but if no exception is taken at the time, then a subsequent commencement of a suit by the party in whose behalf it was made, claiming under such demand, is a ratification of it, and is *prima facie* evidence, at least, that it was made by his authority: *Baxter v. McKinlay*, 16 Cal. 77; *Poynce v. Smith*, 12 N. H. 34; *Connah v. Hale*, 23 Wend. 462. A demand upon one joint debtor is a demand on both, and may be so averred: *Baird v. Walker*, 12 Barb. 298; *Gelsler v. Acosta*, 9 N. Y. 227.

*Conditions, averment of performance.* — Where a right of action depends on the performance of conditions precedent, such performance must be averred: *Buford v. N. Y. L. I. Co.*, 5 Or. 334; *Oakley v. Morton*, 11 N. Y. 25; *Wolfe v. Howes*, 10 N. Y. 197; *Webb v. Smith*, 6 Col. 365. And see *Ferris v. Parry*, 10 Johns. 359; *Robb v. Montgomery*, 20 Johns. 15; *Fickett v. Brice*, 22 How. Pr. 194; *Jennings v. Moss*, 4 Tex. 452; *Clendennan v. Paulsel*, 3 Mo. 250;

*Harrison v. Taylor*, 3 A. K. Marsh. 168; *Wilcox v. Cohn*, 5 Blatchf. 346; *Lightfoot v. Cole*, 1 Wis. 26. Or at least the performance of all the conditions on the part of the pleader, generally: *Home Ins. Co. v. Duke*, 43 Ind. 418; *Lowry v. Megee*, 52 Ind. 107; *Crawford v. Satterfield*, 27 Ohio St. 421; *Smith v. Railroad Co.*, 19 Wis. 326; *Insurance Co. v. McGookey*, 33 Ohio St. 555; *Schobacher v. Germantown etc. Ins. Co.*, 59 Wis. 86. And see *Ferrer v. Home Mut. Ins. Co.*, 47 Cal. 416; *Etna Ins. Co. v. Kittles*, 81 Ind. 96; *Richardson v. North Mo. Ins. Co.*, 57 Mo. 413.

If a party undertakes to set out specifically the fact of the performance, he must do so with all particularity and strictness: *Home Ins. Co. v. Duke*, 43 Ind. 418; *Frankfort Bank v. Countryman*, 11 Wis. 398; *Davis v. Barron*, 13 Wis. 227. Setting out performance of a condition precedent in the language of the condition is sufficient: *Smith v. Lloyd*, 16 Gratt. 295. Where one pleads an excuse for non-performance, he should state his readiness to perform and the facts constituting the excuse: *Oakley v. Morton*, 11 N. Y. 25; *Smith v. Brown*, 17 Barb. 431; *Home Ins. Co. v. Duke*, 43 Ind. 418; *Cornicell v. Haight*, 21 N. Y. 462. It is unnecessary to make a tender of performance when it would be wholly nugatory: *Karcker v. Haverly*, 50 Barb. 79; *Read v. Lambert*, 10 Abb. Pr., N. S., 428. In case of mutual and reciprocal conditions to be performed at the same time, plaintiff must aver not only readiness, but actual performance or tender of performance on his part: *Thomas v. Wickmann*, 1 Daly, 58; *Williams v. Henley*, 3 Denio, 363; *Beecher v. Conradt*, 13 N. Y. 108. See *Van Schaick v. Winne*, 16 Barb. 89; *Webb v. Smith*, 6 Col. 365; *Delaware etc. Canal Co. v. Penn. Coal Co.*, 50 N. Y. 250; *Smith v. Brown*, 17 Barb. 431; *St. Paul Dir. Sons of Temperance v. Brown*, 9 Minn. 157; *Griffiths v. Henderson*, 49 Cal. 566.

*Notice, averment of.* — Where both parties alike are supposed to be cognizant of a fact, notice need not be averred: *Cole v. Jessup*, 2 Barb. 309; *Clough v. Hoffman*, 5 Wend. 499; *Carlisle v. Cahaba etc. R. R. Co.*, 4 Ala. 70; but if the matter is to be considered as lying more properly in the knowledge of the pleader than the adverse party, and it is a fact without notice of which the action could not be maintained, notice should be averred: *Bush v. Crichtfield*, 4 Ohio, 103; *Lent v. Padelford*, 10 Mass. 238. If from the nature or terms of a contract a party is entitled to notice, it must be averred: *Watson v. Walker*, 23 N. H. 471; and the same rules apply to excuse of notice: *Garrey v. Fowler*, 4 Sand. 665.

*Scienter or knowledge, averment of.* — Where, as in some cases, knowledge constitutes the gist of the action, it must be averred in order to maintain the action: *Vrooman v. Laver*, 13 Johns. 339; *Tift v. Tift*, 4 Denio, 175; *Hobbard v. Russell*, 24 Barb. 404. Thus, concerning an animal other than one of those *feræ naturæ*, the person who keeps them is not liable for an injury alleged, unless he had notice of the vicious propensity of the animal: *Fairchild v. Bentley*, 30 Barb. 147; *Earl v. Van Alstine*, 8 Barb. 630; *Laverone v. Manjanti*, 41 Cal. 138; 10 Am. Rep. 269; *Parberry v. Hartgarty*, 35 Ind. 178; *Wormley v. Gregg*, 65 Ill.



251; *Van Leurey v. Lyke*, 1 N. Y. 515; *Worth v. Gilling*, L. R. 2 Com. P. 1. In actions for deceit in a sale of chattels, where fraud is the gist of the action, the *scienter* must be averred: *Moore v. Noble*, 53 Barb. 425; but in breach of warranty in a sale, this is not necessary: *Moore v. Noble*, 53 Barb. 425; nor is it necessary in an action for trespass by defendant's animal on plaintiff's lands: *Van Leurey v. Lyke*, 1 N. Y. 515; *Dickinson v. McCoy*, 39 N. Y. 401. When these allegations are necessary, they should be positive and distinct: *Spencer v. Southwick*, 9 Johns. 314; *Zabriskie v. Smith*, 13 N. Y. 322; but it is sufficient to allege that the defendant "falsely and fraudulently represented," etc.

**Fraud, Averment of.**—To maintain an action on the ground of fraud, it is not sufficient simply to aver fraud, but the facts and circumstances constituting the fraud must be set forth: *Andrews v. King Co.*, 23 Pac. Rep. 409; *Kuoler v. Macy*, 7 Cal. 207; *Davis v. Robinson*, 10 Cal. 412; *Oakland v. Carpenter*, 21 Cal. 666; *Castle v. Butler*, 23 Cal. 77; *Seiple v. Hagar*, 27 Cal. 166; *Kent v. Snyder*, 30 Cal. 674; *Perkins v. Center*, 35 Cal. 726; *O. & V. R. R. Co. v. Plumas County*, 37 Cal. 363; *Sac. Sav. Bank v. Hynes*, 50 Cal. 202; *Chautauque County Bank v. White*, 6 N. Y. 236; *Libby v. Rosekrans*, 55 Barb. 202; *Butler v. Viele*, 44 Barb. 166; *Smith v. Sims*, 77 Mo. 269; *Darnell v. Rinchind*, 30 Ind. 342; *West v. Wright*, 98 Ind. 335; *Bailey v. Ryder*, 10 N. Y. 363. A mere general charge of fraud is a legal conclusion, and insufficient: *Clark v. Dayton*, 6 Neb. 192; *Butler v. Viele*, 44 Barb. 166; *O'Kendon v. Barnes*, 43 Iowa, 615; *Mason v. Searles*, 56 Iowa, 532; *Leavenworth etc. R. R. Co. v. Douglass County*, 18 Kan. 169; *Mut. Loan etc. Ass'n v. Price*, 19 Fla. 127. The facts upon which the charge of fraud is based must be specifically alleged in the complaint: *Payne v. Elliot*, 54 Cal. 339; *Davis v. Robinson*, 10 Cal. 412. Plaintiff is not required by this rule to allege with minuteness all the particulars and circumstances which constitute the evidence of the alleged fraud, but he must make the charge with sufficient distinctness to enable his adversary to come prepared with his evidence upon the general questions of fraud which will be raised: *Capuro v. Builders' Ins. Co.*, 39 Cal. 125; *Cummings v. Thompson*, 18 Minn. 246; *Cowen v. Toole*, 31 Iowa, 513. And see *Barber v. Morgan*, 51 Barb. 116; *Whittelsey v. Delaney*, 73 N. Y. 571. A complaint which alleges that the defendants "in concert did, by connivance, conspiracy, and combination, cheat and defraud the plaintiffs out of certain goods of" a specified value, does not state facts sufficient to constitute a cause of action: *Cohn v. Goldman*, 76 N. Y. 284.

These rules do not apply to an agreed case where the facts are submitted to the court and matters of legal inference are all left to it: *McRae v. Battie*, 69 N. C. 98. Where the facts are not clearly known, they may be alleged in the alternative: *Rasmussen v. McKnight*, 3 Utah, 315. Fraud without damage gives no cause of action: *Herron v. Hughes*, 25 Cal. 559; *Morrison v. Lods*, 39 Cal. 385. A simple conspiracy, however atrocious, unless it results in actual damage to the party, never is the subject of a civil action; and though such con-

spiracy be charged, the averment is immaterial, and need not be proved: *Herron v. Hughes*, 25 Cal. 559; *Hutchings v. Hutchings*, 7 Hill, 104. Where two or more are sued for a wrong done, it may be necessary to prove previous combination in order to secure a joint recovery, but it is never necessary to allege it; and if alleged, it is not to be considered as of the gist of the action; that lies in the wrongful and damaging act done: *Herron v. Hughes*, 25 Cal. 559.

**Title or ownership, averment of.**—Title or ownership in plaintiff must generally be averred: See *Palmer v. Smadley*, 6 Abb. Pr. 205; 28 Barb. 468. The complaint should distinctly disclose the plaintiff's interest in the subject-matter: *Wright v. Field*, 64 How. Pr. 117. Thus, in an action for the possession of personal property, a general or special ownership must be averred: *Beckwith v. Phillis*, 15 Wis. 223; *Tandle v. Cram*, 13 Kan. 344; *Baker v. Cordwell*, 6 Col. 199; *St. Louis etc. R. R. Co. v. Hetch*, 38 Ark. 357; *Stickney v. Smith*, 5 Minn. 486; *Scoville v. Whitelegge*, 49 N. Y. 259; 12 Abb. Pr., N. S., 320; *Thompson v. Strauss*, 29 Hun, 256; *Wright v. Field*, 64 How. Pr. 117. But a general averment of ownership in the complaint is sufficient: *Stall v. Wilbur*, 77 N. Y. 162; *Heine v. Anderson*, 2 Duer, 311; *Malcolm v. O'Reilly*, 89 N. Y. 156; 14 Jones & S. 222; *Berney v. Drexel*, 63 How. Pr. 471, 475; *Sturman v. Stone*, 31 Iowa, 115; *Simmons v. Lyons*, 55 N. Y. 671; *Barclay v. Quicksilver Min. Co.*, 6 Lans. 25. A complaint for conversion alleging the plaintiff's ownership in the present tense only is bad: *Smith v. Force*, 31 Minn. 119. But if ownership is once shown the continuance thereof will be presumed, and need not be averred: *Taylor v. Corbiere*, 8 How. Pr. 385; *Jaeger v. Hartman*, 13 Minn. 55; *Van Rensselaer v. Bonesteel*, 24 Barb. 365. In an action by an assignee in bankruptcy for assets, it is sufficient to allege that the defendant owns the property: *Dabman v. White*, 48 Cal. 439. In actions upon notes, ownership is shown by alleging indorsement and delivery to plaintiff before maturity, and direct allegations that he is holder and owner are unnecessary: *Farmers' Bank v. Wadsworth*, 24 N. Y. 547; *Ketelas v. White*, 48 Cal. 439; though the latter would be sufficient: *Mechanics' Bank v. Stratton*, 36 How. Pr. 170; *Holstein v. Rice*, 15 How. Pr. 1. If there be both a general averment of title or ownership and a special and particular averment, the latter will control, and if insufficient, the former will not be of any aid: *Punney v. Friedley*, 9 Minn. 34.

**Contracts, how pleaded.**—The contract must be either set out in full or its substance averred: *Fairbanks v. Bloomfield*, 2 Duer, 349; *Adams v. Mayore etc.*, 4 Duer, 295; *Steck v. Heath*, 4 E. D. Smith, 95; 1 Abb. Pr. 331; *Alfaro v. Davidson*, 8 Jones & S. 87; *Stoddard v. Treadwell*, 26 Cal. 294; *Joseph v. Holt*, 37 Cal. 253. Compare *Crawford v. Satterfield*, 27 Ohio St. 421. The contract may be stated according to its legal effect: *Stoddard v. Treadwell*, 26 Cal. 294; *Murdock v. Brooks*, 38 Cal. 603; *Brown v. Champlin*, 66 N. Y. 214. Where the contract contains several agreements, only the part claimed to be broken need be averred: *Estes v. Farnham*, 11 Minn. 434; *Williams v. Heagy*, 3 Denio, 363; *Sandford v. Halsey*, 2 Denio, 235;

*Rollins v. St. Paul Lumber Co.*, 21 Minn. 5; *Dorrington v. Myer*, 8 Neb. 211; *Crawford v. Satterfield*, 27 Ohio St. 421; *Detroit etc. R. R. Co. v. Forbes*, 30 Mich. 165; *McCampbell v. Vastine*, 10 Iowa, 538. If the contract has been altered, the plaintiff must aver it as altered: *Smith v. Brown*, 17 Barb. 431; *Baldwin v. Munn*, 2 Wend. 399; and so, if it has been superseded by another, the latter should be pleaded alone: *Chesbrough v. N. Y. & E. R. R. Co.*, 13 How. Pr. 557.

In pleading the breach of a contract the fact constituting it must be averred: *Schenck v. Naylor*, 2 Duer, 675; *Ward v. Hogan*, 11 Abb. N. C. 478; *Branham v. Johnson*, 62 Ind. 259; *Marie v. Garrison*, 13 Jones & S. 157; *Whitehill v. Shickle*, 43 Mo. 537; *Seely v. Hills*, 44 Wis. 484; *Moore v. Besse*, 30 Cal. 570; *Saxonia etc. Co. v. Cook*, 7 Col. 569, 575. The breach need not be set out in detail, where it can be averred generally: *Rowland v. Phalen*, 1 Bosw. 43. The breach must be averred in terms sufficiently wide to show that the contract was unperformed to the extent claimed. Thus where the only averment which was claimed to state a breach of a contract to deliver goods was the following, that "on the fourth day of December, 1864, at Pescadero aforesaid, the defendant refused to deliver said one thousand sacks of potatoes, or any part thereof, to plaintiff," the court said that was not an averment of a breach. The most that could be fairly claimed for it was, that it was an allegation that defendant refused to deliver on that day: *Moore v. Besse*, 30 Cal. 571. In an action on a contract to pay money, non-payment must be alleged; a statement that the whole amount is now due is not enough: *Roberts v. Treadwell*, 50 Cal. 520. The complaint in case of breach of contract for the sale of land must allege tender of conveyance: *Bohall v. Diller*, 41 Cal. 532. For a form of complaint for breach of a lessee's agreement to pay taxes on the land, see *Salisbury v. Shirley*, 53 Cal. 461.

*Waiver of tort, and action on implied contract.* — Plaintiff may waive a tort and sue on the implied contract created by the facts. Perhaps the better way of stating the proposition is, that plaintiff should allege the exact facts, and if they are such that an implied contract arises upon them, he is entitled to introduce evidence accordingly: *Fratt v. Clark*, 12 Cal. 90; *Sheldon v. Uncle Sam*, 18 Cal. 526; *Mills v. Barney*, 22 Cal. 246.

*Writings, how pleaded.* — A writing must be set forth in the pleading according to its tenor or legal effect, and if it is merely referred to or annexed as an exhibit, it will be stricken out as impertinent or irrelevant: *Oh Chow v. Hallett*, 2 Saw. 259.

*Consideration, averment of.* — In an action founded on a contract, where a consideration is not implied, it must be expressly averred: *Spear v. Downing*, 34 Barb. 522; *Burnett v. Bisco*, 4 Johns. 235. Where the consideration of the contract sued on consisted of acts to be performed by plaintiff as a condition precedent to his right of recovery, he must aver the consideration and its performance: *Moore v. Waddell*, 34 Cal. 147; *Becker v. Sweetzer*, 13 Minn. 427. And where the consideration was a past act, the plaintiff must aver its performance at

defendant's request: *Parker v. Crane*, 6 Wend. 647; *Spear v. Downing*, 34 Barb. 522. If the instrument declared on purports to be for "value received," and is recited in the complaint, a consideration is sufficiently alleged: *Prindle v. Caruthers*, 15 N. Y. 425; *Meyer v. Hilsher*, 47 N. Y. 265. Where a consideration must be pleaded, the complaint should disclose facts from which it will appear that there was a legal consideration to support the agreement sued on: *Winne v. Colorado Springs Co.*, 3 Col. 155; *Glasscock v. Glasscock*, 66 Mo. 627; *Dolcher v. Fry*, 37 Barb. 152; *Ross v. Sadgbeer*, 21 Wend. 166; *Lansing v. McKillip*, 3 Caines, 256; *Burnett v. Bisco*, 4 Johns. 235; *Bailey v. Freeman*, 4 Johns. 280; *Moore v. Waddell*, 34 Cal. 147.

*Statute of frauds, how pleaded.* — In declaring upon a contract, where the contract must have been in writing under the statute of frauds, it is not necessary in the declaration to show that fact, though it is said to be otherwise in a plea. The authorities in support of this doctrine are very numerous, among which may be cited *Miller v. Drake*, 1 Caines, 45; *Nelson v. Dubois*, 13 Johns. 175; *Elting v. Vanderlyn*, 4 Johns. 237; *Gibbs v. Nash*, 4 Barb. 449; *Martin v. McFadin*, 4 Litt. 240; *McDowell v. Delap*, 2 A. K. Marsh. 33. The rule in equity is the same as at law: See *Spurrier v. Fitzgerald*, 6 Ves. 548; *Cozine v. Graham*, 2 Paige, 177; *Cowles v. Bowne*, 10 Paige, 526; *Champlin v. Parish*, 11 Paige, 405. If the contract stated in the declaration or bill in equity is denied, it is incumbent on the plaintiff or complainant to prove by legal evidence its existence, and this can be done only by the production or proof of the execution and contents of the written agreement, or some note or memorandum thereof, executed according to the provision of the statute of frauds. It has been held that it is not necessary in a complaint for the contract to be stated in any manner differing from that which was sufficient at common law: *Wakefield v. Greenhood*, 29 Cal. 599; *Vassault v. Edwards*, 43 Cal. 463; *McDonald v. Mission View Homestead Association*, 51 Cal. 210, — recognizing the correctness of the rule that in support of the complaint it will be presumed that the contract declared on complied with the statute of frauds.

*Damages, averment of.* — General damages need not be expressly detailed or described in the complaint to authorize a recovery thereof, and by general damages in this regard are meant damages which are the necessary and natural result of the injury complained of: *Laraway v. Perkins*, 10 N. Y. 371; *Jutte v. Hughes*, 67 N. Y. 267; *Fitch v. Fitch*, 3 Jones & S. 302; *Squier v. Gould*, 14 Wend. 159; *Argotsinger v. Vines*, 82 N. Y. 308; *Phillips v. Hoyle*, 4 Gray, 568; *Camden etc. Oil Co. v. Schlens*, 59 Md. 31. But a gross amount as a consequence of the injury is all that need be stated: See *Harrington v. St. Paul etc. R. R. Co.*, 17 Minn. 215; *Eten v. Luyster*, 5 Jones & S. 486; *Louisville etc. R. R. Co. v. Smith*, 58 Ind. 575. Where, however, the damages, though the natural consequence of the act, are not necessarily the result of it, they should be specifically averred: *Low v. Archer*, 12 N. Y. 277; *Donnell v. Jones*, 13 Ala. 490; *Bogert v.*



*Burkhalter*, 2 Barb. 525; *Neary v. Bastwick*, 2 Hilt. 514; *Baldwin v. New York etc. Nav. Co.*, 4 Daly, 314; *Taylor v. Monroe*, 43 Conn. 36; *Nunan v. City of San Francisco*, 38 Cal. 689; *Rice v. Coolidge*, 121 Mass. 393; *Burrage v. Nelson*, 48 Miss. 237; *Brackett v. Edgerton*, 14 Minn. 174. The reason being to give the defendant an opportunity to procure proof to rebut such damages, or the extent or amount thereof: *Shane v. Hoffman*, 21 Mich. 151; *Solms v. Lutz*, 16 Abb. Pr. 311. Special damage need only be averred where the right of action depends upon the fact that damage has been sustained: *Brygott v. Boulger*, 2 Duer, 160; *Molony v. Dours*, 15 How. Pr. 261; *McTarish v. Carroll*, 13 Md. 429; *Roberts v. Hyde*, 15 La. Ann. 51. And such special damage must be fully and accurately stated: *Hacermeyer v. Fuller*, 60 How. Pr. 316. The right to sue for slander where the words are not actionable depends upon the fact that special damage has been sustained, and it must therefore, in such cases, be alleged: *Bassell v. Ellmore*, 65 Barb. 627; 48 N. Y. 561; *Anonymous*, 60 N. Y. 262; 19 Am. Rep. 174; *Like v. McKinstry*, 41 Barb. 186; *Kendall v. Stone*, 5 N. Y. 14; *Foulger v. Newcomb*, L. R. 2 Ex. 327. But special damage need not be alleged or proved in an action for slander upon words actionable *per se*: *Yeates v. Reed*, 4 Blackf. 463; 32 Am. Dec. 43; *Newbit v. Stutuck*, 35 Me. 315; 58 Am. Dec. 706. Other instances are where in trespass *de bonis asportatis* expenses of recovering possession are sought: *Gray v. Bullard*, 22 Minn. 278; or actions for recovery, in malicious prosecution, of costs and counsel fees for defending the prosecution: *Thompson v. Lumley*, 7 Daly, 74; recovery for loss of rents, in an action for injury to realty: *Squier v. Gould*, 14 Wend. 159; *Potter v. Fremont*, 47 Cal. 165; or for damages for detention after expiration of a tenant's term: *Rothschild v. Williamson*, 83 Ind. 387.

**Judgments, how pleaded.** — The pleader may merely state that a judgment has been duly made or given, without setting out the facts showing jurisdiction: *Chemung C. Bank v. Jackson*, 8 N. Y. 254; *Culligan v. Studebaker*, 67 Mo. 372. But compare *Dick v. Wilson*, 10 Or. 490. If the allegation is controverted, it is then the duty of the party pleading to establish the jurisdiction on the trial. An averment that the judgment was duly "rendered" has been held insufficient: *Young v. Wright*, 52 Cal. 407; nor is the allegation that it was "entered" sufficient: *Hunt v. Dutcher*, 13 How. Pr. 538. But this does not apply to foreign judgments; for it is held a complaint on such a judgment must either aver the fact of the existence of a general jurisdiction in the court where the judgment was rendered, or of a limited jurisdiction extending to the cause of action for which the judgment was recovered, and that the court had obtained jurisdiction of the person of the defendant: *McLaughlin v. Nichols*, 13 Abb. Pr. 244; or the transcript of the judgment must show the jurisdiction of the court on its face, and be set forth in the complaint: *Low v. Burrows*, 12 Cal. 181.

**Demand of relief or judgment.** — Though the plaintiff must demand the relief which he claims, this demand constitutes no part of the

issues to be tried: *Hall v. Hall*, 38 How. Pr. 97; *Culver v. Rogers*, 33 Ohio St. 546. He is not confined to one kind of relief, but may demand any relief which he supposes himself entitled to: *Hall v. Hall*, 38 How. Pr. 97. There is no rule of pleading which requires a party to aver the precise amount he claims; but he may recover an amount less than that which is stated in the complaint: *Meek v. McClure*, 49 Cal. 627. And a plaintiff should not be thrown out of court when an answer has been filed because he prayed for too much or too little or wrong relief: *Murtha v. Curley*, 90 N. Y. 372; 12 Abb. N. C. 12; 3 Civ. Proc. R. 1. Where the defendant answers, the court may give such relief as the parties are entitled to, whether demanded in the complaint or not: *Armitage v. Pulver*, 37 N. Y. 494; *Jones v. Butler*, 30 Barb. 641; 20 How. Pr. 189; *Marquat v. Marquat*, 12 N. Y. 336; *Hopkins v. Lane*, 2 Hun, 38; *Mackey v. Auer*, 8 Hun, 180. And see *Hamilton v. Miller*, 31 Ohio St. 87. But the plaintiff cannot, in the absence of an answer, have any relief not demanded in the complaint: *Simonsen v. Blake*, 20 How. Pr. 484; 12 Abb. Pr. 331; *Peck v. N. Y. etc. R. R. Co.*, 59 How. Pr. 419; 22 Hun, 129; 85 N. Y. 246; *Bartlett v. Holmes*, 12 Hun, 308; 75 N. Y. 528. But the relief actually granted must be consistent with the case made by the complaint: *Bradley v. Abbeich*, 40 N. Y. 504; *Graham v. Reed*, 57 N. Y. 681; *Cowenhoven v. City of Brooklyn*, 38 Barb. 9; *Brown v. Balde*, 2 Lans. 383; 57 N. Y. 286; *Short v. Barry*, 40 How. Pr. 210; 58 Barb. 177; *Boardman v. Davidson*, 7 Abb. Pr., N. S., 439; and no recovery can be had upon a cause of action which has not been pleaded, though issue was joined thereon and trial thereof had: *Fisk Pavement and Flagging Co. v. Evans*, 5 Jones & S. 482. And see *Bailey v. Ryder*, 10 N. Y. 363; *Saltus v. Genin*, 7 Abb. Pr. 193; 3 Bosw. 250; *Atwood v. Lynch*, 5 Jones & S. 5; *Southwick v. First Nat. Bank*, 84 N. Y. 420; *Sterling v. Hanson*, 1 Cal. 479; *Benedict v. Bray*, 2 Cal. 256. Where the judgment was for a larger sum than was claimed at the commencement of the action, but the complaint was amended by leave of the court before the commencement of the trial, and the amount claimed by the amended complaint was in excess of the sum for which judgment was given, it was held that the judgment was good: *Tully v. Harloe*, 35 Cal. 306. The relief demanded does not necessarily limit the plaintiff's remedy or fix the character of the action: *Corry v. Gaynor*, 21 Ohio St. 280; *Rindge v. Baker*, 57 N. Y. 209; 15 Am. Rep. 475; *Williams v. Stote*, 70 N. Y. 601; *Reed v. Reed*, 25 Ohio St. 422. A complaint is not objectionable because it prays for alternative relief: *Young v. Edwards*, 11 How. Pr. 201; *Linden v. Hepburn*, 5 How. Pr. 188; 3 Sand. 668. And see *Rogers v. Brooks*, 30 Ark. 612; *Riddle v. Roll*, 24 Ohio St. 572. But it has been held that a demand for relief in the alternative is improper: *Durrant v. Gardner*, 10 How. Pr. 94; 10 Abb. Pr. 445.

The general principles of compensatory and punitive damages are defined by Judge Deady in the charge to the jury in *Boyle v. Case*, 1 West Coast Rep. 327 (U. S. Dist. Ct. Or.).



*Demurrer of defendant, grounds of.*

§ 189. The defendant may demur to the complaint when it shall appear upon the face thereof either,—

1. That the court has no jurisdiction of the person of the defendant or of the subject-matter of the action;
2. That the plaintiff has no legal capacity to sue; or
3. That there is another action pending between the same parties for the same cause; or
4. That there is a defect of parties, plaintiff or defendant; or
5. That several causes of action have been improperly united;
6. That the complaint does not state facts sufficient to constitute a cause of action;
7. That the action has not been commenced within the time limited by law. [*February 26, 1891, § 2.*]

As to misjoinder of causes, see § 214.

**Demurrer, generally.**—Where issues are squarely presented in the complaint, answer, and reply, a demurrer to the reply should be overruled: *Davis v. Oldakers*, 3 Wash. 593. Ordering a pleading amended, which has been demurred to, in effect sustains the demurrer: 1 Wash. 88. Where the demurrer is sustained, an amendment should be allowed, if the pleading is amendable. The right to demur is lost by answering; and the grounds of a demurrer must be distinctly stated: *Renton v. St. Louis*, 1 Wash. 215. If it appears on the face of complaint that the statute of limitations has run against the claim pleaded, advantage may be taken by demurrer: *Wilt v. Buchtel*, 2 Wash. 417. So as to complaint in equity asking issuance of injunction when for the same reason it does not disclose a good cause of action: *Wingard v. Jameson*, 2 Wash. 402. An equitable action for the return of a conveyance duly executed and placed in escrow, before final proof on lands conveyed, and which defendant had wrongfully obtained and had recorded, is not demurrable, as plaintiff had a special interest in the escrow, and an action at law would not afford an adequate remedy: *Danforth's Adm'r v. Paxton*, 23 Pac. Rep. 805.

No pleading is demurrable unless it is subject to one or more of the objections specifically pointed out in the statute as grounds of demurrer: *Haire v. Baker*, 5 N. Y. 357; *Marie v. Garrison*, 83 N. Y. 14. And see *Getty v. Hudson River R. R. Co.*, 8 How. Pr. 177; *Dunn v. Barnes*, 73 N. C. 273; *Hentsch v. Porter*, 10 Cal. 555. It is not the proper remedy to obtain a change of the place of trial: *Watts v. White*, 31 Cal. 321. Nor is the prayer of the complaint a proper subject of demurrer: *Rollins v. Forbes*, 10 Cal. 299; *People v. Morrill*, 26 Cal. 336; *Poett v. Stearns*, 28 Cal. 228; *Althof v. Conheim*, 38 Cal. 234; *Walker v. Spencer*, 45 N. Y. Sup. Ct. 71; *Garner v. Harmony Mills*, 6 Abb. N. C. 212. The office of the demurrer is not to state facts, but to raise an issue of law upon the facts stated in the complaint: *Cook v. De la Guerra*, 24 Cal. 239; *Freeman v. Frank*, 10 Abb. Pr. 370; *Bradley v. Rodelsperger*, 17

S. C. 9; *Brennan v. Ford*, 46 Cal. 7; *Brooks v. Gibbons*, 4 Paige, 374; *Wilson v. Mayor etc.*, 15 How. Pr. 502. The demurrer admits as true, for the purposes of the demurrer, such facts in the complaint as are issuable and well pleaded: *Tuobumne Water Co. v. Chapman*, 8 Cal. 397; *Branham v. Mayor of San José*, 24 Cal. 602; *Lery v. Curtis*, 1 Abb. N. C. 189; *Standish v. Dow*, 21 Iowa, 363; *Griggs v. City of St. Paul*, 9 Minn. 246; *Blake v. Griswold*, 68 N. Y. 294; *Hance v. Hair*, 25 Ohio St. 349; *Van Doren v. Tjader*, 1 Nev. 380; *Freeman v. Hart*, 61 Iowa, 525; and only such facts: *Id.* It does not admit conclusions of law, although stated in the complaint: *Id.*; *Morrison v. Fishel*, 64 Ind. 177; *Moss v. Witness Printing Co.*, 64 Ind. 125; *Farrar v. Triplett*, 7 Neb. 237; *Frank v. Bush*, 63 How. Pr. 282; 2 Civ. Proc. R. 250; *Musgrave v. Webster*, 53 How. Pr. 365; *Adams v. West Shore etc. R. R. Co.*, 65 How. Pr. 329. Compare *Robertson v. Bennett*, 1 Abb. N. C. 476; *People v. Whitwell*, 62 How. Pr. 383; nor irrelevant facts: *Hull v. Bartlett*, 9 Barb. 297.

The demurrer does not operate as an absolute admission of facts, but merely operates to admit the facts alleged in the pleading, for the purpose of determining the questions of law raised: *Rice v. Rice*, 13 Or. 337.

A demurrer is confined to the facts which appear upon the face of the complaint or petition: *Wilson v. Mayor etc.*, 15 How. Pr. 500; 6 Abb. Pr. 6; *Simpson v. Loft*, 8 How. Pr. 234; *Mayberry v. Kelly*, 1 Kan. 116; *Coe v. Beckwith*, 31 Barb. 339; 19 How. Pr. 398; *Aurora v. Cobb*, 21 Ind. 492; *Davy v. Betts*, 23 How. Pr. 396; *Collins v. Davis*, 57 Iowa, 256; and an objection to facts which do not so appear should be taken by answer: *Powers v. Ames*, 9 Minn. 178; *Getty v. Hudson River R. R. Co.*, 8 How. Pr. 177; *Irring Nat. Bank v. Corbett*, 10 Abb. N. C. 85; *Gillam v. Sigman*, 28 Cal. 637; *Moore v. Hobbs*, 77 N. C. 65.

Special demurrers are not allowed, but if allegations are open to objection for uncertainty or indefiniteness, the remedy is by motion to make the same more definite and certain: *Neis v. Yocum*, 9 Saw. 25. Thus, when time is not an essential element of a cause of action, a

demurrer will not lie to a complaint for want of a date to a material fact alleged therein, but the remedy is a motion to make more definite and certain: *Conroy v. Oregon Const. Co.*, 10 Saw. 630.

Parol demurrers are not recognized in Oregon, where the statute is similar to ours: *English v. Savage*, 5 Or. 518.

A demurrer cannot be stricken out on motion: *Cohen v. Ottenheimer*, 13 Or. 220.

Pleading over after demurrer overruled amounts to an abandonment of the demurrer: *Wells v. Applegate*, 12 Or. 208; *Richards v. Fanning*, 5 Or. 356; *Irvine v. Forbes*, 11 Barb. 557; *Greenwood v. Brink*, 11 Hun, 227; *Harper v. Leal*, 10 How. Pr. 276; *Hayes v. Kedzie*, 11 Hun, 577; *Pottinger v. Garrison*, 3 Neb. 221; *Union Ins. Co. v. McGlookey*, 33 Ohio St. 555; *Carson v. Osborn*, 10 B. Mon. 156; *Jones v. Terry*, 43 Ark. 230; and a waiver of error in overruling it: *Richards v. Fanning*, 5 Or. 356; *Winter v. Norton*, 1 Or. 42; or in sustaining it, where one pleads over by filing an amended complaint or answer, as the case may be: *Huffman v. McDaniel*, 1 Or. 261; and it ceases to be part of the record: *Wells v. Applegate*, 12 Or. 208; *Brown v. Saratoga R. R. Co.*, 18 N. Y. 495. And see *Wheelock v. Lee*, 74 N. Y. 495; 5 Abb. N. C. 72; *Overland Dispatch Co. v. Wetles*, 1 N. Mex. 528.

**Want of jurisdiction.** — A demurrer for want of jurisdiction by a court of general jurisdiction lies only where the want thereof affirmatively appears from the face of the pleading: *Doll v. Feller*, 16 Cal. 433; *Johnson v. Adams Tobacco Co.*, 14 Hun, 89; *Crowley v. Royal Exchange Shipping Co.*, 2 Civ. Proc. R. 174; *Wilson v. Mayor etc.*, 15 How. Pr. 500; 6 Abb. Pr. 6. "That the court has no jurisdiction of the person" means that the defendant is not subject to the jurisdiction of the court, not that he has not been properly served with original process: *Nones v. Hope Mutual Ins. Co.*, 5 How. Pr. 96; 8 Barb. 541; *Ogdenburgh etc. R. R. Co. v. Vermont etc. R. R. Co.*, 16 Abb. Pr., N. S., 249. If the suit has been irregularly commenced, the defendant's remedy is by motion against the irregularity: *Nones v. Hope Mutual Ins. Co.*, 5 How. Pr. 96; 8 Barb. 541. A demurrer "that the court has no jurisdiction, either of the persons of the defendants or of the subject of the action," is sufficiently explicit: *Kent v. Snyder*, 30 Cal. 666; *Ellisen v. Halleck*, 6 Cal. 386; and so of a demurrer "that the complaint does not state facts sufficient to constitute a cause of action: *Ellisen v. Halleck*, 6 Cal. 386. The objection to the jurisdiction is not waived, even if not taken advantage of by demurrer or answer, and the objection may be afterwards raised at any time, and even on appeal: *Hotchkiss v. Eting*, 36 Barb. 58.

**Want of capacity to sue.** — When the defect of want of capacity to sue appears on the face of the complaint, the objection should be taken by demurrer, and not by answer: *Mathews v. Stietz*, 5 Civ. Proc. R. 235; *Hobart v. Frost*, 5 Duer, 672; *Myers v. Machaulo*, 6 Duer, 678; 14 How. Pr. 149; *Haskins v. Alcott*, 13 Ohio St. 210. It is not a good ground of demurrer that it does not appear in the complaint that the plaintiff has the legal capacity to sue. The omission must be taken by an-

swer: *Phoenix Bank v. Donnell*, 40 N. Y. 410. And see *District No. 110 v. Feck*, 60 Cal. 403, where the objection was raised on demurrer that the complaint did not show plaintiff to have been duly created a land district, the objection in this form being overruled. See also *Phoenix Bank v. Donnell*, 41 Barb. 571; 40 N. Y. 410; *Doll v. Feller*, 16 Cal. 432; *Minneapolis Harvester Works v. Libby*, 24 Minn. 327; *State v. Torinna*, 22 Minn. 272; *American Button Hole Co. v. Moore*, 2 Dakota, 280, 290. If actual want of capacity does not appear, the objection must be taken by answer: *Barclay v. Quicksilver Min. Co.*, 6 Lans. 25; *Swamp Dist. v. Feck*, 60 Cal. 403. A demurrer on this ground must relate exclusively to some legal disability of the plaintiff, such as infancy, idiocy, coverture, or the like, and not to the absence of facts sufficient to constitute a cause of action: *De Bolt v. Carter*, 31 Ind. 355; *People v. Crooks*, 53 N. Y. 648; *Winfield Town Co. v. Maris*, 11 Kan. 128; *Dale v. Thomas*, 67 Ind. 570; *Farrell v. Cook*, 16 Neb. 483. And see *Bartholomew v. Lyon*, 67 Barb. 86; *Grantman v. Thrall*, 44 Barb. 173; *Robbins v. Wells*, 26 How. Pr. 15; 18 Abb. Pr. 191; *Jones v. Steele*, 36 Mo. 324; *McNair v. Toler*, 21 Minn. 175. That it applies to all cases where the plaintiff, though having an interest in the subject of the suit and the relief demanded, does not show a right to appear in court and demand such relief in his own name, see *Bulkley v. Big Muddy Iron Co.*, 77 Mo. 105. The infancy of the plaintiff is a want of capacity to sue: *Jones v. Steele*, 36 Mo. 324; *Irvine v. Irvine*, 5 Minn. 61. In pleading it, the demurrant ought not to say, for example, that plaintiff has no legally appointed guardian, but the demurrer ought to go to the sufficiency of the plaintiff's allegation of appointment: *Morrell v. Morgan*, 65 Cal. 575. If the fact appear on the face of the complaint that the plaintiff, suing as a corporation, is not such in fact, this is proper ground of demurrer: *Phoenix Bank v. Donnell*, 41 Barb. 571; 40 N. Y. 410. Compare *Rauh v. Board of Commissioners*, 66 How. Pr. 368; *Tolmie v. Dean*, 1 Wash. 46; *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 648; but where the complaint on its face does not show such fact, the objection must be taken by answer: *Phoenix Bank v. Donnell*, 40 N. Y. 410. The objection is waived if not taken either by demurrer or answer: *Hastings v. McKinley*, 1 E. D. Smith, 273; *Tapley v. Tapley*, 10 Minn. 448; *Palmer v. Davis*, 28 N. Y. 242; *Van Amringe v. Barnett*, 8 Bosw. 357; *Hoop v. Plummer*, 14 Ohio St. 448; *Jones v. Steele*, 36 Mo. 324; *Pettigrew v. Washington Co.*, 43 Ark. 33.

**Another action pending.** — If the objection does not appear on the face of the complaint, it must be taken by answer: *Hornfager v. Hornfager*, 1 Code R., N. S., 412; *Burrows v. Miller*, 5 How. Pr. 51; but unless taken by demurrer or answer, it is waived: *Wright v. Masseras*, 56 Barb. 321; *Bishop v. Bishop*, 7 Rob. (N. Y.) 198; *Hollister v. Stewart*, 111 N. Y. 644. It cannot be raised by a motion to stay the second suit until the determination of the first: *Bishop v. Bishop*, 7 Rob. (N. Y.) 198; nor by a motion to dismiss the later one: *Morton v. Sweltser*, 12 Allen, 134.

The courts usually entertain the objection upon the ground that the subsequent action is



unnecessary, and therefore vexatious: *State v. Dougherty*, 45 Mo. 294. In *Gransby v. Ray*, 52 N. H. 513, it is held, however, that the pendency of a prior action will be cause for abatement, without inquiry into the facts showing actual vexation or oppression. But it is said that the modern practice is not to infer this, but to inquire into the circumstances, and to determine as a matter of fact whether the second suit is vexatious or unnecessary: *State v. Dougherty*, 45 Mo. 294; *Hill v. Dunlop*, 15 Vt. 645; *Downer v. Garland*, 21 Vt. 362; *Ballou v. Ballou*, 26 Vt. 673.

In pleading the objection, facts should be set out which will show that the first action operates to abate the second: *Miller v. Rigney*, 16 Ind. 327. It is held in some cases that the first suit must be still pending when the plea is filed, and that if it be dismissed before the plea is filed the second will not abate. This is the rule in Oregon: *Hopwood v. Patterson*, 2 Or. 50; and in a number of the states: *Adams v. Gardner*, 13 B. Mon. 197; *Leavitt v. Mowe*, 54 Md. 613; *Clifford v. Cony*, 1 Mass. 495; *Peto v. Toare*, 12 Mich. 16; *Hixon v. Schooley*, 26 N. J. L. 461; *Marston v. Lawrence*, 1 Johns. Cas. 397; *Toland v. Tichenor*, 3 Rawle, 320; *Archer v. Ward*, 9 Gratt. 622; *Boland v. Benson*, 50 Wis. 225; but the contrary (that the prior action need not be still pending) has been held in probably as many other states. See among others the following cases: *Lee v. Hefley*, 21 Ind. 98; *Parker v. Colcord*, 2 N. H. 36; *Hope v. Alley*, 11 Tex. 259; *Hadden v. St. Louis etc. R. R. Co.*, 57 How. Pr. 390.

Where two suits are commenced at identically the same time, between the same parties, and for the same cause and relief, it is said that the plaintiff thereby abuses his process and right, and each suit will abate the other, and that no subsequent discontinuance of either will make the other good: *Beach v. Norton*, 8 Conn. 71; *Wales v. Jones*, 1 Mich. 254; *Davis v. Dunklee*, 9 N. H. 545; *Haight v. Holley*, 3 Wend. 258; but the party may, if he can, to defeat the plea, show that one of the actions was really commenced at a later day: *Davis v. Dunklee*, 9 N. H. 545. In *Morton v. Webb*, 7 Vt. 123, it was held, where both actions were commenced at the same time, that if the process was served at different times the action in which the process was first served would abate the other. The fact that an action has been subsequently commenced is not ground for abatement of the prior suit, but the plea can only be set up in the action last commenced: *Renner v. Marshall*, 1 Wheat. 215; *Rizer v. Gillpatrick*, 16 Kan. 564; *Buſum v. Tilton*, 17 Pick. 510; *Webster v. Randall*, 19 Pick. 13; *Ratzer v. Ratzer*, 2 Abb. N. C. 461; *Nicoll v. Mason*, 21 Wend. 339; *Wood v. Lake*, 13 Wis. 84.

The actions must be for the same cause and relief. Concurrent or cumulative remedies do not conflict so as to be pleadable in abatement: *People v. Wayne Circuit*, 26 Mich. 406. An action upon a joint liability and another on a several liability in respect to the same debt do not interfere; as in *Wise v. Prowse*, 9 Price, 393, an action in which two drawers of a negotiable instrument were sued as such, and one of them was afterwards sued as its acceptor; or in *Blackburn v. Watson*, 85 Pa. St.

241, where an action on a joint indorsement was pleaded in abatement of an action on a several liability involving no responsibility as a joint debtor, though on the same instrument, and it was held not to be well pleaded. Proceedings *in rem* and *in personam* do not necessarily conflict with each other, until satisfaction is obtained in one, and therefore cannot be pleaded in abatement of each other; and it was so held in *Delahay v. Clement*, 4 Ill. 201, and *Parmelee v. Tennessee R. R. Co.*, 13 Lea, 600, where a mechanic's lien proceeding was pleaded in abatement of an action for labor and material; *Katorama*, 10 Wall. 204, where an admiralty lien was pleaded in abatement of a common-law action for repairs and supplies to a vessel; *Harmer v. Bell*, 22 Eng. L. & Eq. 62, an action for a collision, where an action for damages was held not to abate a proceeding *in rem* against the steamer; and likewise in *Toby v. Brown*, 10 Ark. 308; *Nelson v. Couch*, 15 Com. B., N. S., 99. A proceeding by bail process and one by attachment cannot be prosecuted at the same time: *Clark v. Tuggle*, 18 Ga. 604. Pendency of a suit against a warehouseman for insurance money received by him for goods lost by fire will not bar an action against a common carrier for the value of the same property that was consumed by fire: *Clark v. Wilder*, 25 Pa. St. 314. Pendency of statutory arbitration is properly pleaded to a subsequent action between the parties to recover a demand included in the submission: *Fahy v. Brannagan*, 56 Me. 42. Pendency of ejectment will not bar an action of covenant for rent by the devisees: *Streaper v. Fisher*, 1 Rawle, 155; 18 Am. Dec. 604; nor will an action to recover rents and profits, by a purchaser at sheriff's sale, affect his action in ejectment for possession: *Henry v. Everts*, 30 Cal. 425; nor in trespass to try title can an action for possession of the property be pleaded in abatement: *Hall v. Wallace*, 25 Ala. 438.

The fact that proceedings by forcible detainer for possession are pending cannot be set up in abatement of a motion for a writ of possession: *Kessinger v. Whittaker*, 82 Ill. 22. In forcible detainer, it is a good defense that another action between the same parties for the same cause is pending on appeal: *Bond v. White*, 24 Kan. 45. In an action by the master of a vessel for wages, an action of debt will not abate a proceeding against the vessel directly: *The Bengal*, Swab. 468; *People v. Wayne Circuit*, 27 Mich. 406. A proceeding in bankruptcy will not warrant staying a common-law action for debt: *Carrington v. Hogarth*, 7 Man. & G. 1013. In *Rousseau v. Estate of Bourgeois*, 28 La. Ann. 186, it is held that the plea of *lis pendens* is not available to executory proceedings. So it is held that a proceeding to forfeit shares will not abate an action for calls on stock: *Great Northern R'y Co. v. Kennedy*, 4 Ex. 417; *Inglis v. Great Northern R'y Co.*, 16 Eng. L. & Eq. 55; a proceeding on a judge's order for payment will not warrant staying a common-law action for debt: *Wade v. Simeon*, 1 Com. B. 610. It has been held that the following classes of actions cannot be maintained at the same time, and that the former is properly pleaded in abatement of the latter in each instance, viz.: An action to foreclose a mortgage to which a subsequent mortgagee is made



a party, and a subsequent suit of foreclosure by such mortgagee on his own behalf: *Rowley v. Williams*, 5 Wis. 151. An action for damages by nuisances, and a statutory proceeding to abate such nuisances, in which no damages were prayed: *Gould v. Langton*, 43 Pa. St. 365. *Assumpsit*, and an action in which plaintiff's claims by the prior action in *assumpsit* might be set off: *Schenck v. Schenck*, 10 N. J. L. 276; *New England Screw Co. v. Bliven*, 3 Blatchf. 240. A suit for the restoration of property and a suit for damages for the wrongful detention: *Draper v. Stouvenal*, 38 N. Y. 319. But the pendency of a suit to foreclose a mortgage for non-payment of one annual installment on the note secured thereby cannot be pleaded in abatement to a subsequent suit to foreclose the same mortgage for the second installment: *Jacobs v. Lewis*, 47 Mo. 344.

The parties must be the same in each suit, and the fact that the plaintiffs in the two suits are different is presumptively an objection to the plea: *Smith v. Blatchford*, 52 Am. Dec. 504. So if the plea does not aver that the defendant was a party to the first proceeding, it is insufficient: *Brannigan v. Rose*, 3 Gilm. 123; *Weaver v. Conger*, 10 Cal. 233; *Primm v. Gray*, 10 Cal. 522; *Gould v. Smith*, 30 Conn. 88. Where only one of two defendants pleads the pendency of a prior action against him, the plea is bad: *De Forest v. Jewett*, 1 Hall, 137. To an action against one obligor, the pendency of an action against all the obligors on the same instrument has been held to be well pleaded: *Graves v. Dale*, 1 T. B. Mon. 191. The defendants in one action cannot plead another action pending against themselves and others for the recovery of land: *Atkinson v. State Bank*, 5 Blackf. 84. Where an action for personal injuries has abated by death, it cannot be pleaded in abatement to an action by plaintiff's personal representatives for damages for his death: *Indianapolis R. R. Co. v. Stout*, 53 Ind. 143. Where an administrator sued as the representative of the wrong party, and consequently was compelled to bring a new suit, the pendency of the former would not abate the latter: *Cornelius v. Vanarsdallen*, 3 Pa. St. 434. The pendency of an action by a firm creditor against a partner and the administrator of his deceased partner may properly be pleaded in defense to an action against the survivor alone as such. *Weil v. Guerin*, 42 Ohio St. 299.

The pendency of a prior suit in a state court is not a bar to a suit in the courts of the United States between the same parties for the same cause of action: *Stanton v. Embrey*, 93 U. S. 548, and numerous decisions there relied upon; *Lynch v. Hartford F. I. Co.*, 17 Fed. Rep. 627; and see the note to *West v. McConnell*, 25 Am. Dec. 135 et seq.

See a full note on this topic to *Smith v. Lathrop*, 84 Am. Dec. 453 et seq.

**Defect of parties.** — The demurrer for this cause will lie when from the face of the complaint it appears that other parties are necessary to a complete determination of the controversy: *Cohen v. Ottenheimer*, 13 Or. 220. Defect is the same as non-joinder; it means too few, not too many, parties: *Bennett v. Preston*, 17 Ind. 291. A defect of parties plaintiff or defendant appearing on the face of the pleading

must be taken by demurrer or will be deemed waived: *Andrews v. Mokelumne Hill Co.*, 7 Cal. 330; *Warner v. Wilson*, 4 Cal. 313; *Beard v. Knox*, 5 Cal. 257; *Tissot v. Throckmorton*, 6 Cal. 473; *Dunn v. Tozer*, 10 Cal. 167; *Mott v. Smith*, 16 Cal. 557; *Bucroughs v. Lott*, 19 Cal. 125; *Barber v. Reynolds*, 33 Cal. 497; *Tennant v. Pfister*, 45 Cal. 270; *Hess v. Nellis*, 65 Barb. 440; *Davidson v. Elms*, 67 N. C. 228; *Donnan v. Intelligencer etc. Co.*, 70 Mo. 168; *Waits v. McClure*, 10 Bush, 763; *Mott v. Ruenbuhl*, 1 Tex. Ct. App. (Civ. Cas.), § 599; *Walker v. Deaver*, 79 Mo. 664; *Zabriskie v. Smith*, 13 N. Y. 322; *Ingraham v. Baldwin*, 12 Barb. 18; *Depuy v. Strong*, 4 Abb. Pr., N. S., 340; 37 N. Y. 372; *Macwell v. Pratt*, 24 Hun, 448. If the defect does not appear on the face of the complaint, to be availed of it must be taken by answer: *Parisich v. Bean*, 48 Hun, 364; *Merritt v. Walsh*, 32 N. Y. 685; *Umsted v. Buskirk*, 17 Ohio St. 113; but the objection cannot be taken by answer, except where evidence is necessary to make the defect apparent: *McCormick v. Blossom*, 40 Iowa, 256; *Ryan v. Mullinix*, 45 Iowa, 631; *Dewey v. Moyer*, 9 Hun, 473; 72 N. Y. 70; *Zimmerman v. Schoenfeldt*, 3 Hun, 692; *Lowry v. Harris*, 12 Minn. 255. If the objection is not taken by either demurrer or answer, it is waived: *Blakeley v. Le Due*, 22 Minn. 476; *Lowry v. Harris*, 12 Minn. 255; *Rowe v. Baccigaluppi*, 21 Cal. 633; *Trenor v. Central Pacific R. R.*, 50 Cal. 222; *Lee v. Wilkes*, 27 How. Pr. 336; 19 Abb. Pr. 355; *Conklin v. Barton*, 43 Barb. 435; *Hoop v. Plummer*, 14 Ohio St. 448; *Albro v. Lawson*, 17 B. Mon. 642; *Bouton v. Orr*, 51 Iowa, 475; *Dreutzer v. Lawrence*, 58 Wis. 594; *Spencer v. Van Cott*, 2 Utah, 342; *Adger v. Pringle*, 11 S. C. 543; *Baldwin v. Caulfield*, 26 Minn. 58; *Rutenburg v. Main*, 47 Cal. 214; *Featherson v. Norris*, 7 S. C. 472; *Tarbox v. Gorman*, 31 Minn. 62. The objection cannot be raised on a demurrer that the complaint does not state sufficient facts: *Tennant v. Pfister*, 51 Cal. 511; *Umsted v. Buskirk*, 17 Ohio St. 113.

That the demurrer should specify in what the misjoinder or defects consists, see *Irvine v. Wood*, 7 Col. 477; and it is insufficient if it merely follows the words of the statute: *Skinner v. Steward*, 13 Abb. Pr. 442; *Baker v. Drury*, 29 Wis. 580; *Dewey v. State*, 91 Ind. 182. If the court can make a judgment or decree determining the controversy without prejudice to the rights of parties not joined, a demurrer for defect of parties will not be sustained: *Wallace v. Eaton*, 5 How. Pr. 99; otherwise the demurrer is well taken: *Wallace v. Eaton*, 5 How. Pr. 99; *Snyder v. Voorhes*, 7 Col. 296. It must appear that the party demurring is prejudiced by the non-joinder: *Stockwell v. Wager*, 30 How. Pr. 271; or that he has an interest in having the omitted parties joined: *Wooster v. Chamberlain*, 28 Barb. 602; *Newbould v. Warren*, 14 Abb. Pr. 80; *Littell v. Sayre*, 7 Hun, 458; *Moore v. Hegeman*, 6 Hun, 290. But a complaint is not demurrable for defect of parties where it avers that the defendants are certain persons named, and many others whose names are not known and whom it is impracticable to bring before the court; as, for instance, in the case of stockholders: *Bronson v. Insurance Co.*, 85 N. C. 411; *Hammond v. Hudson River etc. Co.*, 20 Barb. 378. And see

*Long v. Bank*, 81 N. C. 41; *Hughes v. Whitaker*, 84 N. C. 640.

**Misjoinder of parties.** — By a misjoinder of parties is meant an excess of parties: *Neil v. Trustees*, 31 Ohio St. 15. In many code states misjoinder of parties is not a ground of demurrer: Pomeroy on Remedies, sec. 209. It is held under statutes similar to this that misjoinder of parties is not a ground of demurrer, and that defect of parties only is demurrable: *Boldt v. Budwig*, 19 Neb. 713; *Darcy v. Dakota Co.*, 19 Neb. 721; *Nevil v. Clifford*, 55 Wis. 161. If it appears on the face of the complaint that no cause of action is stated against parties misjoined, they of course may take the objection by demurrer on the ground that the complaint does not state a cause of action against them: *Lewis v. Williams*, 3 Minn. 151; and so a demurrer has been held to lie on this same ground for misjoining plaintiffs whom the face of the complaint shows have no cause of action against the defendants: *Richtmeyer v. Richtmeyer*, 50 Barb. 55. The complaint in an action to recover for a joint trespass against individuals who are husband and wife, which does not allege their marital relation, is not demurrable for a failure to state why she is joined as a defendant with him: *Waters v. Dumas*, 75 Cal. 563. Where it does not appear that any cause of action is stated, the objection may probably be taken by motion to strike out parties or by answer.

But see the opinions expressed on these propositions in Pomeroy on Remedies, secs. 209 et seq.

**Misjoinder of causes of action.** — That the defect of misjoinder of causes of action is waived unless taken advantage of by demurrer is the general rule, see *Blossom v. Barrett*, 37 N. Y. 434; *Finley v. Hayes*, 81 N. C. 368; *McMillan v. Edwards*, 75 N. C. 81; *Field v. Hurst*, 9 S. C. 277; *Simpson v. Greely*, 8 Kan. 586; *Haverstick v. Trudel*, 51 Cal. 431; *Fuhn v. Weber*, 38 Cal. 636; *Learned v. Castle*, 3 West Coast Rep. 154 (Sup. Ct. Cal.); *Anderson v. Hill*, 53 Barb. 238; *Sherman v. Inman Steamship Co.*, 26 Hun, 107; *Crawfordsville v. Bond*, 96 Ind. 236; but there are other cases which hold that the objection may also be taken by answer: *James v. Wilder*, 25 Minn. 305; *Cloon v. City Ins. Co.*, 1 Handy, 32; and it is certainly waived if not raised either by demurrer or answer: *McCarthy v. Garroghty*, 10 Ohio St. 438; *Turner v. Althaus*, 6 Neb. 54; *Berry v. Carter*, 19 Kan. 135; *White v. Delschneider*, 1 Or. 254; *Jones v. Hughes*, 16 Wis. 683; *Marius v. Bicknell*, 10 Cal. 217. The object of allowing a demurrer for this ground is to compel the plaintiff to elect upon which of two or more improperly united causes of action he will proceed: *Sullivan v. N. Y. etc. R. R. Co.*, 1 Civ. Proc. 285. The complaint is demurrable on this ground where only one cause of action is stated, but several forms of relief are asked, all obtainable under the facts stated: *Lattin v. McCarthy*, 41 N. Y. 107. If several causes of action are improperly joined, though set out in one count in the complaint and claimed to be one cause of action, the demurrer properly lies: *Wiles v. Suydam*, 64 N. Y. 173; *Goldberg v. Utley*, 60 N. Y. 427; *Wright v. Conner*, 34 Iowa, 240; *Higgins v. Crichton*, 63 How. Pr. 354; 2 Civ. Proc. R. 317. So the converse of

the proposition is true, and if one cause of action be stated in several counts the demurrer on this ground will not be successful: *Hillman v. Hillman*, 14 How. Pr. 456; *Ward v. Ward*, 5 Abb. Pr., N. S., 145.

The demurrer should specify what causes are alleged to be improperly united: *Haverstick v. Trudel*, 51 Cal. 431. If the demurrer is sustained, the plaintiff must file an amended complaint: *Cohen v. Ottenheimer*, 13 Or. 220.

**Facts not sufficient to constitute cause of action.** — The complaint need state only sufficient facts to constitute a cause of action *prima facie*: *Campbell v. Taylor*, 3 Utah, 325. The criterion is, that the demurrer is proper and will be sustained whenever the complaint does not state a case upon which, if uncontradicted, the plaintiff would have a right to recover: *Houghtaling v. Hills*, 58 Iowa, 287; *Piereson v. McCurdy*, 61 How. Pr. 134; *Fleischmann Bennett*, 23 Hun, 200; 87 N. Y. 231; *People v. Mayor etc.*, 28 Barb. 240; 17 How. Pr. 56; 8 Abb. Pr. 7; *Spear v. Downing*, 34 Barb. 522; 12 Abb. Pr. 437; 22 How. Pr. 30; *Van Liew v. Johnson*, 6 Thomp. & C. 648; *White v. Brown*, 14 Abb. Pr. 282; *Johnston Harvester Co. v. Bartley*, 94 Ind. 131; *Tolmie v. Dean*, 2 Wash. 46; *Leak v. Commissioners etc.*, 64 N. C. 132. If any good cause of action appear, though it be not the one intended, the cause will be retained: *Mackey v. Auer*, 8 Hun, 180; *Witherhead v. Allen*, 3 Keyes, 562; *Newberry v. Garland*, 31 Barb. 121; *People v. Mayor etc.*, 28 Barb. 240; 17 How. Pr. 56; *Roe v. Lincoln County*, 56 Wis. 66; *Williams v. Sexton*, 19 Wis. 42; *Williams v. Warnell*, 28 Tex. 612; *Elgar v. Galveston*, 46 Tex. 421. Where a complaint upon a bond shows it to be the obligation of a married woman, it is essential to allege that it was given for some purpose which would make it binding upon her; it is *prima facie* a nullity, and without such averments the complaint does not state a cause of action: *Broome v. Taylor*, 76 N. Y. 564.

Demurrer is the proper mode of raising the objection that a cause of action is not stated, and a motion to strike out is not proper: *Cline v. Cline*, 3 Or. 355. So the demurrer must be directed to the averments of a pleading taken together; they cannot be separated, and thus considered demurred to: *Herfort v. Cramer*, 7 Col. 483. The objection may properly be stated in the language of the statute: *Kent v. Snyder*, 30 Cal. 366; *Howland v. Kenosha Co.*, 19 Wis. 247; *Monette v. Cratts*, 7 Minn. 234; but a demurrer on the ground that the pleading does not state a good cause of "complaint" is not sufficient: *Pine Co. Mfg. Co. v. Huber Mfg. Co.*, 83 Ind. 121. If the demurrer specifies the points of insufficiency, the demurrant cannot, on the argument, rely on any other grounds: *Lopez v. Cent. Arizona M. Co.*, 1 Ariz. 464.

The demurrer on this ground does not extend to the capacity of parties to sue: *Irring Nat. Bank v. Corbett*, 10 Abb. N. C. 85; *Hobart v. Frost*, 5 Duer, 671; or defect of parties: *Grain v. Abdrich*, 38 Cal. 514; *Burhop v. Milwaukee*, 18 Wis. 431; nor to formal defects: *State Bank v. Shaw*, 5 Hun, 114; *Paola Town Co. v. Krutz*, 22 Kan. 729; nor to the prayer for judgment or relief: *Tewksbury v. Schuenberg*, 41 Wis. 584; *Colstrum v. Minneapolis etc. R. R. Co.*, 31



Minn. 367; *Hiatt v. Parker*, 29 Kan. 765, 771; *Garner v. Thorn*, 56 How. Pr. 452; *Garner v. Harmony Mills*, 6 Abb. N. C. 212; *Bennett v. Preston*, 17 Ind. 291.

**Statute of limitations.** — To sustain the demurrer for this cause, the fact that the action was not commenced within the proper time must appear from the face of the complaint: *Weiss v. Bethel*, 8 Or. 527. In an action

for personal injuries, a complaint alleging that the injury occurred "on or about" a certain day is not demurrable under subdivision 7, for it does not show on its face whether or not the action is barred, but the objection must be taken, if at all, by answer, or perhaps by motion to make certain in this respect: *Conroy v. Oregon Construction Co.*, 10 Saw. 630.

### *How grounds of demurrer may be specified.*

§ 190. [78.] The demurrer may specify the grounds of objection in the statutory language of section one hundred and eighty-nine, or the grounds may be distinctly specified; it may be taken to the whole complaint, or to any one of the alleged causes of action stated therein.

**Demurrer to whole complaint**, because it does not state a cause of action, will be overruled if any cause of action can be found: *Simpson v. Prather*, 5 Or. 86; *Ketchum v. State*, 2 Or. 103; *Cooper v. Clason*, 1 Code R., N. S., 347; *Hyde v. Supervisors etc.*, 43 Wis. 129; *Newberry v. Garland*, 31 Barb. 121; *First Nat. Bank v. Huc*, 28 Minn. 150; *Butler v. Wood*, 10 How. Pr. 222; *Sheldon v. Hoy*, 11 How. Pr. 11; *Seaver v. Hodgkin*, 63 How. Pr. 128; *Jacques v. Morris*, 2 E. D. Smith, 639; *Griffiths v. Henderson*, 49

Cal. 566; *Wearer v. Conger*, 10 Cal. 233; *Bruce v. Benedict*, 31 Ark. 301; *Potter v. Hussey*, 1 Utah, 249; *Wheeler v. Conn. Mut. Life Ins. Co.*, 82 N. Y. 543; 37 Am. Rep. 594; *Fleming v. Albeck*, 67 Cal. 226. And where the complaint contains several counts, a general demurrer thereto on the ground that it fails to state facts sufficient to constitute a cause of action should be overruled if any of the counts are sufficient: *Pfister v. Wade*, 69 Cal. 133.

### *If objections do not appear in complaint, may be taken by answer.*

§ 191. [79.] When any of the matters enumerated in section one hundred and eighty-nine do not appear upon the face of the complaint, the objection may be taken by answer.

### *Proceeding when complaint is amended.*

§ 192. [80.] If the complaint be amended, a copy thereof shall be served on the defendant or his attorney, and the defendant shall answer the same within such time as may be prescribed by the court; and if he omit to do so, the plaintiff may proceed to obtain judgment as in other cases of failure to answer.

### *Objections not taken deemed waived.*

§ 193. [81.] If no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting always the objection that the court has no jurisdiction, or that the complaint does not state facts sufficient to constitute a cause of action, which objection can be made at any stage of the proceedings, either in the superior or supreme court.

**Waiver of objection by failure to demur or answer.** — The objection that a complaint does not state a cause of action is not waived by failure to demur or answer: *Bowen v. Emerson*, 3 Or. 452; *Ewarts v. Steger*, 5 Or. 147; *Mack v. Salem*, 6 Or. 275; *Olds v. Cary*, 13 Or. 362. Nor is the objection that the court has no jurisdiction: *King v. Boyd*, 4 Or. 326.

And these objections may be urged in the appellate court: *Ewarts v. Steger*, 5 Or. 147; *Caldwell v. Rubby*, 1 Idaho, N. S., 760.

*Leave to sue receiver* is jurisdictional, and cannot be waived by him; and the question may be raised at any stage of the case, either in the lower or appellate court: *Brown v. Rauch*, 20 Pac. Rep. 785.



*What the answer must contain.*

§ 194. [82.] The answer of the defendant must contain, —

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief;

2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language without repetition.

**Answer, generally.** — Denial “in manner and form” admits allegations of answer: *City of Seattle v. Buchy*, 2 Wash. 25, 34. Defenses must be stated with clearness, accuracy, and precision: *Mecker v. Wren*, 1 Wash. 73; *Boelter v. Brown*, 1 Wash. 112. Answer setting up a conditional contract, but failing to show an offer to comply with its conditions, is bad on demurrer: *Kemworthy v. Merritt*, 2 Wash. 155. Defendant relying upon payment as a defense must plead it in his answer: *Spokane Mfg. etc. Co. v. McChesney*, 21 Pac. Rep. 198. Waiver of objections to the jurisdiction of the court is made when non-resident defendant, after service by publication, moves to set aside default, and subsequently files his answer: *Sayward v. Carlson*, 23 Pac. Rep. 830. Answer alleging “that each and every of four separate causes of action set forth in the complaint did not accrue within six years” before the commencement of the action contains a negative pregnant, and it is error for the court to grant a judgment against the plaintiff who fails to deny such answer: *Gannon v. Dyke*, 2 Wash. 266. A denial of having received the exact amount of money tenders no issue; and in the absence of other matters of defense, plaintiff would be entitled to judgment on the pleadings: *Dillon v. Spokane Co.*, 3 Wash. 498. In action of ejectment, when plaintiff pleads title by virtue of a certificate of purchase from a receiver of public money of the United States, defendant may properly plead, by way of inducement, a certain state of facts, by reason of which the commissioner of the general land-office caused such certificate to be canceled: *Hays v. Parker*, 2 Wash. 198.

The answer should either take issue directly on the allegations of the complaint, or confessing them, should state distinctly and positively new matter sufficient to avoid them: *Ladd v. Stevenson*, 1 Cal. 18; *Grogan v. Ruckle*, 1 Cal. 194; *Walton v. Minturn*, 1 Cal. 362; *Bernard v. Mullott*, 1 Cal. 368. It is not required to contain any prayer for relief, except where affirmative relief is sought: *Bridge v. Payson*, 5 Sand. 210; *Bendit v. Annesley*, 42 Barb. 192; nor any statement as to what defendant may consider the legal effect of the facts he avers: *Dawley v. Brown*, 9 Hun, 461; nor need the defendant, after stating facts showing that plaintiff ought not to recover, state reasons why he should not recover: *Bridge v. Payson*, 5 Sand. 210. An answer cannot properly set up an objection which appears upon the face of the complaint, where a demurrer upon that ground had been overruled: *Tennant v. Pfister*, 45 Cal. 272. The rights of the parties to a legal action must be determined as they existed at the commencement of the action. Although an equitable defense is allowed to

such an action, it does not, when interposed, change the character of the action, or authorize transactions subsequent to its commencement to be shown to affect those rights: *Wigner v. Ocumyough*, 71 N. Y. 113.

**General denial.** — According to the common-law system of pleading, a defendant could not, under a general denial, give in evidence an excuse or justification of an alleged trespass, a right of common, or a public or private right of way, or a right to an easement, nor any interest in land short of property or right of possession: *Saunders v. Wilson*, 15 Wend. 338; *Babcock v. Lamb*, 1 Cow. 239; *Rouse v. Bardin*, 1 H. Black. 352; 2 Saund. Pl. & Ev. 856; 1 Ch. Pl. 505. A defense of the kind mentioned had to be pleaded specially. The reason of the rule was to prevent surprise: *Demick v. Chapman*, 11 Johns. 131. It seems that under a general denial to a count in *indebitatus assumpsit* it is competent for the defendant to prove payment, on the ground that the effect of the plea is to deny the indebtedness: *Wetmore v. San Francisco*, 44 Cal. 299. Under a general denial in ejectment, defendant may prove any fact going to show that plaintiff had no right of entry when the action was commenced: *Semple v. Cook*, 50 Cal. 26. So in an action of replevin to recover specific personal property, ownership or right of possession in a third party may be shown under the general denial: *Chamberlin v. Winn*, 20 Pac. Rep. 780; 24 Pac. Rep. 446.

Eviction cannot be proved under the general denial in an action for arrears of rent: *Piercy v. Sabin*, 10 Cal. 30, overruling *McLarren v. Spaulding*, 2 Cal. 510.

See Pomeroy on Remedies, section 665, for a criticism of the decisions of California on what is admissible under the general denial.

Conjunctive denials of allegations in the complaint are insufficient: *Leroux v. Murdock*, 51 Cal. 541. A denial in this form, “he says that he denies each and every allegation,” etc., is a good general denial: *Jones Ludlum*, 74 N. Y. 61. In an action upon a contract between the parties, under a general denial, the defendant cannot prove that the plaintiff did not own the claim in suit: *Smith v. Hall*, 67 N. Y. 48.

**Specific denial.** — A specific denial is a denial applicable only to the particular allegation controverted: Per Burnett, J., in *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453. A denial of an allegation in a complaint should so specify the allegation intended to be controverted that any person of average intelligence could identify it: *Mattison v. Smith*, 19 Abb. Pr. 290; and if not done, the answer will be bad for uncertainty: *Mattison v. Smith*, 19 Abb. Pr. 290. A denial in the words of the complaint is very often, and it may be even said gener-

ally, bad: *Moser v. Jenkins*, 5 Or. 447; *Robbins v. Lincoln*, 12 Wis. 9; for it usually raises a "negative pregnant," with an admission that the alleged facts may have transpired on some other day or under different circumstances: *Schartzel v. Germantown etc. Ins. Co.*, 22 Wis. 412; *Davidson v. Powell*, 16 How. Pr. 467; *Salinger v. Lusk*, 7 How. Pr. 430; *Frasier v. Williams*, 15 Minn. 204; *Harden v. Atchison etc. R. R. Co.*, 4 Neb. 521; *Holden v. Kirby*, 21 Wis. 149; *Cuthbert v. City of Appleton*, 24 Wis. 383; *Shearman v. N. Y. Cent. Mills*, 1 Abb. Pr. 187. Thus a denial of wrongfully or illegally doing an act is an admission of doing the act, and the court will decide whether it was lawful or not: *Harris v. Shontz*, 1 Mont. 212; *Toombs v. Hornbuckle*, 1 Mont. 286; *Leroux v. Murdock*, 51 Cal. 541. It is not a denial of the act, but only of the character thereof: *Wood v. Richardson*, 35 Cal. 49; *Feeley v. Shirley*, 43 Cal. 360; *Larney v. Mooney*, 50 Cal. 610. So a denial that property sued for is of a certain value alleged in the complaint is an admission of any less value: *Scott v. Barney*, 4 Or. 288; *Leffingwell v. Griffing*, 31 Cal. 232; *Towdy v. Ellis*, 22 Cal. 650. So it is held that no issues are raised by denials in conjunctive form: *Moser v. Jenkins*, 5 Or. 447; *Fitch v. Bunch*, 30 Cal. 211. Therefore if facts stated in the complaint in conjunctive form are desired to be controverted, they must be denied disjunctively: *Young v. Catlett*, 6 Duer, 437; *Shearman v. N. Y. Cent. Mills*, 1 Abb. Pr. 187; *Reed v. Calderwood*, 32 Cal. 109; *Fish v. Redington*, 31 Cal. 194. Hypothetical denials are not generally good: *Alemany v. Petuluma*, 38 Cal. 557; *Lewis v. Acker*, 11 How. Pr. 163; *Porter v. McCredy*, 1 Code R., N. S., 88; *Buddington v. Davis*, 6 How. Pr. 401; but in some cases they are allowed, as where defendant denies because of lack of sufficient information to form a belief: *Brown v. Ryckman*, 12 How. Pr. 313. Argumentative denials are not generally allowed: *Morris v. Thomas*, 57 Ind. 316; *Lewis v. Kendall*, 6 How. Pr. 59, 66; *De Forrest v. Butler*, 62 Iowa, 78. But see *Loeb v. Weis*, 64 Ind. 285; *Simmons v. Green*, 35 Ohio St. 104. Nor is a denial in the alternative ever allowed: *Ladd v. Ramsby*, 10 Or. 207; *Corbin v. George*, 2 Abb. Pr. 465; *Otis v. Ross*, 8 How. Pr. 193. Thus an allegation that if the plaintiff should prove certain facts the defendant will prove certain matters (stating them) is bad, as being contingent instead of positive: *Lewis v. Kendall*, 6 How. Pr. 59, 66; 1 Code R., N. S., 402. A denial should be direct and unequivocal: *West v. Am. Exchange Bank*, 44 Barb. 179; *Harden v. Railroad Co.*, 4 Neb. 523; and if evasive, will not be construed as a denial: *West v. Am. Exchange Bank*, 44 Barb. 179; *Wood v. Whiting*, 21 Barb. 190; but if it distinctly traverses the matter alleged, it will be held good, regardless of the form in which it is expressed: *Hill v. Smith*, 27 Cal. 479; *Morrison v. O'Reilly*, 2 Utah, 165.

**Denial "upon information and belief"** has been held good under a statute exactly like the above section: *Bennett v. Leeds Mfg. Co.*, 110 N. Y. 150.

**Denial of knowledge or information sufficient to form belief.** — It has been held that any and all material allegations may be put at issue by this form of denial: *Livingston*

*v. Hammer*, 7 Bosw. 670; *Richter v. McMurray*, 15 Abb. Pr. 346; *Treadwell v. Commissioners*, 11 Ohio St. 183; *Kitchen v. Wilson*, 80 N. C. 192; *Farmers' etc. Bank v. City of Charlotte*, 75 N. C. 45; *Macklay v. Sands*, 94 U. S. 586; *Ames v. Railroad Co.*, 12 Minn. 412; *Roby v. Hallock*, 55 How. Pr. 412; *Metraz v. Pearsall*, 5 Abb. N. C. 90; *Richards v. Fuechsel*, 5 Civ. Proc. R. 430; *Henderson v. Manning*, 5 Civ. Proc. R. 221; *People v. Curtis*, 1 Idaho, 753. But the late rule in New York and other states is, that a party cannot file an answer containing an unqualified denial if he has no personal knowledge concerning the fact, but must deny upon information and belief: *Brotherton v. Downey*, 59 How. Pr. 206. And it is held, on the other hand, that where the facts are presumptively within the defendant's knowledge, a denial on information and belief is insufficient, but a positive denial, if any, must be made, as where the allegation charges the defendant with having done or failed to do certain acts: *Hanna v. Barker*, 6 Col. 303; *Humphreys v. McCall*, 9 Cal. 59; *Gas Company v. San Francisco*, 9 Cal. 453; *Lloyd v. Burns*, 6 Jones & S. 423; 62 N. Y. 651; *Morton v. Jackson*, 2 Minn. 219; *Lawrence v. Derby*, 24 How. Pr. 133; *Wing v. Dugan*, 8 Bush, 583; or that acts were done in his presence: *Edwards v. Lent*, 8 How. Pr. 28; or by his agent or partner: *Lewis Acker*, 11 How. Pr. 163; *Chapman v. Palmer*, 12 How. Pr. 37; *Beebe v. Marvin*, 17 Abb. Pr. 194.

When this manner of denial is used, the form of the statute must be closely followed: *Elton v. Markham*, 20 Barb. 343; *Hege v. Bolles*, 2 Daly, 231; 33 How. Pr. 266; *Hackett v. Richards*, 3 E. D. Smith, 13. And see *Sheldon v. Sabin*, 4 Civ. Proc. R. 4. The denial must be of knowledge or information: *Lloyd v. Burns*, 6 Jones & S. 423; 62 N. Y. 651; *Manny v. French*, 23 Iowa, 250; *People v. McCumber*, 27 Barb. 632; 15 How. Pr. 186; *Humphreys v. McCall*, 9 Cal. 59; a mere denial of information being insufficient: *Manny v. French*, 23 Iowa, 250; *Hauteinan v. Gray*, 5 N. Y. Civ. Proc. R. 224, note. A denial that defendant has "sufficient knowledge or information to form a belief as to whether the facts charged in the complaint are true" is sufficient: *Robbins v. Baker*, 2 Or. 52; *Wilson v. Allen*, 11 Or. 154; *Sherman v. Osborn*, 8 Or. 66. This form of denial is peculiarly proper where one has no information on which to form a belief and must make a verified answer, as required in this state. If a party has no knowledge of the matters alleged in the complaint, he is not bound to inform himself on them before answering: *Oregonian R'y Co. v. Oregon R'y & Nav. Co.*, 10 Saw. 464. The same rule applies where one on information and belief, or for want thereof, denies the execution and record of a recorded instrument: *Goodell v. Blumer*, 41 Wis. 436; *Mills v. Town of Jefferson*, 20 Wis. 50; *City of Milwaukee v. O'Sullivan*, 25 Wis. 666; *Brown v. La Crosse City etc.*, 21 Wis. 51. As to the denial of corporate existence, see *Concordia Sav. etc. Ass'n v. Reed*, 93 N. Y. 474; *Crane etc. Mfg. Co. v. Morse*, 49 Wis. 368; *Brown v. City of La Crosse etc. Co.*, 21 Wis. 51; *Bengston v. Thingvalla Steamship Co.*, 3 Civ. Proc. R. 263; affirmed 4 Civ. Proc. R. 260; 31 Hun, 96; *East River Bank v. Rogers*, 7



*Bosw.* 493; *City Bank v. Drake*, 5 N. Y. Week. Dig. 477.

**What may be denied.** — Denials must be of material allegations only: *King v. Utica Ins. Co.*, 6 How. Pr. 485; *Fry v. Bennett*, 5 Sand. 54; *Foren v. Dealey*, 4 Or. 92. An answer need not traverse mere matters of surplusage: *Racouillat v. Rene*, 32 Cal. 450; *Pence v. Durbin*, 1 Idaho, 550. Only those allegations are deemed to be material which the plaintiff must prove upon the trial in order to maintain his action: *Clay Co. v. Simonsen*, 1 Dak. 403; *Fairchild v. Railroad Co.*, 15 N. Y. 337. All matters inserted in the complaint which are merely evidence constitute immaterial averments, and the defendants need not answer them. If they do, both the complaint and answer, so far as they relate thereto, must be disregarded when the sufficiency of the pleadings and issues are brought in question: *Jones v. Petaluma*, 36 Cal. 233; and see *White v. Allen*, 3 Or. 103; *Thompson v. Lee*, 8 Cal. 280; *Green v. Palmer*, 15 Cal. 411; *Coryell v. Cain*, 16 Cal. 567; *Willson v. Cleveland*, 30 Cal. 192; *Larco v. Casanueva*, 30 Cal. 561; *Racouillat v. Rene*, 32 Cal. 450. Mere matters of inducement stated in the complaint are not the subject of denial: *Fry v. Bennett*, 1 Code R., N. S., 238; and so of an averment of the belief of plaintiff as it regards any fact: *Radway v. Mather*, 5 Sand. 654; *Walters v. Chinn*, 1 Met. (Ky.) 499; and likewise of allegations of time, place, or value, when not of the substance of the issue: *Woodruff v. Cook*, 25 Barb. 505; *Livingston v. Hammer*, 7 Bosw. 670; *Davidson v. Powell*, 16 How. Pr. 467. A mere denial of a legal conclusion raises no issue: *Kay v. Churchill*, 10 Abb. N. C. 83; *Emery v. Bultz*, 94 N. Y. 408; *Marsh v. Elsworth*, 36 How. Pr. 532; *Frasier v. Williams*, 15 Minn. 288; *Downer v. Read*, 17 Minn. 493; *Nelson v. Murray*, 23 Cal. 338. If the answer merely denies the conclusions of law resulting from the facts averred in the complaint, it is insufficient to raise an issue, and the facts are deemed admitted: *Nelson v. Murray*, 23 Cal. 338; *Wormouth v. Hatch*, 33 Cal. 128; *Lightner v. Menzel*, 35 Cal. 452.

Thus a denial of indebtedness, without a denial of any of the facts from which that indebtedness follows as a conclusion of law, raises no issues: *Curtis v. Richards*, 9 Cal. 38; *Kinney v. Osborne*, 14 Cal. 112; *Pierson v. Cooley*, 1 Code R. 91; *Morrow v. Congan*, 3 Abb. Pr. 328. The supreme court of California have gone so far as to hold that even where the complaint is in *indebitatus assumpsit* (which complaint they hold to be good, thus recognizing that indebtedness is a fact), a denial of the indebtedness is not sufficient, being a denial of a conclusion of law, and not of a fact: *Wells v. McPike*, 21 Cal. 215. Several other cases have been thought to be authorities for this proposition, but erroneously. For instance, *Caulfield v. Sanders*, 17 Cal. 571, and *Higgins v. Wortell*, 18 Cal. 330. An averment in an answer that the plaintiff's debt is barred by a discharge in insolvency is only a conclusion of law, and not the statement of a fact: *Christy v. Dana*, 42 Cal. 174. Denials that plaintiff is the legal owner and holder of the note sued on are denials of conclusions of law, and will be struck out on motion: *Frost v. Bradford*, 40 Cal. 165; *Felch v. Beaudry*, 40 Cal. 439. So

in an action to enforce a lien, a denial that the plaintiff had any lien raises no issue: *Bradbury v. Cronise*, 46 Cal. 287.

While the denial must be direct, it is not confined to facts directly alleged, but facts impliedly averred may be traversed as though they were directly averred, and the defendant will be entitled to try any issue thus formed, though the plaintiff intended to present a different question: *Youngs v. Kent*, 46 N. Y. 672; *Marie v. Garrison*, 83 N. Y. 14.

**New matter.** — New matter is where defendant seeks to introduce into the case a defense not disclosed by the pleadings, — something relied on by him, but not put in issue by the plaintiff: *Bridges v. Paige*, 13 Cal. 640. Any matter which admits and avoids the cause of action set up in the complaint or petition, and constitutes a defense thereto, is new matter: *Carter v. Koezley*, 9 Bosw. 583; 14 Abb. Pr. 147; *Gilbert v. Cram*, 12 How. Pr. 455; *Bellinger v. Craigue*, 31 Barb. 534; *Goddard v. Fulton*, 21 Cal. 430; *State v. Williams*, 48 Mo. 210; *Northrup v. Insurance Co.*, 47 Mo. 435; *Anson v. Dwight*, 18 Iowa, 241; *Horton v. Ruhling*, 3 Nev. 498. Whatever admits that a cause of action, as stated in the complaint, once existed, but at the same time avoids it, — that is, shows that it has ceased to exist, — is new matter: *Swenson v. Cresop*, 28 Ohio St. 668; *Allen v. Saunders*, 6 Neb. 436; *Douglas v. Haberstro*, 25 Hun, 262; *Coles v. Soulsby*, 21 Cal. 47. A party does not waive the effect of a denial contained in one portion of his answer by setting up in the appropriate manner new or affirmative matter: *Billings v. Drew*, 52 Cal. 565; *Buhne v. Corbett*, 43 Cal. 264; *Quigley v. Merritt*, 11 Iowa, 147. Among instances of new matter are release: *Turner v. Caruthers*, 17 Cal. 431; *McKyring v. Bull*, 16 N. Y. 297; accord and satisfaction: *Coles v. Soulsby*, 21 Cal. 50; *Sweet v. Burdett*, 40 Cal. 97; payment: *Green v. Palmer*, 15 Cal. 417; *Seward v. Torrence*, 3 Hun, 220; discharge in bankruptcy: *Cornell v. Dakin*, 38 N. Y. 253; license: *Clifford v. Dam*, 82 N. Y. 52; act of God: *New Haven etc. Co. v. Quintard*, 37 How. Pr. 29; and the like.

But new matter must be distinctly averred to be taken advantage of: *Glizer v. Clift*, 10 Cal. 303; *Tilson v. Clark*, 45 Barb. 178; *Morrell v. Insurance Co.*, 33 N. Y. 429; *Catlin v. Gunther*, 1 Duer, 253; *McKyring v. Bull*, 16 N. Y. 297; *Johnson v. Ball*, 74 N. C. 355; *Railroad Co. v. Washburn*, 5 Neb. 125; *Ocean Steamship Co. v. Williams*, 69 Ga. 251; *Peet v. O'Brien*, 5 Neb. 360; and a defendant cannot give evidence of any new matter not set up in his answer: *Sanford v. Travers*, 7 Bosw. 498; 40 N. Y. 140; *Dieffendorf v. Gage*, 7 Barb. 18; *Baker v. Bailey*, 16 Barb. 54. The general rule in regard to pleading new matter is thus stated by Pomeroy on Remedies, sec. 687: "The defense of new matter consists, therefore, of facts, — positive facts; and these should be averred as carefully and with as much detail as the facts which constitute the cause of action and are alleged in the complaint. The defense of new matter depends upon the existence of facts from which it results as truly as the cause of action results from other facts. The rule for setting forth the facts which constitute the defense is therefore the same as that for setting forth the facts which constitute the cause of action." Where



the defendant wished to raise the point under a denial that a steamboat company could not be incorporated under an act of the legislature, the court held that the want of capacity in the plaintiff to sue should have been specially set up in the answer; the denial was not sufficient: *Cal. Steam Nav. Co. v. Wright*, 8 Cal. 590; 1 Mass. 1, 159; 6 N. H. 197, 527. The want of legal capacity to sue is a personal disability, and if the defendant intends to set up such a defense, he should state so distinctly: *California Steam Navigation Co. v. Wright*, 8 Cal. 590.

**Counterclaim:** See the next section.

**Defenses in particular cases.** — In the code states, where general denial is provided for by statute, an important matter for consideration is the question whether certain defenses are or are not admissible under such a denial. But as in this state only specific denials are admissible, the question does not arise, and the only question for consideration is, whether or not a defense constitutes new matter. Some examples of what constitute new matter, and which must be pleaded as such, have already been stated.

The defense of action pending must be specially pleaded: *Williams v. McGrade*, 18 Minn. 82; *White v. Talmage*, 3 Jones & S. 223; *Turner v. Reese*, 22 Kan. 319; *Wythe v. City of Salem*, 4 Saw. 88; *Calaveras Co. v. Brockway*, 30 Cal. 325; *Dawley v. Brown*, 79 N. Y. 390; *Ward v. Decey*, 12 How. Pr. 193; *Bourland v. Nixon*, 27 Ark. 315. An award is in confession and avoidance, and must be specially pleaded as new matter: *Brown v. Perry*, 14 Ind. 32; *Brazill v. Isham*, 12 N. Y. 9. So with defenses of incapacity, such as coverture: *Stevens v. Bostwick*, 2 Hun, 423; *Dillaye v. Parks*, 31 Barb. 132; *Frecking v. Rolland*, 53 N. Y. 422; *Ferris v. Holmes*, 8 Daly, 217; *Smith v. Dunning*, 61 N. Y. 249; *Caldwell v. Brown*, 43 Tex. 216; see *Kitty v. Long*, 1 Hun, 714; or infancy: *Young v. Bell*, 2 Cranch C. C. 342; *Mott v. Burnett*, 2 E. D. Smith, 50; *Roe v. Angeline*, 7 Hun, 679; *Miller v. Fisher*, 1 Ariz. 232; *Pinchback v. Graves*, 42 Ark. 222; *Rush v. Wick*, 31 Ohio St. 512; so with a misnomer: *King v. Randlett*, 33 Cal. 321; *Thompson v. Elliott*, 5 Mo. 118; *White v. Miller*, 7 Hun, 427; *Traver v. Eighth Ave. R. R. Co.*, 6 Abb. Pr., N. S., 46; 4 Abb. Ct. App. 422; or a defense that the plaintiff is not the real party in interest: *White v. Drake*, 3 Abb. N. C. 133; *Horton v. Shepherd*, 1 Civ. Proc. R. 26; *Hammond v. Earle*, 58 How. Pr. 426; that the action was commenced before the cause accrued: *Smith v. Holmes*, 19 N. Y. 271; that a judgment has been rendered between the same parties for the same cause: *Richardson v. Hickman*, 22 Ind. 244; *Cave v. Crafts*, 53 Cal. 135; *Marshall v. Shafter*, 32 Cal. 176; *McKnight v. Taylor*, 1 Mo. 282; *Fanning v. Hibernia Ins. Co.*, 37 Ohio St. 344; *Dalrymple v. Hunt*, 5 Hun, 111. So with a defense of usury: *Morford v. Davis*, 28 N. Y. 481; *West Transp. Co. v. Kelderhouse*, 87 N. Y. 430; *Cone v. Warner*, 18 N. Y. Week. Dig. 90; *Butterworth v. Pecare*, 8 Bosw. 671. Facts constituting an estoppel must be pleaded: *Rugh v. Ottenheimer*, 6 Or. 231; *Anderson v. Hubble*, 93 Ind. 570; 47 Am. Rep. 394. In pleading a former adjudication in bar, facts showing what was determined in the former

suit must be stated: *Heatherly v. Hadley*, 2 Or. 269; *Wyeth v. Salem*, 4 Saw. 88.

**Statute of limitations.** — If the defect does not appear upon the face of the complaint, the defense of the statute of limitations must be set up as new matter: *Steamer Senorita v. Simonds*, 1 Or. 74; *Budd v. Walker*, 29 Hun, 344; *A. & N. R. R. Co. v. Miller*, 31 Minn. 661; *Smith v. Richmond*, 19 Cal. 476; *Kahnweiler v. Anderson*, 78 N. C. 133; *Green v. Railroad Co.*, 73 N. C. 524; *Parker v. Irwin*, 47 Ga. 405.

The answer should allege that the cause of action did not accrue within a prescribed period before the commencement of the action: *McCullister v. Willey*, 52 Ind. 382; and an allegation that the defendant did not at any time within the prescribed period undertake, promise, or agree is bad as an answer of the statute: *McCullister v. Willey*, 52 Ind. 382.

**Consideration.** — Where the instrument sued on is of the character which imports a consideration, and none is alleged in the complaint, a want of consideration must be averred as new matter in order to be availed of as a defense: *Bingham v. Kimball*, 17 Ind. 396; *Philbrooks v. McEwen*, 29 Ind. 347; *Nelson v. White*, 61 Ind. 139; *Smith v. Flack*, 95 Ind. 116; *Allen v. Carpenter*, 7 Col. 87; *Patterson v. Gile*, 1 Col. 200; *Hammond v. Earle*, 58 How. Pr. 426; but where the plaintiff must allege a consideration, a denial of his allegation is of course sufficient. A failure of consideration must be treated as new matter: *Moore v. Boyd*, 95 Ind. 134, 135; *Dubois v. Hermance*, 56 N. Y. 673. Compare *Spies v. Roberts*, 18 Jones & S. 301. So illegality of consideration must be treated in this manner: *Wilkins v. Riley*, 47 Miss. 306.

**Justification.** — A defense of justification in tort must be specially pleaded, it being in confession and avoidance: *Konigsberger v. Harvey*, 12 Or. 286; *Kerwick v. Steelman*, 44 Ga. 199; *Ocean Steamship Co. v. Williams*, 69 Ga. 251; *Boaz v. Tate*, 43 Ind. 60; as in cases of malicious prosecution: *Gee v. Culver*, 12 Or. 228; or assault and battery: *Konigsberger v. Harvey*, 12 Or. 286; and the particulars of the defense must be alleged: *Billings v. Waller*, 28 How. Pr. 97; *Wachter v. Quenzer*, 26 N. Y. 547; *Summan v. Breunin*, 52 Ind. 140; *Tilson v. Clark*, 45 Barb. 178. Under this head may be considered license, which must be pleaded as new matter: *Haight v. Badgley*, 15 Barb. 499; *Clifford v. Dam*, 81 N. Y. 52; as a justification by license in the case of alleged unlawful taking and conversion of property: *Beatty v. Swarthout*, 32 Barb. 293. And see *Glaizer v. Clift*, 10 Cal. 203; *McDonald v. Prescott*, 2 Nev. 109. But see, *contra*, *Wallace v. Robb*, 37 Iowa, 192.

**Negligence.** — Where one sues for negligence, the rule as to whether defendant must set up contributory negligence as new matter has been variously decided. In some states, among them Oregon, it is held that contributory negligence must be negated by the plaintiff in the complaint: *Kahn v. Love*, 3 Or. 206; *Maxfield v. R. R. Co.*, 41 Ind. 269; *Murphy v. Deane*, 101 Mass. 455; 3 Am. Rep. 390; *Morrison v. R. R. Co.*, 63 N. Y. 643.

**Damages.** — The allegation of the amount of damages is not generally traversable: *Moloney*

*v. Dows*, 15 How. Pr. 261; 2 Hilt. 247; *Baldwin v. Navigation Co.*, 4 Daly, 314; *Wood v. Steamboat Fleetwood*, 10 Mo. 529; *Field v. Barr*, 27 Mo. 416; *Gill v. Sells*, 15 Ohio St. 195; and is not admitted by a failure on the part of the defendant to deny it in his answer: *Field v. Barr*, 27 Mo. 416; *Loeb v. Kamak*, 1 Mont. 152.

*Aggravating or mitigating circumstances.* — Circumstances in aggravation need not be traversed, for they are not admitted by failure to deny them: *Schnaderbeck v. Worth*, 8 Abb. Pr. 37; *Moloney v. Dows*, 15 How. Pr. 261; *Gilbert v. Rounds*, 14 How. Pr. 46; *Lane v. Gilbert*, 9 How. Pr. 150. It seems that circumstances in mitigation need not be set up in answer to a cause of action which is denied: *Smith v. Lisher*,

23 Ind. 500; *Hays v. Berryman*, 6 Bosw. 679; *Duval v. Davey*, 32 Ohio St. 604; *Haywood v. Foster*, 16 Ohio St. 88; *O'Brien v. McCann*, 58 N. Y. 373; *Dunlap v. Snyder*, 17 Barb. 561; *Wandell v. Edwards*, 25 Hun, 498; *Smith v. Lisher*, 23 Ind. 500.

**Partial defenses.** — A partial defense may be set up, but it must be pleaded as such: *Webb v. Nickerson*, 11 Or. 382; *Fitzsimmons v. Insurance Co.*, 18 Wis. 234; *Davenport etc. Co. v. Davenport*, 15 Iowa, 6; *Ward v. Polk*, 70 Ind. 309; or it will be insufficient: *Reynolds v. Roundabout*, 59 Ind. 483; *Fitzsimmons v. Insurance Co.*, 18 Wis. 234; *Peck v. Parchin*, 52 Iowa, 46; *McMahan v. Spinning*, 51 Ind. 187.

**Joinder of defenses:** See the next section.

### *Counterclaim defined.*

§ 195. [83.] The counterclaim mentioned in the preceding section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:—

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.

3. The defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They shall each be separately stated, and refer to the causes of action which they are intended to answer, in such a manner that they may be intelligibly distinguished.

**Action at law is not changed into suit in equity** by the fact that both legal and equitable defenses along with the general issue have been pleaded to such action at law: *Brown v. Rank*, 132 U. S. 216.

**Counterclaim, generally.** — Statutes allowing counterclaims should be construed liberally, to the end that controversies may be adjusted in a single action in the cases specified in the statute: See *Goebel v. Hough*, 26 Minn. 252; *Ashley v. Marshall*, 29 N. Y. 494; *Glen etc. Mfg. Co. v. Hall*, 61 N. Y. 226, 237; *Standley v. Northw. Mut. Life Ins. Co.*, 95 Ind. 254; *Carpenter v. Manhattan Life Ins. Co.*, 22 Hun, 49; *Stone v. Stone*, 2 Met. (Ky.) 340. For valuable information concerning the set-off and recoupment before the code, and the extent to which those defenses are continued under the new system, together with an analysis of the meaning of "counterclaim," see Pomeroy on Remedies, secs. 626 et seq.; and also Bliss on Code Pleading, secs. 367 et seq. In a very recent note in 3 N. Y. Civ. Proc. Rep. 212, Montgomery H. Throop has written a very careful monograph on the New York law of counterclaim. He there states the history of the legislation relating to counterclaims, and very thoroughly examines the case law of that state on this subject.

The counterclaim allowed under the code is in the nature of a cross-action against the plaintiff, in the cases specified, upon which the defendant may have an affirmative judgment against the plaintiff: *Clarkson v. Manson*, 60 How. Pr. 45; *Fettretch v. McKay*, 47 N. Y. 427; *Garrett v. Love*, 89 N. C. 205.

The general test as to the admissibility of a counterclaim is, whether at the time the action was commenced by plaintiff an action could have been maintained upon the counterclaim against the plaintiff: *Burrage v. Bonanza G. & S. M. Co.*, 12 Or. 169; *Cragin v. Lovell*, 88 N. Y. 258; 2 Civ. Proc. R. 128; *Taylor v. Mayor etc.*, 20 Hun, 292; 82 N. Y. 10; *Patterson v. Patterson*, 59 N. Y. 574; *Robinson v. Howes*, 20 N. Y. 84; *Denniston v. Trimmer*, 27 Hun, 393; *Heidenheimer v. Wilson*, 31 Barb. 636; *Vassear v. Livingston*, 13 N. Y. 248; *Holzbauer v. Heine*, 37 Mo. 443.

**Parties.** — The counterclaim to be sustained must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action; *Briggs v. Seymour*, 17 Wis. 255; *Babbett v. Young*, 51 Barb. 466; *Linn v. Rugg*, 19 Minn. 181; *Ernst v. Kunkle*, 5 Ohio St. 520; *Merrick v. Gordon*, 20 N. Y. 93; *Thompson v. Sickles*, 46 Barb. 49; *Conibe v. Hollister*, 19 Wis. 269;



*Dolph v. Rice*, 21 Wis. 590; *Grier v. Hinman*, 9 Mo. App. 213; *Barnes v. McMullins*, 78 Mo. 261, 253; *Kell v. Wise*, 43 Cal. 628; *Scott v. Thibault*, 83 N. C. 382. The defendant cannot set up and maintain as a valid counterclaim a right of action subsisting in favor of another person; the test is, whether the defendant could have maintained an independent action upon the demand: *Bellout v. Thompson*, 33 N. C. 495. Thus a surety cannot set up as a counterclaim a cause of action existing in favor of the principal against the plaintiff: *Gilson v. Torrence*, 25 N. Y. 306; *Lester v. Williamson*, 55 N. Y. 619; *O'Brien v. Karing*, 57 N. Y. 649. So where the demand sought to be counterclaimed exists in favor of the defendant and a stranger to the action, it cannot be set up: *Hook v. White*, 36 Cal. 299; *Campbell v. Geet*, 2 Hilt. 290; *Bird v. McCoy*, 22 Iowa, 549; *Weil v. Jones*, 70 Mo. 560; *Harris v. Rivers*, 53 Ind. 216; *Great Western Ins. Co. v. Pease*, 1 Wy. 45.

The counterclaim must be between the parties in the same right or in the same capacities as they appear in the original proceeding: *Nagle v. Palmer*, 7 Cal. 543; *Russell v. Conway*, 11 Cal. 93; *Johnson v. Gunter*, 6 Bush, 534; *Peabody v. Bloomer*, 5 Duer, 678; 6 Duer, 53; 3 Abb. Pr. 353; *Pinckney v. Keyler*, 4 Duer, 469; *Mynderse v. Snook*, 1 Lans. 488; *Ives v. Miller*, 19 Barb. 196. One of two joint defendants cannot set up a counterclaim existing in his favor alone, unless he could obtain a several judgment: *Bockner v. Harris*, 11 Jones & S. 548; *Nat. State Bank v. Boylan*, 2 Abb. N. C. 216. So in a suit on a several liability, one cannot set up a counterclaim existing jointly in favor of himself and another against the plaintiff: *Bathwin v. Berrien*, 53 How. Pr. 81; *Campbell v. Geet*, 2 Hilt. 290; *Hopkins v. Lane*, 2 Hun, 38; *Hopkins v. Lane*, 87 N. Y. 501; *Bathwin v. Briggs*, 50 How. Pr. 80. And as to setting off a joint demand against a several claim, see *Hook v. White*, 36 Cal. 301; *Gannon v. Dougherty*, 41 Cal. 663; *Howard v. Shores*, 20 Cal. 277; *Stearns v. Martin*, 4 Cal. 229; *Haskell v. Moore*, 29 Cal. 437; *King v. Wise*, 43 Cal. 628; *Hopkins v. Lane*, 87 N. Y. 501; and a several claim against a joint demand, see *Stearns v. Martin*, 4 Cal. 229; *Collins v. Butler*, 14 Cal. 223. See Pomeroy on Remedies, secs. 755-758.

No one in a representative capacity can set up debts of his in such capacity against his personal indebtedness, as in the case of guardians: *Gousner v. Franks*, 75 Mo. 64; receivers: *Johnson v. Gunter*, 6 Bush, 534. But one indebted to an estate, if employed to render services for it, may set them up as a counterclaim in an action for the amount of his indebtedness: *Davis v. Stover*, 53 N. Y. 473. But in an executor's action for a debt, one cannot counterclaim his share of the estate as next of kin: *Woodhouse v. Woodhouse*, 11 N. Y. Week. Dig. 241.

The counterclaim must exist at the commencement of the action. A claim barred by the statute of limitations cannot be set up as a counterclaim: *De Lavalette v. Wendt*, 75 N. Y. 579; and see *Taylor v. City of New York*, 82 N. Y. 10; *Lyon v. Petty*, 65 Cal. 322; citing *Bellene v. Thompson*, 33 Cal. 495; *Stoddard v. Treadwell*, 26 Cal. 310; *Paige v. Carter*, 64 Cal.

489; and *Carpentier v. Oakland*, 30 Cal. 339. Items of a counterclaim accruing after the action was commenced cannot be given in evidence: *Paige v. Carter*, 64 Cal. 489; *Martin v. Kenton*, 37 N. Y. 396; 10 Bosw. 16; *Lyon v. Petty*, 65 Cal. 322; *Myers v. Davis*, 22 N. Y. 489. For until a demand becomes mature, it may be assigned so as to affect the rights of the party against whom it might be set up as a counterclaim: *Myers v. Davis*, 22 N. Y. 489. The assignee before maturity of a promissory note may set up an existing right of action upon it as a counterclaim: *Lyon v. Petty*, 65 Cal. 322; but if assigned after maturity, the rule is otherwise: *Lyon v. Petty*, 65 Cal. 322; *Barnes v. McMullins*, 78 Mo. 250. In an action against an executor, a demand which arose after the death of the testator cannot be set up: *Merritt v. Seaman*, 6 N. Y. 168.

A defendant is not bound to set up a cause of counterclaim, but may, if he choose, enforce its recovery in a separate suit: *Wach v. Hazleton*, 14 How. Pr. 97; *Lingnot v. Redding*, 4 E. D. Smith, 285; *Halsey v. Carter*, 1 Duer, 607; *Morgan v. Powers*, 66 Barb. 35; *Inslee v. Hazleton*, 8 Hun, 230; *Hobbs v. Duff*, 23 Cal. 629; *Stoddard v. Treatwell*, 26 Cal. 308; *Francis v. Edwards*, 77 N. C. 275. And judgment against defendant would be no answer in a subsequent suit on the cause which might have been counterclaimed: *Brown v. Gulland*, 80 N. Y. 417; *Ruppert v. Haug*, 24 Hun, 382; 87 N. Y. 141. The fact that a court excluded a counterclaim will not affect the right of recovery thereon: *Ives v. Goddard*, 1 Hilt. 434.

Matter pleaded as a counterclaim should be stated to be such, and should be clearly and specifically pleaded: *Van Valen v. Lapham*, 5 Duer, 689; *Clough v. Murray*, 19 Abb. Pr. 97; *Sullivan v. Byrne*, 10 S. C. 122; *Selleck v. Griswold*, 49 Wis. 39; *Union Nat. Bank v. Carr*, 49 Iowa, 359; *Reed v. Ref. Dutch Church*, 13 Phila. 58; *Rosch v. Seno*, 31 Wis. 128. If not so named, and if no affirmative relief be prayed, it has been held that an answer will not constitute a counterclaim: *Brannan v. Paty*, 58 Cal. 330; *King v. Enterprise I. Co.*, 45 Ind. 43. The statement of a counterclaim should be made in the same manner as would be a statement of a cause of action in a complaint: *Vasseur v. Livingston*, 4 Duer, 285; 13 N. Y. 248; *Wright v. Bacheller*, 16 Kan. 259; *Sale v. Bayler*, 24 Kan. 432; *Allen v. Douglass*, 29 Kan. 412; *Kinard v. Sanford*, 64 Cal. 650; *Garrett v. Love*, 89 N. C. 205; and an omission of an essential element will render it bad: *Allen v. Douglass*, 29 Kan. 412; but the counterclaim may be gathered from the whole answer: *Cragin v. Lovell*, 88 N. Y. 258.

And it may be stated generally, that in an action on contract a cause of action founded purely in tort, and not arising out of the same transaction, cannot be set up as a counterclaim: *Bell v. Lesini*, 4 Civ. Proc. R. 367; *Piser v. Stearns*, 1 Hilt. 86; *Chambers v. Lewis*, 2 Hilt. 591; 11 Abb. Pr. 210; *Derries v. Warren*, 82 N. C. 356; *Bell v. Lesini*, 66 How. Pr. 385; *Trotter v. Commissioners*, 90 N. C. 455; and see *Clapp v. Bright*, 21 Hun, 240; *Shelly v. Vanardsdell*, 23 Ind. 543; *Berry v. Carter*, 19 Kan. 140. But where the claim arises out of the transaction stated in the complaint, the defendant may set it up whether it arises out of



tort or contract: *Bitting v. Thaxton*, 72 N. C. 541; and see *Devries v. Warren*, 82 N. C. 356; *Lasher v. Williamson*, 55 N. Y. 619; *Hoffu v. Hoffman*, 33 Ind. 172; *Tinsley v. Tinsley*, 15 B. Mon. 459. Counterclaims of damages from torts pleaded to actions on torts have not been allowed, as a general rule. In replevin, the subject-matter of the litigation necessarily consists only of the property mentioned in the complaint; and it is not competent for the defendant, by his answer, to introduce a new and distinct subject-matter of litigation by claiming of the plaintiff the release and return of other and distinct personal property, even though he present such a case as would have enabled him to recover in an independent action: *Lorensohn v. Ward*, 45 Cal. 10. In an action for damages for an assault and battery, a libel published by the plaintiff of and concerning the defendant does not constitute a counterclaim: *Macdougall v. Maguire*, 35 Cal. 274; *Pattison v. Richards*, 22 Barb. 143; *Murden v. Priment*, 1 Hilt. 76; *Barhyte v. Hughes*, 33 Barb. 320; *Schnaderbeck v. Worth*, 8 Abb. 38.

**Cause arising out of transaction set forth in complaint.** — The meaning of the term "transaction," as here used, will be found explained in *Pomeroy on Remedies*, 769-774; *Bliss on Code Pleading*, sec. 372. As examples of causes of action that have been deemed proper counterclaims under this subdivision are legal actions in which both parties demand a money judgment, as where the "transaction" set forth in the complaint and the counterclaim are in form for debt or damages upon contracts express or implied: *Stoddard v. Treadwell*, 26 Cal. 305; *Dennis v. Belt*, 30 Cal. 252; *Wikler v. Boynton*, 63 Barb. 547; *Hay v. Short*, 49 Mo. 139; *Gordon v. Bruner*, 49 Mo. 570; *Racine Co. Bank v. Keep*, 13 Wis. 209; *Butler v. Titus*, 13 Wis. 429; *Koempel v. Shaw*, 13 Minn. 488; *McKegney v. Widekind*, 6 Bush, 107.

In a suit for services as agent of defendant under a contract, defendant in answer set up a violation of the contract on the part of plaintiff, and also certain other matter, amounting to a tort on his part, as conspiracy to have the property of defendant sold and bought in by him, circulating false reports that defendant was a bankrupt, its affairs a swindle, etc. It was held that this latter portion of the answer was properly struck out on motion of plaintiff: *Bates v. Sierra Nevada etc. Co.*, 18 Cal. 171. It has been said that an unliquidated claim for damages was held not the subject of offset, either equitable or legal: *Ricketson v. Richardson*, 19 Cal. 354. But in a subsequent case, where the principal and cross-claim were based upon the same contract, the court held that both might be considered in the same action, though the damages might be unliquidated; and if the jury found a balance in favor of defendant, he might have judgment and execution therefor: *Stoddard v. Treadwell*, 26 Cal. 305; *Pattison v. Richards*, 22 Barb. 146; *Glason v. Moen*, 2 Duer, 639; *Spencer v. Babcock*, 22 Barb. 326. The code, by enumerating tests, excludes all others by intendment: *Stoddard v. Treadwell*, 26 Cal. 305. Where a breach of a contract on the defendant's part was the foundation of the plaintiff's claim for damages, and the counterclaim for damages

arose on the same contract, the court held that it could be interposed by the defendant: *Dennis v. Belt*, 30 Cal. 252. So a breach of the covenant to ship goods in good cases is available as a counterclaim in an action for their price: *Wheelock v. Pacific Co.*, 51 Cal. 224. Damages for injury to the property against which the assessment was issued cannot be set up as a counterclaim in an action to recover an assessment for the improvement of a street. The court said this doctrine was settled in *Emery v. San Francisco Gas Co.*, 28 Cal. 345; *Emery v. Bradford*, 29 Cal. 75; *Nolan v. Reese*, 32 Cal. 484; and *Himmelmann v. Steiner*, 38 Cal. 175.

**Actions arising on contract.** — This includes the old remedy of set-off: *Pomeroy on Remedies*, sec. 796.

In an action upon a contract, the defendant has a right to set up as a counterclaim any cause of action existing in his favor against the plaintiff at the commencement of the action: *Parsons v. Sutton*, 66 N. Y. 92. It is not necessary that the contract out of which the counterclaim arises should have been originally made with the defendant; it may come to him by assignment, but must have done so before the commencement of the action, and the right of action on such contract to which the defendant has succeeded, or which has been in him always, must have accrued before the commencement of the action: *Gannon v. Dougherty*, 41 Cal. 661; *Rice v. O'Connor*, 10 Abb. Pr. 362; *Van Valen v. Lapham*, 5 Duer, 689; *Rickard v. Kohl*, 22 Wis. 506. And this fact must be alleged, otherwise the answer setting up the counterclaim will be demurrable: *Gannon v. Dougherty*, 41 Cal. 661.

Under this subdivision, where one may waive tort and sue in contract, a claim of such nature may be set up as a counterclaim: *Wood v. Mayor etc.*, 73 N. Y. 556; *Bell v. Leshini*, 4 Civ. Proc. R. 367; *Barnes v. McMullins*, 87 Mo. 260; *Brown v. Tuttle*, 66 Barb. 169; *Brady v. Brennan*, 25 Minn. 210; *City Nat. Bank v. Nat. Park Bank*, 32 Hun, 105. The contract set up as a counterclaim need not be one connected with plaintiff's claim: See *Spencer v. Babcock*, 22 Barb. 639; *Lemon v. Trull*, 13 How. Pr. 248; *Parsons v. Sutton*, 66 N. Y. 92; 7 Jones & S. 544; *Sprout v. Crowley*, 30 Wis. 187; *Fanson v. Linsley*, 20 Kan. 235; *Stoddard v. Treadwell*, 26 Cal. 294.

**Joinder of defenses.** — In most of the code states it is held that a defendant must, in his answer, set up all his defenses, whether they consist of matter in abatement or of matter going to the merits, or both: *Bliss on Code Pleading*, sec. 345. But in Oregon and Missouri it has been held otherwise, and to the effect that a defendant must plead matter in abatement, first, for the reason that issues in dilatory pleas and issues on the merits cannot be tried together; and it is further held that a plea in abatement, pleaded with matter to the merits, is considered waived or abandoned: *Hopwood v. Patterson*, 2 Or. 50; *Oregon Cent. R'y Co. v. Wait*, 3 Or. 428; *Dowell v. Cardwell*, 3 Saw. 217; *Chapman v. School District*, 1 Deady, 116; *Ripstein v. St. Louis*, 57 Mo. 86; *Fordyce v. Hathorn*, 57 Mo. 120. See *Bliss on Code Pleading*, sec. 345.

A defense must be consistent in itself, but

need not be consistent with other defenses: *Springer v. Dwyer*, 50 N. Y. 19; *Bell v. Brown*, 22 Cal. 678. Admissions in one defense do not affect denials in another, and it is not a waiver of a denial to set up new and affirmative matter: *Amador Co. v. Butterfield*, 51 Cal. 526. Defendant may plead ownership of realty in fee, and also ownership in himself and another: *Moore v. Willamette*, 7 Or. 355. Denial of execution of note and allegation of payment, release, or discharge are not necessarily inconsistent: *Kellogg v. Baker*, 15 Abb. Pr. 286. Denial of execution and statute of limitations may be pleaded together: *Willson v. Cleveland*, 30 Cal. 192; or denial and justification: *Hackley v. Oymun*, 10 How. Pr. 44; *Hollenbeck v. Clow*, 9 How. Pr. 289; *Murphy v. Carter*, 1 Utah, 17; *Derby v. Gallup*, 5 Minn. 119; in trespass, denial of plaintiff's title and license: *Booth v. Sherwood*, 12 Minn. 426; or in an action upon a sale, rescission, and breach of warranty: *Bruce v. Burr*, 67 N. Y. 237. But a denial of a contract, and allegation of non-performance by the adverse party, are inconsistent: *Lewis v. Acker*, 11 How. Pr. 163; and so denial and

tender were held inconsistent: *Arnold v. Dimond*, 4 Sand. 680.

Each defense must be complete in itself: *Reid v. Huston*, 55 Ind. 173; *Smith v. Little*, 67 Ind. 549; *Benedict v. Seymour*, 6 How. Pr. 298; *Siter v. Jewett*, 33 Cal. 92; and defects cannot be aided by reference to other defenses in the same answer, unless it expressly adopts them: *Hammond v. Earle*, 58 How. Pr. 426; *Baldwin v. U. S. Tel. Co.*, 54 Barb. 517; *Cutlin v. Pedrick*, 17 Wis. 88; *Loosey v. Orser*, 4 Bosw. 391; *Lynn v. Crim*, 96 Ind. 89. It must be either a complete defense to the whole complaint: *Baldwin v. U. S. Tel. Co.*, 54 Barb. 517; or if declared to be a partial defense, must fully answer so much as it purports to do, unaided by reference to other defenses: *Frazee v. Frazee*, 70 Ind. 411; *State v. Roche*, 94 Ind. 372.

While each defense must be separately stated, and refer to the cause which it is intended to answer: *Kneedler v. Bergh*, 10 How. Pr. 67; *Norman v. Rogers*, 59 Barb. 275; if the defect is not called to the attention of the court by motion, it will be waived: *Truitt v. Baird*, 12 Kan. 420.

*Defendant may demur to one or more causes, and answer the remainder.*

§ 196. [84.] The defendant may demur to one or more of several causes of action stated in the complaint, and answer the residue.

While defendant may demur to some of the causes of action and answer as to others, he cannot answer certain allegations and demur as to others in the same cause of action: *Ransom v. McClees*, 64 N. C. 17. And see

*Lord v. Vreeland*, 24 How. Pr. 316; 15 Abb. Pr. 122; *Clark v. Van Deusen*, 3 Code R. 219; *Hayden v. Anderson*, 17 Iowa, 158; *Sumner v. Young*, 65 N. C. 579.

*Sham, frivolous, and irrelevant answers stricken out.*

§ 197. [85.] Sham, frivolous, and irrelevant answers and defenses may be stricken out on motion, and upon such terms as the court may in its discretion impose.

**Striking out answers or defenses as frivolous or sham.** — The procedure is by motion to strike out as sham: *Fabbricotti v. Launitz*, 3 Sand. 743; *Torrence v. Strong*, 4 Or. 39. The courts referring to this matter hold that such statutes confer no new power, but simply declare the power of the courts theretofore possessed: *Manufacturers' Bank v. Hitchcock*, 14 How. Pr. 406; *Wayland v. Tysen*, 45 N. Y. 288, reversing 9 Abb. Pr., N. S., 79.

A sham answer is one good in form, but false in fact, and not pleaded in good faith: *Foren v. Dealey*, 4 Or. 92; *Piercy v. Sabin*, 10 Cal. 27; *Gostorfs v. Taafse*, 18 Cal. 387; *Lefferts v. Snediker*, 1 Abb. Pr. 41; *Hull v. Smith*, 1 Duer, 649; 8 How. Pr. 149; *Walker v. Hewitt*, 11 How. Pr. 394; *Struver v. Ocean Ins. Co.*, 2 Hilt. 475; *Brown v. Jenison*, 3 Sand. 732. In *Kiefer v. Thomas*, 6 Abb. Pr., N. S., 42, and *Hadden v. N. Y. Silk Manufacturing Co.*, 1 Daly, 338, it is said that the answer to be sham must be false in the sense of being a mere pretense set up in bad faith and without color of fact, though in *Roome v. Nicholson*, 8 Abb. Pr., N. S., 343, 1 Sweeny, 525, it is held that it may be sham even if defendant believed it to be true, the test of its untruth being falsity in fact, and the defendant's ignorance thereof

being immaterial. So, though material and pertinent, if false in fact, it is a sham answer: *Lee Bank v. Kitching*, 11 Abb. Pr. 438; 7 Bosw. 669. In *Bachman v. Everding*, 1 Saw. 70, it is said that a plea is sham which is palpably false on its face, but Bliss says that this definition is evidently faulty, and should be applied to a frivolous pleading: Bliss on Code Pleading, sec. 422.

The power to strike out will not be exercised except in a clear case: *Lockwood v. Salhenger*, 18 Abb. Pr. 136; *Fosdick v. Groff*, 22 How. Pr. 158. In *Hadden v. N. Y. Silk Manufacturing Co.*, 1 Daly, 388, the court says that it should be satisfied that the object of the pleader was to delay or to annoy plaintiff, or to trifle with the court. If the plea shows its falsity on its face, it should be rejected on motion: *Henderson v. Reed*, 1 Blackf. 347; *Smith v. Webb*, 5 Blackf. 287; *Oakley v. Deroe*, 12 Wend. 196. An application to strike out a plea as false will not be granted, if it raises a question of law rather than of fact: *Fisher v. Pond*, 1 Hill, 672. An answer which is so framed that it does not set up a valid defense, but which states facts that may, by being properly averred, constitute a defense, will not be struck out as sham or irrelevant: *Alfred v.*



*Watkins*, 1 Code Rep., N. S., 343; *Struwer v. Ocean Ins. Co.*, 2 Hilt. 475; 9 Abb. Pr. 23.

For a full discussion of the law concerning striking out answers as sham, see the extended note to *People v. McCumber*, 72 Am. Dec. 520 et seq.

A frivolous answer or defense is one which contains nothing that affects the plaintiff's case, and may be stricken out on motion, but a motion to strike out therefor is not well taken if any of the matter included in it is material if true: *Oregonian Ry Co. v. Oregon S. & N. Co.*, 10 Saw. 464.

An answer insufficient in form or substance, is not necessarily frivolous. Such an answer may be amended by leave of the court, but a

frivolous answer is evidence of bad faith, and not ordinarily amendable: *Youngs v. Kent*, 46 N. Y. 672. That only may be regarded as frivolous in an answer or demurrer which is made to appear so incontrovertibly, by a fair statement of it without argument: *Cook v. Warren*, 88 N. Y. 37; *Youngs v. Kent*, 46 N. Y. 672. So where an answer presents a material issue, it cannot be held as frivolous, although there may be allegations therein which are immaterial: *Munger v. Shannon*, 61 N. Y. 251. Where there is a semblance of a cause of action or defense set up in a pleading, its sufficiency cannot be determined on motion to strike it out as redundant or irrelevant: *Walter v. Fowler*, 85 N. Y. 621.

### *Plaintiff may demur to the answer.*

§ 198. [87.] The plaintiff may demur to an answer containing new matter, when it appears upon the face thereof that such new matter does not constitute a defense or counterclaim, or he may for like cause demur to one or more of such defenses or counterclaims, and reply to the residue.

**Demurrer to answer.** — The only defects for which one may demur to a pleading are those named in the statute allowing the demurrer: *De Witt v. Swift*, 3 How. Pr. 280; *Richards v. Edick*, 17 Barb. 261; *Trustees etc. v. Odlin*, 8 Ohio St. 293; *Bushey v. Reynolds*, 31 Ark. 662; *Dunn v. Remington*, 9 Neb. 82; *Aurira v. Cobb*, 21 Ind. 492. A mere denial is not demurrable, however defective its form: *Smith v. Greening*, 2 Sand. 702; *Lund v. Seamen's Sav. Bank*, 37 Barb. 129; 23 How. Pr. 258; *People v. Barker*, 8 How. Pr. 258; *Maretzek v. Cauldwell*, 2 Rob. (N. Y.) 715; 19 Abb. Pr. 35. But an answer which professes to set up new matter as a defense, and does not state facts which constitute one, may be demurred to for insufficiency: *Merritt v. Millard*, 5 Bosw. 645; *Fabricotti v. Lannitz*, 3 Sand. 743; *White v. Drake*, 3 Abb. N. C. 133. An amended answer is as well demurrable as would be the original: *Sands v. Calkins*, 30 How. Pr. 1.

An answer is held to be sufficient under the demurrer here allowed, if it puts the plaintiff to proof of any material averment: *Ruth v. Ruth*, 12 Neb. 594.

The demurrer must be directed to the whole answer or a particular defense, but cannot be directed to a part of an entire defense: *Ferrier v. Ferrier*, 64 Cal. 23; *Locke v. Peters*, 65 Cal. 161; *Cobb v. Frazee*, 4 How. Pr. 413; *Smith v. Brown*, 6 How. Pr. 383. The connected structure of a pleading cannot be destroyed or disjointed at the pleasure of the pleader, and its disconnected averments separately demurred to: *Herfort v. Cramer*, 7 Col. 483.

Under the provision that plaintiff may demur to some and reply to other defenses or

counterclaims, it is held that where an answer sets up two distinct defenses, though they be not separately stated, plaintiff may demur to one and reply to the other: *Bass v. Upton*, 1 Minn. 408.

Upon the hearing of this demurrer, the question is open and may be raised, whether the court has jurisdiction, or whether the complaint states a cause of action: *Clay County v. Simonsen*, 1 Dak. 403; 2 Dak. 112; *Pino v. Beckwith*, 1 N. M. 19; *People v. Booth*, 32 N. Y. 397; *Pardo v. Osgood*, 2 Abb. Pr., N. S., 365; *Mattheys v. Steitz*, 5 Civ. Proc. Rep. 335; *Morey v. Ford*, 32 Hun, 446; *Petersen v. Swan*, 18 Jones & S. 46; *Scott v. State*, 89 Ind. 368; *Kretsch v. Helm*, 45 Ind. 438; *Lytle v. Lytle*, 37 Ind. 281; *Meniffee v. Clark*, 35 Ind. 304.

If the demurrer is sustained, it is almost a matter of course to allow an amendment: *Cooper v. Jones*, 4 Sand. 699; *White v. Mayer*, 5 Abb. Pr. 322; and it is certainly error to proceed to trial as if issues were joined by the pleadings: *Curman v. Ross*, 64 Abb. Pr. 249.

A demurrer to the answer must be disposed of before judgment can be rendered for the plaintiff: *Huse v. Moore*, 20 Cal. 115. But proceeding to trial without objecting that the demurrer has not been disposed of may be regarded as a waiver: See *Caldenwood v. Teris*, 23 Cal. 335; and so it is a waiver of the demurrer if the plaintiff, while it is pending, replies to the matters which were demurred to: *Robertson v. Huffman*, 92 Ind. 247.

Judgment for failure to answer after demurrer to answer sustained is erroneous if the record does not show that defendant had notice of the ruling: *Tolmie v. Otchin*, 1 Or. 35.

### *The reply of plaintiff.*

§ 199. [86.] When the answer contains new matter constituting a defense or counterclaim, the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by



him, or any knowledge or information thereof sufficient to form a belief; and he may allege in ordinary and concise language, without repetition, any new matter, not inconsistent with the complaint, constituting a defense to such new matter in the answer.

**The reply.** — No reply is necessary when the allegations in the answer merely raise the question of the truth of the allegations set forth in the complaint or petition: *Ferguson v. Tutt*, 8 Kan. 370; *Nelcott v. Porter*, 19 Kan. 131; that is, when no new matter is pleaded in the answer: *Meyer v. Binkleman*, 5 Col. 262; *Riddle v. Pa. ke*, 12 Ind. 89; *State v. Williams*, 48 Mo. 210; *Ferris v. Johnson*, 27 Ind. 247; *Ferguson v. Tutt*, 8 Kan. 370; *Corry v. Campbell*, 25 Ohio St. 134; *Heath v. White*, 3 Utah, 474; but if new matter is alleged, a failure to reply will be taken as an admission of such new matter: *Schofield v. State Nat. Bank*, 9 Neb. 316; *Crichton v. Kellerman*, 1 Disn. 548; *Ballanger v. Lautier*, 15 Kan. 608; *Board etc. v. Shaw*, 15 Kan. 33. New matter requiring a reply is such matter as must be affirmatively pleaded: *Nash v. St. Paul*, 11 Minn. 174; *Evans v. Stone*, 80 Ky. 78. An answer purporting to admit a fact not stated in the complaint will not be construed as alleging affirmatively that such fact exists, so as to require a reply: *Hoisington v. Armstrong*, 22 Kan. 110.

A reply setting up facts inconsistent with the facts stated in the answer has been held to amount to a denial of those facts: *Meredith v. Lackey*, 14 Ind. 529. A reply to an original answer is good as a reply to an amended answer which only adds matter not requiring a reply: *Leslie v. Leslie*, 11 Abb. Pr., N. S., 311. Failure to reply to the new matter in the separate answer of one defendant does not admit such matter as to other defendants who do not set it up: *Bartholow v. Campbell*, 56 Mo. 117. It is not the province of a reply to introduce new causes of action: *Durbin v. Fisk*, 16 Ohio St. 533; *School District v. Caldwell*, 16 Neb. 68; and it has been held not allowable to set out a cause of action a second time, or to make a new assignment of it in the reply: *Shull v. Green*, 34 How. Pr. 418; 49 Barb. 311; *Stewart v. Wallis*, 30 Barb. 344; for the reply is only permitted as a response to the answer; and therefore a reply cannot be used to supply the omission of necessary averments in the complaint: *Bernheimer v. Marshall*, 2 Minn. 78; *Webb v. Bulwell*, 15 Minn. 479. A reply cannot change or enlarge the character of the action stated in the complaint, or the rights or remedies of the plaintiff: *Hatch v. Coddington*, 32 Minn. 92. In an action on a claim barred by the statute of limitations, where a new promise may be inferred from the facts stated, an answer alleging that the cause of action did not accrue within the statutory period needs no reply: *Buckingham v. Orr*, 6 Col. 587. But when the new promise is not alleged or to be inferred in the complaint, and defendant pleads the bar of the statute, the new promise must be set up by way of reply: *Buckingham v. Orr*,

6 Col. 587. And see *Hexter v. Clifford*, 5 Col. 168; *Smith v. Hall*, 19 Cal. 85; *Clark v. Atkinson*, 2 E. D. Smith, 112; *Watkins v. Stevens*, 4 Barb. 168; *Cutler v. Wright*, 22 N. Y. 472; *Conkey v. Barbour*, 22 Ind. 196; *Woodward v. Sloan*, 27 Ohio St. 596; *Clinton v. Eddy*, 37 How. Pr. 23; 54 Barb. 54; 1 Lans. 61; *Williams v. Willis*, 15 Abb. Pr., N. S., 11. In an action for the purchase price of land, an allegation that the deed was a mortgage to secure a usurious loan, and asking that it be canceled, is new matter requiring a reply: *Georgia v. Keetch*, 66 Barb. 245. A reply of fraud, to avoid the effect of a discharge in bankruptcy alleged in the answer, is proper: *Hamilton v. Reynolds*, 88 Ind. 191. In divorce, an answer setting up countercharges and asking for a divorce for defendant requires a reply: *School Dist. v. Wrebeck*, 31 Minn. 77. Mere conclusions of law need no reply: *Dunning v. Pond*, 5 Minn. 302; *State v. Williams*, 77 Mo. 463; *Jordan v. National S. & L. Co.*, 74 N. Y. 467.

Irrelevant matter in a reply can only be reached by a motion to strike out: *Magnus v. Admire*, 4 Mo. App. 133.

Want of a reply may be waived by proceeding to trial upon the evidence as if facts to which a reply is necessary had been denied: *State v. Williams*, 77 Mo. 463; *Simmons v. Carrier*, 68 Mo. 421; *Woodward v. Sloan*, 27 Ohio St. 592; *Lorell v. Wentworth*, 39 Ohio St. 614; *Nooner v. Short*, 20 Kan. 624; *Bent v. Phibbrick*, 16 Kan. 190; *Hopkins v. Cothran*, 17 Kan. 173; *Wilson v. Fuller*, 9 Kan. 190; *Gibbs v. Dickson*, 33 Ark. 107; *McAlister v. Howell*, 42 Ind. 15, 26; *Henslee v. Cannefar*, 49 Mo. 295; *Meador v. Malcolm*, 78 Mo. 550. The plaintiff need not set up facts in rebuttal of an affirmative defense not a counterclaim: *Arthur v. Homestead Fire Ins. Co.*, 78 N. Y. 462; *Metropolitan Life Ins. Co. v. Mecker*, 85 N. Y. 614. No reply is necessary where an issue is made by an averment in the complaint of non-payment and an allegation of payment in the answer: *Van Geisen v. Van Geisen*, 10 N. Y. 316. Where issues are squarely presented in the complaint and answer, and the reply denies the facts set up in the answer, it is error to sustain a demurrer to the reply, and to dismiss the action: *Davis v. Oldakers*, 3 Wash. 593.

**Amendment of reply.** — Where the answer sets up that the wheat in question was delivered in payment of certain "wheat notes," a reply setting up a contract for the conveyance of land and defendant's want of title is not at variance with the complaint; and an omission to plead in the reply a rescission of the contract, which does not mislead defendant nor affect his substantial rights, may be cured by amendment at any stage of the proceedings: *Ankeny v. Clark*, 20 Pac. Rep. 583.

### *Proceeding when plaintiff fails to plead.*

§ 200. [88.] If the answer contain a statement of new matter constituting a defense or counterclaim, and the plaintiff fail to reply or

demur thereto within the time prescribed by law, the defendant may move the court for such judgment as he is entitled to on the pleadings, and if the case require it, he may have a jury called to assess the damages.

**Motions for judgment on pleadings**, except in the cases provided for in this section, though frequently made, are not correct practice: *Bowles v. Doble*, 11 Or. 474.

*Demurrer or motion to the reply.*

§ 201. [89.] The defendant may demur to any new matter contained in the reply, when it appears upon the face thereof that such new matter is not a sufficient reply to the facts stated in the answer. Sham, frivolous, and irrelevant replies may be stricken out in like manner and on the same terms as like answers and defenses.

*Court must by rule fix times of pleading.*

§ 202. [90.] The court shall establish the rules prescribing the time in which pleadings subsequent to the complaint shall be filed.

## CHAPTER VI.

### OF THE VERIFICATION OF PLEADINGS.

§ 203. Subscription and verification of pleadings.

§ 204. In what cases verification may be omitted.

*Subscription and verification of pleadings.*

§ 203. [91.] Every pleading shall be subscribed by the party or his attorney, and, except a demurrer, shall also be verified by the party, his agent or attorney, to the effect that he believes it to be true. The verification must be made by the affidavit of the party, or if there be several parties united in interest and pleading together, by one at least of such parties, if such party be within the county and capable of making the affidavit; otherwise the affidavit may be made by the agent or attorney of the party. The affidavit may also be made by the agent or attorney if the action or defense be founded on a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney, or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney. When the affidavit is made by the agent or attorney, it must set forth the reason of his making it. When a corporation is a party, the verification may be made by any officer thereof, upon whom service of a notice might be made; and when the state, or any officer thereof in its behalf, is a party, the verification may be made by any person to whom all the material allegations of the pleading are known. When the party is absent from or a non-resident of the county in



in which the suit is brought, the verification may be made by the agent or attorney of said party.

The last sentence of this section was added by an act approved February 1, 1888, which went into effect on its approval.

**Subscription to pleadings.** — The signature cannot be by an attorney in fact: *Dacey v. Pollock*, 8 Cal. 572; *Weir v. Slocum*, 3 How. Pr. 397; and where a complaint is signed by an attorney in fact, it is the same as though commenced by an entire stranger to the plaintiff: *Dixey v. Pollock*, 8 Cal. 572. Where an answer had the signature of the attorney of record and that of an associate attorney attached to it, the court declined to strike it out. The court will not try the question whether the signature of the attorney of record was put there by himself or by his associate without his authority. There is nothing in the case of *Commissioners of the Funded Debt of San José v. Younger*, 29 Cal. 147, which is counter to this view: *Willson v. Cleveland*, 30 Cal. 192, 200. A judgment is not void or erroneous because the name of the plaintiff's attorney attached to the complaint is printed, instead of being written: *Hancock v. Bowman*, 49 Cal. 413.

Want of proper subscription is a mere irregularity, which is waived by pleading over: *State v. Brown*, 10 Or. 433; *Ehle v. Huller*, 10 Abb. Pr. 287.

**Verification.** — The object of the verification is to insure good faith in the averments of the parties: *Patterson v. Ely*, 19 Cal. 28. It is not a part of the pleading: *George v. McAvoy*, 6 How. Pr. 200; and want of verification or defect therein will be waived by pleading over: *State v. Brown*, 10 Or. 423; *Robbins v. Benson*, 11 Or. 515; *Greenfield v. Steamer Gunnell*, 6 Cal. 67; *McCullough v. Clark*, 41 Cal. 298. It is too late to raise the objection for the first time in the appellate court: *Payne v. Flournoy*, 29 Ark. 500.

The objection cannot be raised by demurrer: *Seattle C. & T. Co. v. Thomas*, 57 Cal. 197; but should be by motion. If the objection is made by proper motion, it is the duty of the court to require the pleading to be verified as required by law: *Dorrington v. Meyer*, 8 Neb. 214. An amendment of the verification is said to rest in the trial court, and the ruling is not subject to review on appeal: *Blanchard v. Bennett*, 1 Or. 325.

The courts are not inclined to favor objections on the ground of insufficient verification: *Wilkin v. Gilman*, 13 How. Pr. 225.

The affidavit should be subscribed by the deponent: *Lutimber v. Allen*, 2 Sand. 648. In New York it has been held that it should not be made before the party's attorney as notary: *Post v. Coleman*, 9 How. Pr. 94; *Peyser v.*

*McCormack*, 7 Hun, 300; and also in *Warner v. Warner*, 11 Kan. 121; but in *Kuhland v. Sedgwick*, 17 Cal. 123, and *Pfeiffer v. Riehn*, 13 Cal. 164, it is held that the verification may be made before the party's attorney if he be a notary, or before any one authorized to make affidavits; and see *Young v. Young*, 18 Minn. 90. A certificate "subscribed and sworn to before me" is held a sufficient *jurat*: *Sargent v. Townsend*, 2 Disn. 472.

The residence of defendant in another county, at a great distance from the place of trial, and the consequent inability of counsel to obtain his affidavit at the time it became necessary to file the answer, is not ground for not verifying the answer, but merely for obtaining an extension of the time for answering: *Drum v. Whiting*, 9 Cal. 423; *Strout v. Curran*, 7 How. Pr. 36; and the verification may or should then be made by the attorney.

Where the verification is by another than the party, it must state the reasons why the party did not make it; and this, whether the verification is made by the attorney: *Fitch v. Bigelow*, 5 How. Pr. 237; or by the party's agent: *Ross v. Longmuir*, 15 Abb. 326. Though one of several parties united in interest may verify the pleading, if the interests of several parties are not united, all must verify it: *Gray v. Kendall*, 10 Abb. Pr. 66; *Hull v. Ball*, 14 How. Pr. 305; *Andreios v. Storms*, 5 Sand. 609.

A verification by an attorney or agent, if the facts are within his personal knowledge, must show that the truth or falsity are within the personal knowledge: *West v. Home Ins. Co.*, 9 Saw. 412; but it need not show that the party is without the county, or his reasons for not verifying the pleading: *Steamer Senorita v. Simonds*, 1 Or. 274; but otherwise such facts must be stated: *Fitch v. Bigelow*, 5 How. Pr. 237; *Treadwell v. Fassett*, 10 How. Pr. 184; *Lyons v. Murat*, 54 How. Pr. 23; *Cropsey v. Wiggenshorn*, 3 Neb. 108. The attorney of an absent party may verify though the party has a resident agent: *Drever v. Appert*, 2 Abb. Pr. 165. An agent may verify a reply where he could verify the complaint: *Drever v. Appert*, 2 Abb. Pr. 165. Where a party has several agents, the verification need not be made by the agent who knows most about the matter: *Id.*

The verification where a corporation is a party may be made by a director: *Bigelow v. Whitehall Mfg. Co.*, 1 City Ct. Rec. 138; but if it be a foreign corporation, the verification may be made by its agent or attorney, duly appointed under the Oregon foreign-corporation act: *West v. Home Ins. Co.*, 9 Saw. 412.

*In what cases verification may be omitted.*

§ 204. [92.] When, in the judgment of the court, an answer to an allegation in any pleading might subject the party answering to a criminal prosecution, the verification of the answer to such allegation may be omitted. No pleading shall be used in a criminal prosecution against the party as evidence of a fact alleged in such pleading.



**Verification, when excused.** — That the verification of an answer may be omitted whenever the defendant would be excused from testifying as a witness to the truth of any matter denied by the answer, see *Drum v. Whiting*, 9 Cal. 422; *Clapper v. Fitzpatrick*, 3 How. Pr. 314; *Blaisdell v. Raymond*, 5 Abb. Pr. 144;

*Henry v. Salina Bank*, 1 N. Y. 83. In *State ex rel. McCormick v. Winton*, 11 Or. 456, it was held that when in the judgment of the court the answer to a charge against an attorney might subject him to a prosecution for a felony, the verification to such answer may be omitted.

## CHAPTER VII.

### OF THE GENERAL RULES OF PLEADING.

- § 205. Instruments of writing and accounts, how pleaded.
- § 206. Pleadings to be liberally construed.
- § 207. Irrelevant, redundant, and indefinite pleading, how objected to.
- § 208. Judgments of inferior courts, how pleaded.
- § 209. Conditions precedent, how pleaded.
- § 210. Private statutes, how pleaded.
- § 211. Requisites of pleading in action for libel or slander.
- § 212. Justification and mitigation in such actions.
- § 213. Answer in actions to recover property distrained.
- § 214. What causes of action may be united.
- § 215. Material allegations not controverted are deemed admitted, except those in the reply.
- § 216. Material allegation defined.

#### *Instruments of writing and accounts, how pleaded.*

§ 205. [93.] It shall not be necessary for a party to set forth in a pleading a copy of the instrument of writing, or the items of an account therein alleged; but unless he file a verified copy thereof with such pleadings, and serve the same on the adverse party, he shall, within ten days after a demand thereof in writing, deliver to the adverse party a copy of such instrument of writing, or the items of an account, verified by his own oath, or that of his agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court, or judge thereof, may order a further account, when the one delivered is defective; and the court may, in all cases, order a bill of particulars of the claim of either party to be furnished.

**Pleading account — Bill of particulars.** — Items of account need not be set forth in the pleading declaring on such account: *Allen v. Patterson*, 7 N. Y. 476; *Abadie v. Carillo*, 32 Cal. 172; *Wilkins v. Stidger*, 22 Cal. 235; *Majee v. Kast*, 49 Cal. 140. In *Barkley v. R. & S. R. Co.*, 27 Hun, 515, it is held that the word "account," as here used, applies to almost every demand upon contract consisting of several items; but in other cases it is held that the right to demand a bill of items of account is limited to the case of account stated: *Moore v. Belloni*, 42 N. Y. Sup. Ct. 184; *Johnson v. Mallory*, 2 Rob. (N. Y.) 681. The items must in all cases be set forth with as much particularity as the nature of the case will admit; but the law does not require impossibilities, and the party called upon to account is not subjected to the necessity of doing an impracticable thing: *Conner v. Hutchinson*, 17 Cal. 281. It is sufficient

filing of a copy of the account to set down in the form of an account the items thereof, and to file it with the complaint, without having previously made any entries in an account-book: *Black v. Chesser*, 12 Ohio St. 621.

If a party fails to object to the verification of an account within a reasonable time, he should not afterwards be heard to object to it: *Robbins v. Benson*, 11 Or. 514. The refusal to allow plaintiff to give evidence in support of his claim is proper only where he fails or refuses to give an account; it is not proper where items have been furnished, and the defendant, without asking for a more detailed account, moves that plaintiff be precluded from giving evidence: *Hart v. Spect*, 62 Cal. 187. The proper practice, if the account is insufficient or defective, is to move that the same be made more specific or definite: *Flinders v. Ish*, 2 Or. 320; *McKinney v. McKinney*, 12 How. Pr. 22.

A further account may be required at any time before trial: *Yates v. Bigelow*, 9 How. Pr. 186. Though a reply has been served, a plaintiff may call for a further bill of an account set up in the answer: *Yates v. Bigelow*, 9 How. Pr. 186. An order requiring a further account is defective and insufficient, if it do not state the particulars in reference to which a further specification is required; and it was held error to preclude the defendant from giving evidence of an account set up in the answer under such circumstances. If the account as delivered is not satisfactory, and the other party intends to object to the introduction of evidence on the subject, an order for its exclusion should be obtained previous to the trial: *Kellogg v. Paine*, 8 How. Pr. 329. On appeal from an order setting aside a judgment for failure to answer, it appeared that defendant had demanded a bill of particulars; plaintiff had furnished one as follows: "For merchandise, as per bill, eight hundred and seventy-seven dollars and ninety-four cents." Defendant treated it as a nullity, and did not answer. The supreme court held that defendant, if dissatisfied, should have obtained an order for further particulars, and had no right to consider plaintiff in default because he had furnished what defendant deemed an insufficient bill, and they reversed the order and ordered judgment to be entered: *P. Tool Co. v. Prader*, 32 How. Pr. 638; *Goodrich v. James*, 1 Wend. 289.

An order to furnish a copy of the account mentioned in the complaint does not *per se* extend the time to answer: *Platt v. Townsend*, 3 Abb. Pr. 9.

**Bill of particulars.**—It has been held, under a statute in substance like this, that bills of particulars are not confined to actions involving an account, or to actions for the recovery of money demands arising upon contract. The court may order them in any action, without regard to its nature, subject, or form, where the circumstances are such that justice demands

that a party should be apprised of the matters for which he is to be put for trial with greater particularity than is required by the rules of pleading. They have been ordered in actions of libel, escape, trespass, trover, ejectment, and even in criminal cases: *Tilton v. Beecher*, 59 N. Y. 176, 184; *Dwight v. Germania L. Ins. Co.*, 84 N. Y. 493. And they will be ordered in behalf of the plaintiff as well as of the defendant: See case last cited. And the defendant may be required to serve a bill of particulars concerning a matter of defense as well as of matter set up in counterclaim: *Kelsey v. Sargent*, 100 N. Y. 602. The word "claim," in this section, includes not merely a ground or cause of action upon which affirmative relief is asked, but also, in case of a defendant, whatever is set up by him, based upon facts alleged, as the reason why judgment should not be taken against him: *Dwight v. Germania Life Insurance Co.*, 84 N. Y. 493. See sec. 531, N. Y. Ann. Code Civ. Proc. of 1889.

**Order is discretionary.**—It is discretionary with the court to grant an application for a bill of particulars: *Tilton v. Beecher*, 59 N. Y. 176; *People v. Tweed*, 63 N. Y. 194; *Dwight v. Germania Life Ins. Co.*, 84 N. Y. 502. But it is a broad judicial discretion which must be employed with the view to enable parties to prepare their pleadings and evidence for the trial of the real issues involved, and not to impose unnecessary labor on any party: *Butler v. Mann*, 9 Abb. N. C. 49. While the court has power to require a bill of particulars to be furnished, an order denying an application for such a bill, solely upon the ground of want of power, will be reviewed by an appellate court; but if the court below exercises its undoubted power, its discretion in granting or refusing the application will not be reviewed: *Tilton v. Beecher*, 59 N. Y. 189.

See generally, on this subject, note in 2 N. Y. Civ. Proc. Rep. 240.

### *Pleadings to be liberally construed.*

§ 206. [94.] In the construction of a pleading, for the purpose of determining its effect, its allegation shall be liberally construed, with a view to substantial justice between the parties.

**Construction of pleadings.**—Pleadings will be liberally construed: *Chambers v. Hoover*, 3 Wash. 107; especially to sustain a judgment after verdict, where no motion was made to make them more definite: *Johnson v. Leonard*, 20 Pac. Rep. 591. And party on motion may be compelled to make his pleadings full and accurate: *Puget Sound Iron Co. v. Worthington*, 2 Wash. 472; *Renton v. St. Louis*, 1 Wash. 215; *Neuberg v. Farmer*, 1 Wash. 182; or have his case dismissed: *Chambers v. Hoover*, 3 Wash. 107. See notes to next succeeding section. The rule as to liberal construction of pleadings is held to apply only to matters of form; and does not apply to the fundamental requisites of a cause of action, and it is therefore still requisite that the pleader should present a clear and unequivocal statement of his cause of action or defense: *Puget Sound Iron Co. v. Worthington*, 2 Wash. 472; *Renton v. St. Louis*, 1 Wash. 215; *Neuberg v.*

*Farmer*, 1 Wash. 182; *Clark v. Dillon*, 97 N. Y. 370; *Beurge v. Koop*, 48 N. Y. 225; *Spear v. Downing*, 34 Barb. 522; and therefore, when a material statement is susceptible of two meanings, the one most unfavorable to the pleader must still be taken: *Clark v. Dillon*, 97 N. Y. 370; and the judgment to be rendered must still be *secundum allegata et probata*: *Neudecker v. Kohlberg*, 81 N. Y. 296; *Tooker v. Arnoux*, 76 N. Y. 397.

While all presumptions are to be made in favor of a pleading, it is held that much greater latitude will be allowed where the objection of insufficiency is not made until the trial than where raised on demurrer: *Clark v. Dillon*, 97 N. Y. 370; and the court will, at the trial, sustain the complaint, if possible: *Barkley v. State*, 15 Kan. 99; whereas, on a motion to strike out or render more definite, and the like, the pleading will be more strictly construed: *Nevada v. Kidd*, 28 Cal. 634. But



notwithstanding this, the court will favor the pleader, and will adopt a rational construction rather than one which will render the pleading an absurdity: *Olcott v. Carroll*, 39 N. Y. 436; and on appeal, every presumption will be indulged in favor of the ruling of the court below in sustaining a pleading: *Evans v. Schafer*, 88 Ind. 92.

The pleading must be construed so as to make the different parts harmonize, if possible: *Ryle v. Harrington*, 14 How. Pr. 59. General statements qualified, and clearly intended to be qualified, by subsequent parts must be so taken: *Page v. Boyd*, 11 How. Pr. 415. Facts must control rather than the conclusions of the pleader: *Jones v. Phoenix Bank*, 8 N. Y. 228. An admission will be taken most strongly against the party making it: *Miller v. Moore*, 1 E. D. Smith, 739. But a party desiring to take advantage of it must accept it as an entirety: *Rouse v. Whited*, 25 N. Y. 170; 82 Am. Dec. 337; *Albro v. Figueroa*, 60 N. Y. 630; *Goodyear v. De la Vergne*, 10 Hun, 537; *Wisby v. Bonte*, 19 Ohio St. 247. A complaint not objected to before trial should be strongly construed against the defendant: *Lyon v. Bond*, 3 Wash. 407.

Language actually used in a pleading is to be construed according to its ordinary and common meaning: *Rathbun v. Railroad Co.*, 16 Neb. 441, 443; *Woodbury v. Sackrider*, 2 Abb. Pr. 402; *Trustees etc. v. Odlin*, 8 Ohio St. 293, 297; *Hill v. Supervisors*, 10 Ohio St. 621; and if it is capable of different meanings, that which will support the pleading should be taken rather than that which will defeat it: *Allen v. Patterson*, 7 N. Y. 476; *Olcott v. Carroll*, 39 N. Y. 436; *Morse v. Gilman*, 16 Wis. 504.

Words are to be taken in their usual and common acceptation: *Woodbury v. Sackrider*, 2 Abb. Pr. 402; *Rathbun v. Railroad Co.*, 16 Neb. 441, 443; *Walton v. Singleton*, 7 Serg. & R. 449; *Backus v. Richardson*, 5 Johns. 476; and a liberal rather than restricted sense is to be given to the words, unless it clearly appears that the restricted sense was the one intended: *Close v. Nat. City Bank*, 14 Abb. Pr., N. S., 326. But where a word has two meanings, one of which is the result of judicial and statutory definition, this meaning should be accepted, unless the pleading clearly shows that another was intended: *Cook v. Warren*, 88 N. Y. 37. A word should be construed in its larger and more favorable sense than otherwise: *Miller v. Miller*, 33 Cal. 353. Abbreviations which are clearly understood will not be held ambiguous, but will be given their full intent: *Odd Fellows' Building Ass'n v. Hogan*, 28 Ark. 261. The abbreviation "vs." and the word "versus" are, in legal practice, so far English words as not to be contrary to a statute requiring all pleadings to be in the English language: *Smith v. Butler*, 25 N. H. 521. So the abbreviation "etc." is English, and will not vitiate a pleading on the ground that it is expressive of Latin words: *Berry v. Osborn*, 28 N. H. 279. Allegations of time, in the absence of averment to the contrary, are presumed to refer to the commencement of the action: *Townsend v. Norris*, 7 Hun, 239; *Burns v. O'Neil*, 10 Hun, 494; *McCormick v. Blossom*, 40 Iowa, 256. Where place is material, and the pleading is ambiguous in regard thereto, the presumption should be taken against the party whose pleading it is: *Beach v. Bay State Co.*, 18 How. Pr. 335.

### *Irrelevant, redundant, and indefinite pleading, how objected to.*

§ 207. [95.] If irrelevant or redundant matter be inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby; and when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment, or may dismiss the same.

**Motion to strike out.** — The motion to strike out irrelevant or redundant matter is addressed to the discretion of the court, and should be granted only when it is entirely clear that such matter is improper or irrelevant: *Town of Esser v. Railroad Co.*, 8 Hun, 361; *People v. Tweed*, 63 N. Y. 201; *Younger v. Dugie*, 26 Hun, 442; *Madden v. Railway Co.*, 30 Minn. 453; *Cate v. Gilman*, 41 Iowa, 530. The adverse party may move to have such matter stricken out, or answer to the merits: *Meeker v. Gilbert*, 3 Wash. 369. The power of striking out is to be exercised with reluctance and caution: *Esser v. Railroad Co.*, 8 Hun, 361; *St. John v. Griffith*, 6 Abb. Pr. 237. The power to strike out can be properly exercised only in favor of a person aggrieved: *Homan v. Byrne*, 14 N. Y. Week. Dig. 175. The indefiniteness to be relieved is only such as appears on the face of the pleading, and not such as may be ascertained by matter *dehors* the record: *Brown v.*

*Railroad Co.*, 6 Abb. Pr. 237; *Schofield v. Nat. Bank*, 9 Neb. 316.

The motion must point out the deficiency in the pleading with a reasonable degree of certainty: *Gilmore v. Norton*, 10 Kan. 491; *O'Connor v. Koch*, 56 Mo. 253; *Bowman v. Sheldon*, 5 Sand. 657. Thus a motion to strike out should indicate what it is desired should be stricken out: *Blake v. Eldred*, 18 How. Pr. 240; *Benedict v. Drake*, 6 How. Pr. 352; *Bryant v. Bryant*, 2 Rob. (N. Y.) 612; and a motion to make certain should indicate what it is claimed is uncertain: *Gilmore v. Norton*, 10 Kan. 491; *Kerr v. Reece*, 27 Kan. 338; for the court cannot be required to examine the whole pleading and select the objectionable parts: *Blake v. Eldred*, 18 How. Pr. 240. Where a specification in a motion to strike out included some matters not proper to be struck out, it was held that the whole motion should be denied: *White v. Allen*, 3 Or. 103.



**Irrelevant matter.** — Irrelevant matter is such as has no bearing on the question in dispute, and does not affect the subject-matter of the controversy so as in any way to affect or assist the decision of the court: *Jeffras v. McKillop etc. Co.*, 2 Hun, 351; 4 Thomp. & C. 578; *Straver v. Ocean Ins. Co.*, 2 Hilt. 475; 9 Abb. Pr. 23; *Fasnacht v. Stehn*, 53 Barb. 650; 5 Abb. Pr., N. S., 338; *Cahill v. Palmer*, 17 Abb. Pr. 196; 45 N. Y. 478. And see *Kelly v. Waterbury*, 87 N. Y. 179; *Kreusom v. Purdom*, 11 Or. 266. Matters merely of evidence should be stricken out as irrelevant: *Clark v. Otten-dorfer*, 2 N. Y. Month. Law Bull. 53; *McCau-ley v. Long*, 61 Tex. 74; *Bowen v. Aubrey*, 22 Cal. 566; *Cathcart v. Peck*, 11 Minn. 45; but not when the facts and evidence are synony-mous: *Davenport G. M. Co. v. Taussig*, 5 Civ. Proc. Rep. 69. Argument should be stricken out: *Gould v. Williams*, 6 How. Pr. 51; and so with unnecessary reasons for interposing a plea: *Nichols v. Briggs*, 18 S. C. 473. The sufficiency of what seems to be a cause of ac-tion or defense cannot be tried on motion to strike out: *Walter v. Fowler*, 85 N. Y. 621; and matter in an answer will not be stricken out so long as it is responsive to the allegations of the complaint: *McIntyre v. Ogden*, 17 Hun, 604. Where irrelevant matter cannot injure or prejudice the other party, it is held that it will not be stricken out: *Duprat v. Havemeyer*, 18 N. Y. Week. Dig. 439.

**Redundant matter.** — Redundancy is not identical with irrelevancy: *Bowman v. Sheldon*, 5 Sand. 657. A needless repetition of mate-rial averments has been held to be redundancy: *Bowman v. Sheldon*, 5 Sand. 657. Matter clearly redundant, if it is not prejudicial to

the opposite party or does not encumber the record, will not be stricken out: *Clark v. Har-wood*, 8 How. Pr. 470; *Denithorne v. Denithorne*, 15 How. Pr. 232; *Brockelman v. Brandt*, 10 Abb. Pr. 141. It has been held that redun-dant matter, in an answer which responds to similar matter in the complaint, will not be stricken out: *McIntyre v. Ogden*, 17 Hun, 604. A motion to strike out for redundancy in a complaint comes too late after pleading to the merits or after demurrer: *New York Ice Co. v. Insurance Co.*, 21 How. Pr. 234; *Best v. Clyde*, 86 N. C. 4; or, it has been held, even after an order for time to plead: *Best v. Clyde*, 86 N. C. 4.

**Motion to make certain and definite.** — See notes to next preceding section. The fact that the complaint contains other sufficient allega-tions will not deprive the defendant of his right to have a particular one made more cer-tain: *People v. Guardian Soc.*, 6 N. Y. Week. Dig. 136. But a motion to make a pleading more definite and certain should not be granted, unless the pleading is plainly insufficient in this respect: *People v. Tweed*, 5 Hun, 353; 63 N. Y. 194. The motion must be made in the lower courts, and the objection of mere un-certainty cannot be raised for the first time on appeal: *Osborn v. Graves*, 11 Or. 526; and it is even held that it must be made before trial, and that it cannot first be taken at the trial: *Farmers' etc. Bank v. Sherman*, 6 Bosw. 181; 29 How. Pr. 573; 33 N. Y. 69; *Germania Bank v. Distler*, 67 Barb. 333; *Bue v. Ketchum*, 51 Wis. 324; *Redmon v. Phoenix Fire Ins. Co.*, 51 Wis. 292; but the order refusing to grant the motion has been held appealable: *Brummett v. Perry*, 59 How. Pr. 155.

### *Judgments of inferior courts, how pleaded.*

§ 208. [96.] In pleading a judgment or other determination of a court or office[r] of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction.

**Judgment, how pleaded.** — At common law, in counting upon a judgment of an inferior court, it was necessary to state the facts con-ferring jurisdiction: *Smith v. Andrews*, 6 Cal. 652; *Sacain v. Chase*, 12 Cal. 283; *Constock v. Breed*, 12 Cal. 286; *Rowley v. Howard*, 23 Cal. 404; *Jolley v. Foltz*, 34 Cal. 226; *Turner v. Koby*, 3 N. Y. 193; *Barnes v. Harris*, 4 N. Y. 375. In commenting upon the change in pleading which the above section makes, the supreme court of California, in *Young v. Wright*, 52 Cal. 407, 410, and in *Judah v. Fredericks*, 51 Cal. 389, say that the statute must be strictly complied with. "A party wishing to avail himself of a provision of this character must comply strictly with its terms. In exonerat-ing him from an obligation which would other-wise be incumbent upon him, the statute prescribes the precise conditions on which he is to be relieved, and they must be strictly performed. In this case the averment is, not that the judgment was duly 'given or

made,' but that it was 'duly rendered,' and we are inclined to think these are not equiva-lent terms." As to what is a sufficient plead-ing of a judgment under this section, see *Beams v. Emantelli*, 36 Cal. 117; and see *City of Los Angeles v. Mellus*, 59 Cal. 444, 451. To say that the "judgment was entered" (*Hunt v. Dutcher*, 13 How. Pr. 538), or "duly re-ndered," is not equivalent to a statement that it was duly given or made: *Young v. Wright*, 52 Cal. 407. An insolvent discharge is within the meaning of a judgment under this sec-tion: *Livingston v. Oaksmith*, 13 Abb. Pr. 183.

The provision has been generally held not to apply to foreign judgments, though there are decisions to the contrary: *Hollister v. Hoagster*, 10 How. Pr. 539; *McLaughlin v. Nichols*, 13 Abb. Pr. 244; *De Nobele v. Lee*, 61 How. Pr. 272; *Karns v. Kuckle*, 2 Minn. 313; *Kronberg v. Eider*, 18 Kan. 150. As a case *contra*, see *Haastad v. Black*, 17 Abb. Pr. 227.

*Conditions precedent, how pleaded.*

§ 209. [97.] In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts showing such performance.

**Performance of conditions precedent, how pleaded.** — The old rule, as laid down by Mr. Stephen, was, that "in pleading the performance of a condition or covenant, . . . the party must show specially the time, place, and manner of performance": Steph. Pl. 334. The length to which the above section goes in departing from the ancient rule is indicated by *Dye v. Dye*, 11 Cal. 163; *Himmelsann v. Danos*, 35 Cal. 441; and *Rhoda v. Alameda Co.*, 52 Cal. 350, where it is said: "In actions upon contracts, a general allegation of performance of conditions precedent is declared sufficient by our statute. But a general allegation of the performance of condition prescribed by a statute has not been so declared, and is not therefore sufficient." The same principle was enforced in *People v. Jackson*, 24 Cal. 630, where, in pleading title to land under an act of the legislature which prescribes conditions precedent to acquiring title, it was held necessary to aver a performance of all the acts required by the statute. The rule recognized by these decisions is, that in all other cases than contracts the facts showing a performance must be specially pleaded. The rule cannot be extended beyond the cases mentioned in the section: *People v. Jackson*, 24 Cal. 632.

Moreover, it would seem to follow from this principle that the section applies only to conditions expressed in the contract, and not to

conditions imposed by law, as demand and notice in actions against indorsers; and such is the view contended for in Bliss on Code Pleading, sec. 302.

Compliance with this section is optional: *Mayor v. Doodv*, 4 Abb. Pr. 127; and if a party, instead of pleading in the form here allowed, attempts to specifically plead performance of a condition precedent, he must do so with all the particularity required by the common-law practice: *Garvey v. Fowler*, 4 Sand. 665.

An allegation that the plaintiff has fully performed on his part all conditions of the contract is sufficiently explicit: *Cal. Steam Nav. Co. v. Wright*, 6 Cal. 258; *Griffiths v. Henderson*, 49 Cal. 570; *Ferrer v. Home Mutual Ins. Co.*, 47 Cal. 416; and see *Crawford v. Satterfield*, 27 Ohio St. 421; *Lowry v. Megee*, 52 Ind. 107; *Andreas v. Holcombe*, 22 Minn. 339; *Blessingame v. Home Ins. Co.*, 75 Cal. 633. So an allegation that work was performed according to contract is equivalent to saying that it was duly performed: *Griffin v. Pitman*, 8 Or. 343. As to conditions precedent generally, see *Cutter v. Powell*, 2 Smith's Lead. Cas., and notes. Courts are disinclined to construe stipulations in a contract to do certain things within a given time in consideration of the payment of money by the other party, as conditions precedent: *Front St. etc. Co. v. Butler*, 50 Cal. 575.

*Private statutes, how pleaded.*

§ 210. [98.] In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title, and the day of its passage, and the court shall thereupon take judicial notice thereof.

**Private statutes, how pleaded.** — Private statutes are not judicially noticed, and therefore must be specially pleaded: *Railway Co. v. Moore*, 33 Ohio St. 384; *Bretz v. Mayor*, 35 How. Pr. 130. But it has been held that a private statute which is recognized in a public act will be judicially noticed, and need not be pleaded: *Webb v. Bidwell*, 15 Minn. 359.

In the absence of a law providing for the judicial notice of a private statute, the latter will not be judicially noticed: See extended note to *Lanfear v. Mestier*, 89 Am. Dec. 670.

Ordinances and by-laws of municipal corporations will be judicially noticed by the courts of the municipality, but not by courts generally: *Lanfear v. Mestier*, 89 Am. Dec. 670.

*Requisites of pleading in action for libel or slander.*

§ 211. [99.] In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause arose, but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and



if such allegation be controverted, the plaintiff shall be bound to establish on trial that it was so published or spoken.

**Libel or slander, complaint in.** — Where the words are actionable *per se*, no extrinsic averment for the purpose of showing the application of defamatory matter to the plaintiff is necessary: *More v. Bennett*, 48 N. Y. 472; *Dean v. Miller*, 66 Ind. 440; *Langton v. Hagerth*, 35 Wis. 150. But the code has not dispensed with the necessity of inducement or innuendoes where they are necessary to show the defamatory meaning of the words: *Wallace v. Bennet*, 1 Abb. N. C. 478; *Stewart v. Wilson*, 23 Minn. 449; *Hamm v. Wickline*, 26 Ohio St. 81; *De Witt v. Wright*, 57 Cal. 576; *Fleischmann v. Bennett*, 87 N. Y. 231. And the rule yet is, that where matter is not defamatory on its face, and becomes so only by reference to extrinsic facts, such facts must be alleged: *Buisdell v. Raymond*, 14 How. Pr. 265; 4 Abb. Pr. 446; *Fry v. Bennett*, 5 Sand. 54; *Wachter*

*v. Quenzer*, 29 N. Y. 547; *Carroll v. White*, 33 Barb. 615; *Wilson v. Fitch*, 41 Cal. 378; *Maynard v. Fireman's Fund Ins. Co.*, 47 Cal. 207; *Chamberlain v. Vance*, 51 Cal. 75; *Works v. Stevens*, 76 Ind. 181; *Emmerson v. Marrel*, 55 Ind. 265; *Lipprant v. Lipprant*, 52 Ind. 273; *Frank v. Dunning*, 38 Wis. 270; *Stewart v. Wilson*, 23 Minn. 449; *Smith v. Coe*, 22 Minn. 276; *Christal v. Craig*, 80 Mo. 367; *Legg v. Dunleavy*, 80 Mo. 558. Nor does the above section do away with the necessity of averring that the persons who read the writings or heard the words knew the plaintiff was meant: *De Witt v. Wright*, 57 Cal. 576.

See the definition of *colloquium* and of innuendo in the notes to *Thompson v. Lusk*, 26 Am. Dec. 94, and to *Van Vechten v. Hopkins*, 4 Am. Dec. 548.

*Justification and mitigation in such actions.*

§ 212. [100.] In an action mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

**Libel or slander, answer in.** — The same matter may be pleaded both in mitigation and in justification, but must be separately stated for each purpose, and such purpose alleged: *Fink v. Justh*, 14 Abb. Pr., N. S., 107; *Kelly v. Taintor*, 48 How. Pr. 270. The pleader may state that he will lose all the evidence to mitigate the damages by adding to his pleading a notice to that effect: *Fink v. Justh*, 14 Abb. Pr., N. S., 107; *Kelly v. Taintor*, 48 How. Pr. 270.

The defendant may plead in mitigation alone without attempting to prove justification: *Bush v. Prosser*, 11 N. Y. 347; *Dolevin v. Wilder*, 34 How. Pr. 488; *Van Benschoten v. Yaple*, 13 How. Pr. 97. Though he fails in justification, the matter in mitigation must go to the jury: *Bisley v. Shaw*, 12 N. Y. 67. Where matter is pleaded in mitigation only, it is not the subject of demurrer: *Newman v. Otto*, 4 Sand. 668; *Van Benschoten v. Yaple*, 13 How. Pr. 97; nor of a motion to strike out or make definite and

certain: *Maretzek v. Cauldwell*, 2 Rob. (N. Y.) 715; *Smith v. Trafton*, 3 Rob. (N. Y.) 709. But see *Dolevin v. Wilder*, 7 Rob. (N. Y.) 319; *Van Benschoten v. Yaple*, 13 How. Pr. 97.

Notwithstanding the change effected by the code in allowing matters adduced in justification, although insufficient for that purpose, to be used in mitigation of damages, still, where there is an entire failure to sustain the slander, and the circumstances show that the reiteration in the answer was malicious and without probable cause for believing it true, it may be considered by the jury on the question of damages: *Distin v. Rose*, 69 N. Y. 122; see also *Hatfield v. Lasher*, 81 N. Y. 246, holding that facts offered in mitigation must have been known to defendant when he uttered the defamatory words. See also *Willover v. Hill*, 72 N. Y. 36, to the same effect.

As to the form of pleading a justification, see *Kelly v. Waterbury*, 87 N. Y. 179.

*Answer in actions to recover property distrained.*

§ 213. [101.] In an action to recover the possession of property distrained doing damage, an answer that the defendant or person by whose command he acted was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing the damage thereon, shall be good without setting forth the title to such real property.

*What causes of action may be united.*

§ 214. [102.] The plaintiff may unite several causes of action in the same complaint, when they all arise out of,—



1. Contract, express or implied; or
2. Injuries, with or without force, to the person; or
3. Injuries, with or without force, to property; or
4. Injuries to character; or
5. Claims to recover real property, with or without damages for the withholding thereof; or
6. Claims to recover personal property, with or without damages for the withholding thereof; or
7. Claims against a trustee, by virtue of a contract or by operation of law.

But the causes of action so united must affect all the parties to the action, and not require different places of trial, and must be separately stated.

**Joinder of causes of action.** — Even in those cases where the joinder of several causes of action is permitted, the codes expressly state that they must be separately stated: *Boles v. Cohen*, 15 Cal. 152; *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 547. And if the pleading does not conform to this requirement, it is held in California that the defendant may demur: *Nev. Canal Co. v. Kidd*, 43 Cal. 180; 37 Cal. 282; *Buckingham v. Waters*, 14 Cal. 146; *Watson v. S. F. & H. B. R. R. Co.*, 41 Cal. 17; *White v. Cox*, 46 Cal. 169. In New York, if distinct causes of action, which may be united, are not separately stated, the remedy is by motion to make more definite and certain, and not by demurrer; because an omission to state by distinct counts distinct causes of action, which may be joined in the same complaint, is not a misjoinder by causes of action: *Bass v. Comstock*, 38 N. Y. 21; but a demurrer may be interposed when the causes of action are improperly united: *Goldberg v. Utley*, 60 N. Y. 429; *Wiles v. Suydam*, 64 N. Y. 175.

Each count must be complete in itself; each must contain all the facts necessary to constitute a cause of action; and its defects cannot be supplied from statements in other counts, unless expressly referred to in it: *Haskell v. Haskell*, 54 Cal. 260; and connected by appropriate words: *Anderson v. Speers*, 8 Abb. N. C. 382; *Reiners v. Broadhorst*, 59 How. Pr. 91. No particular mode of separately stating a cause is provided, however, and any mode which apprises defendant of what is intended is sufficient: *Hall v. McKechnie*, 22 Barb. 244; *Benedict v. Seymour*, 6 How. Pr. 298.

The causes of action must be in favor of all the plaintiffs, and must affect all the defendants: *Johnson v. Kirby*, 65 Cal. 482; although they need not affect all equally, or in the same manner: *Vermeule v. Beck*, 15 How. Pr. 333; *Blake v. Van Tilborg*, 21 Wis. 672. The defendants must also be charged in the same capacity in all the counts. Thus causes of action against defendant as an officer and as an individual cannot be joined: *Hancock v. Johnson*, 1 Met. (Ky.) 242; nor as executor and personally: *Ferrin v. Myrick*, 41 N. Y. 315.

**Contract, express or implied.** — Several breaches of one contract, although they relate to different portions thereof, may be joined: *Madge v.*

*Puig*, 12 Hun, 15. So claims to recover money paid on several separate purchases of lottery tickets may be joined: *Groover v. Morris*, 73 N. Y. 473. And actions for money tortiously received may be joined with other causes of action on contracts express or implied: *Stewart Balderston*, 10 Kan. 131. A complaint which contains a count setting forth the facts attending the purchase of a county warrant by plaintiff, and charging that defendants are liable upon an implied contract to repay the purchase-money, and a second count charging the defendants as indorsers of negotiable paper, and a third count in the usual form for money had and received, is not demurrable on the ground of misjoinder of causes of action: *Keller v. Hicks*, 22 Cal. 457. If a mortgage is assigned by the mortgagee to another party as a pledge for the payment of a debt due the other party by the mortgagee, it is not an improper joinder of several causes of action for the assignee to unite in the same action his claim against the mortgagor and mortgagee and persons having liens or encumbrances upon the mortgaged property, and make them all parties: *Farwell v. Jackson*, 28 Cal. 105. Causes of action on contract and for statutory penalty cannot be joined: *Wiles v. Suydam*, 64 N. Y. 173.

**Injuries to person.** — Where a complainant filed his complaint praying for the recovery of possession of land in the city of S., and damages for the detention of the land, and for forcible eviction and expulsion from it, and for the value of improvements erected upon it by him, the court sustained a demurrer to the complaint, because a cause of action for an injury to property was improperly joined with one for an injury to person: *Mayo v. Madden*, 4 Cal. 27.

**Injuries to property.** — The injuries that may be joined are independent and distinct. The property injured may be the same or different; it may be either real or personal; the title of the plaintiff to redress may be original in respect to one injury, while in respect to the other or others the right may have come to him by assignment. Some of the injuries complained of may be legal, while others may be of an equitable character. Trespass to land is a legal injury; to threaten to enter upon and waste it is an equitable injury; but both may

be joined in the same complaint, for the statute reason that both are injurious to property. That general likeness is the only test to which the question of joinder in cases like the present can be subjected under our system: *More v. Massini*, 32 Cal. 595. But the fact that a contract affects real property, such as land, does not change the nature of the obligation so as to permit a cause of action arising from it to be joined with a cause of action for injuries to the same tract of land: *Thomas v. Utica & B. R. R. Co.*, 97 N. Y. 245. Plaintiff filed her complaint in the court below for trespass against defendant, and prayed a verdict for five hundred dollars, the alleged value of property destroyed, and five hundred dollars damages. On demurrer the court held the complaint unobjectionable: *Tendesen v. Marshall*, 3 Cal. 440. And in an action for injuries to a mining claim, a claim for damages to the plaintiff by reason of the breaking away of the defendant's dam, and the consequent washing away of the pay-dirt of the plaintiff, may properly be joined with a claim for damages in the preventing plaintiff from working his claim: *Fraser v. Sears Union W. Co.*, 12 Cal. 555. The plaintiffs were owners in severalty of certain distinct parcels of land, and the action was brought to restrain the defendant from depriving them of water carried by various ditches to their respective lands, and to recover damages sustained by reason of past diversions of the water. It was held that the cause of action for damages was several as to each of the plaintiffs, and that it could not be joined with the cause of action for an injunction, which was common to all of them: *Barham v. Hostetter*, 67 Cal. 272. But if the complaint in an action against a sheriff and his official bondsmen alleges only a cause of action against him as a trespasser, and against his sureties as signers of the bond, and not otherwise, there is a misjoinder of causes of action: *Ghirardelli v. Bourland*, 32 Cal. 585.

*Recovery of real property.* — The plaintiff in an action for the recovery of real property may also claim damages for the withholding of it, and the value of the rents and profits: *Sullivan v. Davis*, 4 Cal. 291; *McKinney v. McKinney*, 8 Ohio St. 423; *Tompkins v. White*, 8 How. Pr. 520; *Holmes v. Davis*, 21 Barb. 265; 19 N. Y. 488; *Vandervoort v. Gould*, 36 N. Y. 639; *Armstrong v. Hinds*, 8 Minn. 254; *Locke v. Peters*, 65 Cal. 162; *Furlong v. Cooney*, 72 Cal. 322; but a cause of action for damages to other land cannot be joined with such an action: *Furlong v. Cooney*, 72 Cal. 322. However, to recover for the value of the rents and profits, a claim therefor must be set up, as the general claim for damages will not cover them: *Larned v. Hudson*, 57 N. Y. 161. But a claim for the possession of real property, with damages for its detention, cannot be joined in the same complaint with a claim for consequential damages arising from a change of a road by which a tavern-keeper may have been injured in his business. The damages in the one case arise out of the use of land claimed by the plaintiffs; the damages in the other case arise from an unauthorized diversion of a public road, by means of which the plaintiff suffered a loss of his usual business and profits: *Bowles v. Sacramento Turnpike Road*, 5 Cal. 225. One

action may, however, be brought to recover two separate or distinct pieces or parcels of land: *Boles v. Cohen*, 15 Cal. 152. The rights of parties in several tracts of land may, and ought to be, adjudicated in the same action to quiet title, where the adverse claimants are the same to each tract; and should all be included in one count: *Pennie v. Hildreth*, 81 Cal. 127. As to alleging the damages, an allegation of the value of the "use and occupation, rents and profits," of the premises for the period during which the defendants were in the wrongful possession, and excluded the plaintiffs, was held sufficient to charge the defendants, without any averment that they received such rents and profits. The whole averment was held to be, in effect, only that the value of the use of the premises whilst the plaintiffs were excluded from their enjoyment was the amount stated, which was a proper averment as the basis of the damages claimed for the wrongful detention of the property: *Patterson v. Ely*, 19 Cal. 40.

*Recovery of personalty.* — A claim to recover personalty may be united with a claim for damages for its taking or detention: *Pharis v. Carver*, 13 B. Mon. 236.

A cause of action for work and labor performed by the plaintiff for the defendant and a cause of action for work and labor performed for the defendant by an assignor of the plaintiff may be united in the same complaint: *Fraser v. Oakdale L. & W. Co.*, 73 Cal. 187.

*Joinder of causes in equity suits.* — Legal and equitable relief may be sought in the same action: *Lattin v. McCarty*, 41 N. Y. 107; *Phillips v. Gorham*, 17 N. Y. 270. Thus a legal cause for damages for breach of an agreement and an equitable one for its specific performance may be joined: *Sternberger v. McGovern*, 56 N. Y. 12; *Beck v. Allison*, 56 N. Y. 366. A complaint for money obtained by frauds at different times states but one cause of action: *People v. Tweed*, 63 N. Y. 194; but where several persons have been defrauded by means of similar, but not the same, false representations, they cannot be joined as plaintiffs to recover damages for the fraud: *Gray v. Rothschild*, 112 N. Y. 668. A cause of action to recover money paid on contract, because of defendant's refusal to perform and repudiation of the contract, may be united in the same complaint with one to recover back the money paid, on the ground that it was obtained from the plaintiff by fraud, but should be separately stated: *Freer v. Denton*, 61 N. Y. 492. If, however, two such causes are blended in one count, the plaintiff may recover without proving the fraud alleged, unless there has been an objection made by motion that the causes are not separately stated: *Freer v. Denton*, 61 N. Y. 492.

A claim to enforce an express or implied trust may be joined in a complaint with a claim to enforce a vendor's lien, existing without any written contract. Both such claims are founded on trusts, — one lying in contract, and the other arising by act and operation of law: *Burt v. Wilson*, 28 Cal. 632-639.

A plaintiff sued to obtain a transfer to him of certain shares of the stock of a corporation which one of the defendants had acquired from him through fraud. In the same action,



he sought to recover other shares of the stock which had been sold to another defendant under an assessment fraudulently levied by the corporation, and it was held that there was a misjoinder of causes of action: *Johnson v. Kirby*, 65 Cal. 482. But where a purchaser of real estate at an execution sale brought an action to set aside certain conveyances alleged to have been made by the judgment debtor in fraud of creditors and purchasers, and to re-

cover possession of the property, there is no misjoinder of causes of action: *Pfister v. Dacey*, 65 Cal. 403.

A complaint which seeks to reform a mortgage, and to enforce the same as reformed, states but one cause of action: *Hutchinson v. Ainsworth*, 73 Cal. 452.

Objection that causes of action have been improperly united, if appearing on complaint, is taken by demurrer: § 189.

*Material allegations not controverted are deemed admitted, except those in the reply.*

§ 215. [103.] Every material allegation of the complaint not controverted by the answer, and every material allegation of new matter in the answer not controverted by the reply, shall, for the purpose of action, be taken as true; but the allegation of new matter in a reply is to be deemed controverted by the adverse party, as upon a direct denial or avoidance, as the case may require.

**Allegations not denied, effect of.** — Each material allegation of the complaint not controverted by the answer must, for the purposes of the action, be taken as true: *Fleischmann v. Stern*, 90 N. Y. 114; *Burnap v. National Bank*, 96 N. Y. 125, 130; *Dunham v. Cudlipp*, 94 N. Y. 129. Compare *Gildersleeve v. Landon*, 73 N. Y. 609. And where a counterclaim is interposed, and there is no reply, but the trial proceeds as if all the matters set up in the counterclaim are in issue, and no point is raised that the counterclaim is admitted, the point cannot be taken on appeal: *Jordan v. National S. & L. Bank*, 74 N. Y. 467; *Muldoon v. Blackwell*, 84 N. Y. 646. New matter in an answer not instituting a counterclaim is deemed controverted, and may be traversed or avoided in any way; and for that purpose, competent evidence takes the place of pleading: *Arthur v. Homestead Fire Ins. Co.*, 78 N. Y. 462; *Curtis v. Sprague*, 49 Cal. 301; *Colton L. & W. Co. v. Raynor*, 57 Cal. 588. If a material averment of the complaint is admitted by the answer, and it is sought to be avoided by allegations of new matter, the affirmative of the issue in with the defendant, and to sustain the defense he must prove his allegations. If he fails to do so, the averment of the complaint stands admitted: *Connor v. Keese*, 105 N. Y. 643.

The object of this section is to compel defendant to admit what he cannot conscientiously deny: *Hartwell v. Page*, 14 Wis. 49. Such matter as is not denied, if material, need not be proved: *Lillenthal v. Anderson*, 1 Idaho, 673; *Hartwell v. Page*, 14 Wis. 49; *Landers v. Bolton*, 26 Cal. 416. Failure to deny an immaterial allegation is not an admission of its truth: *Connors v. Meir*, 2 E. D. Smith, 314; *Fry v. Bennett*, 5 Sand. 54; *Oechs v. Cook*, 3 Duer, 161. So an admission of a legal conclusion by the defendant in his answer is in no way binding upon the court: *Cutting v. Lincoln*, 9 Abb. Pr., N. S., 436. And see *Union Bank v. Bush*, 36 N. Y. 631; *Downer v. Read*, 17 Minn. 493. A denial of immaterial allegations only admits the statements in material ones: *Leffingwell v. Griffing*, 31 Cal. 231. But nothing is admitted by an omission to answer except what is well pleaded: *Harlow v. Hamilton*, 6 How. Pr. 475. And see *Fry v. Bennett*, 5 Sand. 54; *Clay County v. Simonsen*, 1 Dak. 403; 2 Dak. 112. And neither admissions nor stipulations can make a case broader than it is by allegation: *Tucker v. Parks*, 7 Col. 62. But a fact impliedly averred, if not denied, will be deemed admitted: *Anable v. Steam Engine Co.*, 16 Abb. Pr. 286; 25 N. Y. 470. Immaterial allegations need not be denied: *Jones v. Petaluma*, 36 Cal. 230; *Racouillat v. Rene*, 32 Cal. 450.

*Material allegation defined.*

§ 216. [104.] A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient.

**An immaterial allegation**, though not stricken out, need not be proved: See note to the preceding section.

**Material allegations.** — See this term defined in *Whitwell v. Thomas*, 9 Cal. 499.



## CHAPTER VIII.

### OF MISTAKES IN PLEADINGS, AND OF AMENDMENTS.

- § 217. Variance, when shall be deemed material.
- § 218. Practice in cases of immaterial variance.
- § 219. What is failure of proof.
- § 220. Variance in action to recover personal property.
- § 221. Power of court to allow amendments.
- § 222. Amendments, how made.
- § 223. Pleadings not in proper form may be stricken out.
- § 224. Defendant designated by fictitious name when true name not known.
- § 225. Harmless defects shall be disregarded.
- § 226. Supplemental pleadings, when allowed.

#### *Variance, when shall be deemed material.*

§ 217. [105.] No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just.

**Variance.** — The cause of action as proved must correspond with that averred in the pleadings, or there will be a variance: *Knapp v. Roche*, 5 Jones & S. 395; *Stout v. Coffin*, 28 Cal. 65; *Hathaway v. Ryan*, 35 Cal. 188; *Mondran v. Goux*, 51 Cal. 151; *Hopkins v. Orcutt*, 51 Cal. 537; *Bolen v. San Geronio Co.*, 55 Cal. 164; *McCord v. Seale*, 56 Cal. 262. The objection that the proof varies from the pleadings must, however, be taken at the trial; and if omitted, the objection cannot be raised for the first time on appeal: *Hill v. Mellon*, 3 Or. 542; *Davidson v. Oregon & Cal. R. R.*, 11 Or. 136; *Dikeman v. Norris*, 36 Cal. 94; *Bell v. Knowles*, 45 Cal. 193; *Speer v. Bishop*, 24 Ohio St. 598. Nor can the objection be made for the first time on a motion for a new trial: *Bell v. Knowles*, 45 Cal. 193. It is within the discretion of a court to disregard a variance between allegation and proof, and nothing short of an abuse of such discretion can be assigned as error on appeal: *Brown v. Moore*, 3 Or. 438. A refusal on the part of the plaintiff to amend his complaint to correspond to the proof, where the variance is material, will authorize nonsuit: *Tomlinson v. Monroe*, 41 Cal. 94.

**Material variance.** — No variance is material unless the adverse party has been actually misled to his prejudice, in maintaining his action or defense upon the merits: *Hill v. Mellon*, 3 Or. 542; *Dodd v. Denny*, 6 Or. 156; *Dunn v. Durant*, 9 Daly, 391; *Hoppelkom v. Hoffmann*, 12 Neb. 99; *Johnson H. Co. v. Clark*, 30 Minn. 308; and the party claiming to have been misled must prove that fact to the satisfaction of the court, showing in what respect he has been

so misled: *Hill v. Mellon*, 3 Or. 542; *Dodd v. Denny*, 6 Or. 156; *Dunn v. Durant*, 9 Daly, 391; *Catlin v. Gunter*, 11 N. Y. 368; *Meyers v. Chambers*, 68 Mo. 626.

A failure of proof is more than a material variance, and cannot be remedied by amendment. This occurs where no cause of action or defense whatever has been proved: *Dunn v. Durant*, 9 Daly, 391; and see *Poirer v. Fisher*, 8 Bosw. 258; *Kelsey v. Western*, 2 N. Y. 500; *Fay v. Grimstead*, 10 Barb. 321; *Gasper v. Adams*, 28 Barb. 441; whereas in case of a variance a cause of action or defense is proved, but not the one averred in the pleading; or a variance arises between the facts as proved and the facts which have been averred as constituting the cause of action or defense, or some of them: *Dunn v. Durant*, 9 Daly, 391.

There may be a material variance between the terms of the contract alleged and that proved; as where the complaint averred that defendant accepted a horse, agreeing to sell him for not less than three hundred dollars, and the proof was that defendant was authorized to sell the horse for not less than three hundred dollars, but there was no proof of his agreement to do so: *Tomlinson v. Monroe*, 41 Cal. 94. A complaint for goods sold and delivered is not sustained by evidence of a contract to furnish the goods to defendant to be by him sold on commission: *Evans v. Bailey*, 66 Cal. 112. So where plaintiffs sue in their separate capacities, and prove a contract with the partnership of which they were members: *McCord v. Seale*, 56 Cal. 262. If the complaint

alleges a promise to pay money to a corporation, and the promise proved was made to a committee of a church, there is a fatal variance between the complaint and proof: *Christian College v. Hendley*, 49 Cal. 349.

*Immaterial variances.* — As to the effect of immaterial variances, see the next section.

The following are examples of immaterial variance: Where an immaterial allegation — that is, one which might be regarded as surplusage — is not proved: *Sacramento Co. v. Bird*, 31 Cal. 73. Mere differences in quantity or extent do not create material variances: *Pensley v. Hart*, 3 West Coast Rep. 623. So where the variance goes merely to the identity of the paper sued on: *Zeigler v. Wells*, 28 Cal. 265; and see *Haskell v. Cornish*, 13 Cal. 45; alleging sale to have been in writing and proving one by parol: *Patterson v. Keystone M. Co.*, 30 Cal. 364; where the agreement declared was erroneously set forth: *Peters v. Foss*, 20 Cal. 590; where the copy of the writing spread on the pleadings contains trifling departures from the original, as in abbreviations, and in stating the amount in words as well as figures: *Corcoran v. Doll*, 32 Cal. 89; where the allegation is, goods sold and money had and received; and the proof, unlawful taking and sale of goods and retaining price: *Harpending v. Shoemaker*, 37 Barb. 270; allegation, delivery to convey to C; proof, delivery to convey to B, misdelivering them and promise to regain possession and deliver to C: *Richards v. Westcott*, 2 Bosw. 589; allegation, an express agreement; proof of implied one: *Smith v. Lippincott*, 49 Barb. 398; allegation, implied agreement for services; proof, express agreement: *Fort v. Gooding*, 9 Barb. 371; allegation of an absolute promise; proof of a conditional promise, the condition having been fulfilled before the action was begun: *Hart v. Hulson*, 6 Duer, 294; declaring on an express promise barred by the statute of limitations, and proving an acknowledgment from which a promise will be implied: *Farrell v. Palmer*, 36 Duer, 187; declaring on an express warranty and proving an implied warranty: *Leopold v. Vankirk*, 27 Wis. 152, 155; 29 Wis. 458, 551; *Giffert v. West*, 33 Wis. 617; declaring on an unconditional contract, and proving a conditional contract, the conditions being of a character not to play any part in the pending action: *Clarke v. Phoenix Ins. Co.*, 36 Wis. 186; alleging an express promise to pay for work and labor, and proving a *quantum meruit*: *Sussdorf v. Schmidt*, 55 N. Y. 319; complaint on *quantum meruit*; proof of specific contract fixing price: *Falls v. Vestrali*, 2 Keyes, 152; *Ludlow v. Dole*, 62 N. Y. 617; pleading a total failure of consideration, and proving a partial failure: *Plute v. Vega*, 31 N. Y. 383; allegations of work to be done at agreed compensation; proof that it was to be at what it was reasonably worth: *Scott v. Lilienthal*, 9 Bosw. 224; under complaint on a contract for a specific sum for services, proof of value constitutes an immaterial variance: *Sussdorf v. Schmidt*, 55 N. Y. 319; allegation of delivery to carriers at 59 Broadway; proof of delivery in Canal Street: *Newstadt v. Adams*, 5 Duer, 43; allegation of neglecting to forward goods; proof of refusal to deliver at destination: *Rosebrooks v. Dinsmore*, 5 Abb. Pr., N. S.,

59; in ejectment, allegation, title by conveyance; proof, title by inheritance: *Cruger v. McClaury*, 41 N. Y. 219; allegation in ejectment that defendant was in possession of the premises in right of his wife; proof, possession in his own right: *Rose v. Bell*, 38 Barb. 25; allegation that property belonged to plaintiff; proof that he held it as a factor: *Gorum v. Cary*, 1 Abb. 285; allegation, technical release; proof, release by estoppel: *Cornell v. Masten*, 35 Barb. 157; allegation, agreement to deliver property in consideration of transfer and release of a claim against third party; proof, sale of debt without its release: *Meriden Brit. Co. v. Zingsen*, 4 Rob. (N. Y.) 312; allegation, sale; proof, employment to manufacture: *Union Ind. Rub. Co. v. Tomlinson*, 1 E. D. Smith, 364; in slander, variance in time: *Potter v. Thompson*, 22 Barb. 87; so variance in the slanderous words proved from those charged, where they could not mislead: *Boynton v. Boynton*, 43 How. 380; alleging libel upon the plaintiff, and proving publication of the words of the plaintiff and a third person: *Robinet v. McDonald*, 65 Cal. 611; allegation of unlawfully setting fire to a building; proof of negligent waste in suffering it to be burned: *Robinson v. Wheeler*, 25 N. Y. 252; allegations, in action to recover money paid by mistake, that plaintiff's book-keeper supposed checks had been duly dishonored; proof that he supposed they were covered by an agreement waiving protest: *Walbridge v. Ocean Nat. Bank*, 59 N. Y. 642; allegation of notice of non-payment; proof of facts to excuse notice: *Purchase v. Mattison*, 6 Duer, 587; allegation of due presentment to maker and demand; proof, presentment at last known place of business, whence he had removed, and that after diligent search he could not be found: *Paton v. Lent*, 4 Duer, 231; variance in term of lease: *Phelps v. Van Dusen*, 3 Abb. App. Dec. 604; allegation, note payable generally; proof, note at eight months: *Chapman v. Carolin*, 3 Bosw. 456; allegation, note at three months; proof, at four: *Trowbridge v. Didier*, 4 Duer, 448; allegation, note made by Orrin North; proof that it was made by two persons trading as Orrin North: *Bank of Cooperstown v. Woods*, 28 N. Y. 545; allegation that work was performed by "Jones Wolcott"; proof that it was performed by "Edwin Wolcott": *Wolcott v. Meech*, 22 Barb. 321; occurrence of injury from negligence in different manner from that alleged: *Poildard v. N. Y. & N. H. R. R. Co.*, 7 Bosw. 437; variance in the degree of force used in expelling the plaintiff from defendant's cars: *Kline v. C. P. R. R.*, 39 Bosw. 591; allegation of a sole liability; proof of a joint undertaking: *Carter v. Hope*, 10 Barb. 180; allegation that defendant is owner of all; proof that he is owner of part only: *Van Rensselaer v. Jones*, 2 Barb. 643; variance in description, and adjoining owner being stated to be on east instead of west side: *Russell v. Conn.*, 20 N. Y. 81; allegation, moneys procured to be paid by fraud; proof, money paid without fraud: *Byrnie v. Wood*, 24 N. Y. 607; allegation that goods were sold and delivered to the defendant; proof that the goods were purchased by the defendant, but delivered to a third party for his own use by order of the defendant: *Royers v. Verona*, 1 Bosw. 417.



*Practice in cases of immaterial variance.*

§ 218. [106.] When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.

**What amendments allowed at trial.** — trial: *Ford v. Ford*, 56 Barb. 525; *Woolsey v. Roundout*, 2 Keyes, 603.  
A new cause of action cannot be inserted at the

*What is failure of proof.*

§ 219. [107.] When, however, the allegation of the cause of action or defense to which the proof is directed is not proved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof.

**Failure of proof.** — A failure of proof is where no cause of action or defense whatever is proved: *Dunn v. Durant*, 9 Daly, 391; *Kelsey v. Western*, 2 N. Y. 500. Thus in an action of replevin to recover possession of goods, where plaintiff rests his whole claim upon the fact that he has a special property in such goods by virtue of a chattel mortgage, and the instrument is ruled out, when offered in evidence, as not being a mortgage in law, but absolutely void, the case is one of failure of proof: *Marsh v. Wale*, 20 Pac. Rep. 578. Where the complaint is in tort, and the proof is of a contract, or vice versa, the variance is fatal, and constitutes a failure of proof: *Walter v. Bennett*, 16 N. Y. 250; *De Grau v. Elmore*, 50 N. Y. 1; *Beard v. Yates*, 2 Hun, 466. But a trial court may allow an amendment to a complaint by striking out words sounding in tort, where their omission leaves a complete statement of a cause of action on contract, and the defendant is not misled thereby: *Beckwith v. Rochester I. Mfg. Co.*, 25 Hun, 59. Where the complaint is for fraud, the action cannot be sustained on the ground of mutual mistake: *McMichael v. Kilmer*, 76 N. Y. 36; nor on the ground that a liability on contract was dis-

closed by the evidence: *People v. Dennison*, 84 N. Y. 273.

The following are instances of failure of proof: Where an action is on account stated, and no account is shown: *Volkenning v. Degraaf*, 42 N. Y. Super. Ct. 424; an allegation of want of consideration, and proof of payment: *Texier v. Gouin*, 5 Duer, 389; allegation of conversion, proof of negligent loss: *Toland v. Steam Nav. Co.*, 4 Abb. Pr., N. S., 316; allegation of marriage, and proof of mere betrothal: *Klien v. Wolfsohn*, 1 Abb. N. C. 134; allegation of neglect to construct cattle-guards, and proof of neglect to fence: *Parker v. Rensselaer & S. R. R. Co.*, 16 Barb. 315; an allegation of release, and proof of a new promise: *Stevens v. Tappin*, 5 Duer, 219. Suing to recover balance due on partnership account, and proof disclosing purchase by defendant of plaintiff's interest, is fatal: *Whitney v. Burrington*, 59 Duer, 36. The plaintiff in replevin cannot, in his complaint, for the purpose of enabling him to sue in replevin, aver that the defendant is in possession of the property, and then, on the trial, recover judgment against him on the ground that he was not in possession: *Hawkins v. Roberts*, 45 Cal. 38, 42.

*Variance in action to recover personal property.*

§ 220. [108.] Where the plaintiff in an action to recover the possession of personal property, on a claim of being the owner thereof, shall fail to establish on trial such ownership, but shall prove that he is entitled to the possession thereof by virtue of a special property therein, he shall not thereby be defeated of his action, but shall be permitted to amend, on reasonable terms, his complaint, and be entitled to judgment according to the proof in the case.

**A complaint to recover personal property**, which alleges ownership generally, cannot be amended to show right of possession by virtue of special ownership, when plaintiff holds

under a mortgage: *Silshy v. Aldridge*, 23 Pac. Rep. 836; *Kerron v. North Pac. Lum. and Mfg. Co.*, 24 Pac. Rep. 445.

*Power of court to allow amendments.*

§ 221. The court may, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings, by adding or



striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars, and may, upon like terms, allow an answer to be made after the time limited by this code, and may, upon such terms as may be just, and upon payment of costs, relieve a party, or his legal representatives, from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. [February 26, 1891, § 3.]

This is § 109 of the code of 1881, omitting the last clause, which was a special provision for applications for relief after the close of the term of court. It is omitted in view of the provision of the constitution declaring the court always open.

**Amendments in furtherance of justice.**

— *At what stages allowed, etc.* — A pleading cannot lawfully be amended in a material respect, except at a time which will give the party against whom the amendment is allowed a right and opportunity to meet by proof the new allegations made against it: *Romeyn v. Sickles*, 108 N. Y. 650; *Butcher v. Bank of Brownsville*, 83 Am. Dec. 446. And with this limitation, amendments to pleadings should be, and generally are, allowed at any stage of the proceedings, when the suit will not be delayed thereby: See case last cited; *Reeder v. Sayre*, 70 N. Y. 180. Thus amendments have been permitted at the trial: *Walsh v. McKeen*, 75 Cal. 519; *Riverside L. & I. Co. v. Jensen*, 73 Cal. 550; *Doane v. Houghton*, 75 Cal. 360; *Reeder v. Sayre*, 70 N. Y. 180; *Allen v. Ranson*, 100 Am. Dec. 282; *Price v. Brown*, 98 N. Y. 388; at the close of the evidence: *Chapin v. Dobson*, 78 N. Y. 74; pending a motion for a nonsuit, to make the complaint conform to the evidence: *Kamm v. Bank of California*, 74 Cal. 191; *Valencia v. Couch*, 32 Cal. 339; 91 Am. Dec. 589; after nonsuit granted, but before it was entered, pending a motion for a new trial: *Thomas v. Nelson*, 69 N. Y. 118; *Phillips v. Brigham*, 71 Am. Dec. 227; and before judgment, to make the complaint correspond with the judgment: *Hooper v. Wells, Fargo, & Co.*, 85 Am. Dec. 211. In California, pleadings cannot be amended by the trial court pending appeal: *Kirby v. Superior Court*, 68 Cal. 604. Compare *Dreyfuss v. Tompkins*, 67 Cal. 339; and *Hooper v. Wells, Fargo, & Co.*, 85 Am. Dec. 211; but in New York the supreme court has power, on appeal from a judgment for the plaintiff, to amend the complaint so as to make it conform to the terms of the contract as proved upon the trial: *Harris v. Tumbidge*, 83 N. Y. 92. Permission to amend will sometimes be granted by the court of its own motion: *Valencia v. Couch*, 91 Am. Dec. 589; but it is not bound to exercise that power, and may dismiss a complaint without prejudice: *Knapp v. McGowan*, 96 N. Y. 76. But if a party does not amend his pleading, or offer to amend it, when it is shown to be defective, a

motion to dismiss the complaint on account of the defect should be granted, and if refused, such denial will be reversed on appeal: *Pope v. Terre Haute etc. Co.*, 107 N. Y. 61; *Dixon v. Woodward*, 103 N. Y. 638; *Southwick v. First Nat. Bank*, 84 N. Y. 420. So if there has been no amendment, and judgment has been rendered upon a different cause of action, will the judgment be reversed: See last two cases cited. A bill of particulars, like a pleading, may be amended: *Case v. Pharis*, 106 N. Y. 114. An application to amend, on the ground of a variance between the pleadings and proof of the opposite party will not be allowed, unless the statutory affidavit is filed, showing that the moving party has been misled to his prejudice: *Allen v. Ranson*, 100 Am. Dec. 282, note 287. Defendant, by obtaining time and failing to file his amended answer, is not entitled to longer time without some showing why such answer was not ready: *Butcher v. Bank of Brownsville*, 83 Am. Dec. 446.

*Same — Discretion of court, etc., do not extend to new causes of action.* — Leave will be granted to amend before trial whenever justice will be furthered thereby, when some reasonable excuse for the defect is given: *Harrington v. Slade*, 22 Barb. 161; *Pierson v. McCullitt*, 22 Cal. 127; *Stringer v. Davis*, 30 Cal. 321; and to permit such an amendment as provided by this section is usual, a refusal of leave being the exception: *Henderson v. Morris*, 5 Or. 24; *State v. Mayor etc.*, 18 Iowa, 388; *Brockman v. Berryhill*, 16 Iowa, 183; *Miller v. Perry*, 38 Iowa, 301; *Hedges v. Roach*, 16 Neb. 674; *Clark v. Clark*, 20 Ohio St. 128. The exercise of the power is within the sound discretion of the court: *Hexter v. Schneider*, 14 Or. 184; and for an abuse of such discretion the appellate court will reverse the judgment: *Bowles v. Doble*, 11 Or. 475; *Hexter v. Schneider*, 14 Or. 184; *Bailey v. Kay*, 50 Barb. 110; *Stringer v. Davis*, 30 Cal. 318; *Schickelin v. Whipple*, 10 Wis. 81; *Wright v. Bacheller*, 16 Kan. 259; *Smith v. Yreka Water Co.*, 14 Cal. 201. The court may impose terms upon which amendments can be made: *Williams v. Miller*, 1 Wash. 88; *Silbury v. Frost*, 3 Wash. 388; *McGee v. Piedmont Mfg Co.*, 7 S. C. 263; *Clune v. Sullivan*, 56 Cal. 249. And amendments may be made at any stage of the case, upon terms: *Carson v. Raulstack*, 3 Wash. 168; *Chambers v. Hoover*, 3 Wash. 107; *Gailihu v. Cadwell*, 3 Wash. 501; *Wood v. Mastick*, 2 Wash. 64; *Renton v. St. Louis*, 1 Wash. 215;

*Nesherg v. Farmer*, 1 Wash. 182; *Kerron v. North Pacific etc. Mfg. Co.*, 24 Pac. Rep. 445; *Williams v. Miller*, 1 Wash. 88. A reply may be amended: *Ankeny v. Clark*, 20 Pac. Rep. 583; and an affidavit: *Murne v. Schuabacher*, 2 Wash. 130.

As to terms, see *Harrington v. Slade*, 22 Barb. 161; *Tooker v. Arnoux*, 1 N. Y. Month. Law Bull. 54; *Havemeyer v. Havemeyer*, 62 How. Pr. 476; 1 N. Y. Civ. Proc. Rep. 418; *Smith v. Rathbun*, 13 Hun, 47; 75 N. Y. 122. If leave is given a defendant to put in an amended answer, provided no matter be set up therein which will affect orders previously made in the cause, such amended answer will be stricken out if it is incompatible with the terms upon which the leave was granted: *Crump v. Thomas*, 89 N. C. 241. The court cannot under this section allow amendments which substitute one cause of action for another: *Van Syckels v. Perry*, 3 Rob. (N. Y.) 621; *Robertson v. Robertson*, 9 Daly, 44; *Givens v. Wheeler*, 5 Col. 598; *Burnes v. Quigley*, 59 N. Y. 265; *Parker v. Rodas*, 79 Mo. 88; or set up a new cause of action: *Andrews v. Andrews*, 3 Wash. 286; *Evangelical Luth. Church v. Finger*, 11 N. Y. Week. Dig. 460; *Pottier v. Matthews*, 1 N. Y. Week. Dig. 12; *Van de Haar v. Van Domseller*, 56 Iowa, 671; *Board of Supervisors v. Decker*, 34 Wis. 378; *Scorill v. Glasner*, 79 Mo. 449; *Humphrey v. Hughes*, 79 Ky. 487; *Sweet v. Mitchell*, 15 Wis. 641; *Spreng v. Brooks*, 23 Wis. 196; *Wheeler v. Van Denberg*, 5 Col. 598; *Givens v. Wheeler*, 6 Col. 149; for this would not be an amendment. If the same evidence will support both complaints, and the same measure of damages will apply to both, the change is an amendment, and not a substitution of another cause: *Lumpkin v. Cather*, 69 Mo. 170; *Scorill v. Glassner*, 79 Mo. 449. And it is a fair test to determine whether a new cause of action is alleged in the amended complaint, that a recovery had upon the original complaint would be a bar to any recovery under the amended complaint: *Davis v. New York etc. R. R. Co.*, 110 N. Y. 646. An application for leave to amend may be refused for riches of the applicant: *Egert v. Wicker*, 10 How. 193; *Gowdy v. Poulain*, 2 Hun, 218; 4 Thomp. & C. 545; *Abham v. Boyd*, 4 Daly, 39; *Courtright v. Deeds*, 37 Iowa, 503. When all the facts alleged in a complaint will not entitle a plaintiff to any relief, facts essential to the cause of action, occurring after the commencement of the action, cannot be incorporated into the complaint by amendment: *McCullough v. Cady*, 4 Bosw. 603.

The court may at the trial, or before the cause is submitted, allow an amendment to conform the pleading to the facts proved, if no substantial change in the claim or defense is worked thereby: *Meyer v. Feigel*, 34 How. Pr. 434; 7 Rob. (N. Y.) 122; *Thomas v. Nelson*, 69 N. Y. 118; *Levensberg v. Purdy*, 18 N. Y. 515; 16 Barb. 376; *Rettig v. Newman*, 99 Ind. 424; *Woddy v. Trustees etc.*, 2 Keyes, 603; 4 Abb. App. 639; *Hammond v. Railroad Co.*, 49 Iowa, 450; *Farmers' Gold Bank v. Storer*, 60 Cal. 387; and such amendments are very liberally allowed in furtherance of justice: *Kirstein v. Madden*, 38 Cal. 163; *Gillan v. Hutchinson*, 16 Cal. 153; *Hannon v. Gibson*, 14 Mo. App. 33; under a judicious discretion of the court:

*Brauns v. Stearns*, 1 Or. 367; *Hammond v. Foster*, 4 Mont. 421; *Hoffman v. Rothenberger*, 82 Ind. 484. It has been held that the only limit on the power of the court to allow amendments at the trial is, that a new cause of action shall not be brought in: *Reeder v. Sayre*, 6 Hun, 562; 70 N. Y. 180. And see *Fogg v. Edwards*, 20 Hun, 90; *Union Bank v. Mott*, 10 Abb. Pr. 372; 18 How. Pr. 506; *Johnson v. Oppenheim*, 43 How. Pr. 433; 12 Abb. Pr., N. S., 449; 55 N. Y. 280; *Van Ness v. Bush*, 14 Abb. Pr. 33. As to how far amendments varying or altering a cause of action are allowed, see extended note to *Stevenson v. Mudgett*, 34 Am. Dec. 158-162; *Miles v. Vanhorn*, 79 Am. Dec. 477; *Castagnino v. Balletta*, 82 Cal. 250. The answering of an amended complaint is a waiver of the objection that it alleges a new cause of action which arose after the institution of the suit: *Witkowski v. Hern*, 82 Cal. 604. An amendment increasing the amount claimed, but not changing the cause of action, has been allowed: *Dakin v. Insurance Co.*, 13 Hun, 122; 77 N. Y. 600; *Miaghan v. Insurance Co.*, 24 Hun, 58; *Knapp v. Roche*, 62 N. Y. 614. And see *Raleigh v. Cook*, 60 Tex. 438.

It is held that no material amendment will be allowed after the cause has been submitted or verdict or finding announced, especially where the material rights of the opposite party would be affected: *Holcraft v. King*, 25 Ind. 352; but where nothing appears by the record, it is presumed that the amendment was made in proper time: *Williams v. McGrade*, 18 Minn. 82.

The fact that an appeal has been taken and the cause then remanded will not affect the power of the lower court in regard to amendment. And the appellate court can only remand the cause for amendment, but cannot prescribe the character of amendment: *Braunson v. Oregonian Ry Co.*, 11 Or. 161.

It has been held that one may amend by adding a prayer for additional relief: *Getty v. Hudson R. R. Co.*, 6 How. Pr. 269; or by changing the place of trial: *Stryker v. N. Y. Ech. Bank*, 28 N. Y. 20; *Toll v. Cromwell*, 12 N. Y. 79.

This right to amend includes the right to withdraw a demurrer and serve an answer instead: *Robertson v. Bennett*, 1 Abb. N. C. 476; *People v. Whitwell*, 62 How. Pr. 383; *Frank v. Bush*, 2 N. Y. Civ. Proc. Rep. 250; 63 How. Pr. 282. And an amended complaint which radically changes the cause of action may be demurred to without a withdrawal of the answer to the original complaint: *Kellar v. Bare*, 62 Iowa, 468.

The amended pleading supersedes the original, which itself ceases to perform any function as a pleading: *Sands v. Calkins*, 39 How. Pr. 1; *Dunn v. Baker*, 12 How. Pr. 521; *Fry v. Bennett*, 9 Abb. Pr. 45; 3 Bosw. 200; *People v. Hunt*, 1 Idaho, N. S., 433. As concerns the commencement of the action, the amendment relates back to that time: *Barber v. Reynolds*, 33 Cal. 497; *Ward v. Kallgleisch*, 21 How. Pr. 283. But see *Sheldon v. Adams*, 18 Abb. Pr. 405; *Evangelical Lutheran Church v. Finger*, 11 N. Y. Week. Dig. 460; *Anderson v. Meyers*, 50 Cal. 525; *Jeffers v. Cook*, 58 Cal. 151. And an amended complaint is to be held as stating the cause of action as it existed when the suit



was instituted: *Worley v. Moore*, 97 Ind. 15. And see *Ryan v. Railroad Co.*, 21 Kan. 365; *Brown v. Galena Min. Co.*, 32 Kan. 528.

*Amendment or pleading over after demurrer.* — Upon demurrer overruled, it lies in the discretion of the court to permit the party to plead over on proper terms: *Bonnifield v. Price*, 1 Wyo. 172; but it must appear that the demurrer was interposed in good faith: *Osgood v. Whittlesey*, 10 Abb. Pr. 134.

If demurrer is sustained, it ought to be with leave to amend on such terms as may be proper: *Gallagher v. Delaney*, 10 Cal. 410. But if no leave to amend be asked for, it is not error to proceed to final judgment without granting such leave: *Seale v. McLaughlin*, 28 Cal. 672; *Gilbin v. Hutchinson*, 16 Cal. 154; *Deross v. Gray*, 22 Ohio St. 159; and so, if the pleading cannot be amended so as to be effective, judgment without such leave is proper: *Snow v. Fourth Nat. Bank*, 7 Rob. 479. On appeal from a judgment overruling a demurrer, the appellate court will not entertain a motion for leave to plead over: *Powell v. D. S. & G. R. R.*, 14 Or. 22; nor reverse the judgment to allow an amendment: *Sutter v. San Francisco*, 36 Cal. 112. Taking leave to amend an answer after demurrer sustained is a waiver of the right to assign error upon the action of the court in sustaining the demurrer: *Hurd v. Smith*, 5 Col. 233.

*Striking out.* — A motion to strike from the files ought not to be allowed without first giving an opportunity to amend: *Butcher v. Bank of Brownsville*, 83 Am. Dec. 446. The power to strike out, on motion, averments in a pleading because of irrelevancy, applies simply to such matter as is irrelevant to the cause of action or defense attempted to be set up in the pleadings against the moving party: *Hopery v. Andrews*, 94 N. Y. 195. And a judge has no power on the trial to strike out pleadings: *Smith v. Countryman*, 30 N. Y. 655, 676; nor has he power to strike out an answer consisting of a general denial of the material allegations of the complaint, upon the ground that it is sham: *Wayland v. Tyson*, 45 N. Y. 281; although it is shown by affidavits to be false: *Thompson v. Erie R. R. Co.*, 45 N. Y. 468. But a defense alleged upon information and belief may be properly stricken out as sham upon the positive affidavit of the plaintiff that it is false, when the defendant's affidavit does not legally tend to establish a defense: *Kay v. Whittaker*, 44 N. Y. 565. Compare extended note to *Humphreys v. McCall*, 70 Am. Dec. 636, concerning the striking out, on motion, of insufficient answers made on information and belief; also extended note to *People v. McCumber*, 72 Am. Dec. 521-526, on striking out answer as sham. A counterclaim cannot be stricken out as irrelevant: *Feltretch v. McKay*, 47 N. Y. 426. Names of defendants who are not proper parties may be stricken out of caption of complaint by way of amendment: *Dane v. Houghton*, 75 Cal. 360. But a material averment defectively stated should not be stricken out: *Svrain v. Burnette*, 76 Cal. 299. The question as to whether an amended complaint has been properly filed must be raised, not by answer, but by an objection to the amendment, or by motion to strike the amended pleading from the files: *Wheeler v. West*, 78 Cal. 95.

**Relief from judgments.** — Every court has inherent power to vacate entries in its records for judgments, orders, or decrees: *Ladd v. Mason*, 10 Or. 308. Under this provision of the code, the supreme court has power to entertain an application to relieve a party from a decree taken against him through "mistake, inadvertence, or excusable neglect," and appealed before he has had time to make application in the lower court to set the decree or order aside, and it may remand the cause, with instructions in accord with such decision: *Branson v. Oregonian R'y Co.*, 10 Or. 278.

The power to relieve from judgments under this section is discretionary, and not reviewable, except for abuse of discretion: *Hatch v. Central Nat. Bank*, 78 N. Y. 487; *Dougherty v. Nevada Bank*, 68 Cal. 275; *Hitchcock v. McElrath*, 69 Cal. 634; *Bailey v. Taaffe*, 29 Cal. 422; *Johnson v. Eldred*, 13 Wis. 482; *Powell v. Weith*, 68 N. C. 342. The power is to be liberally exercised: *Roland v. Kregenhagen*, 18 Cal. 455; *Mason v. McNamara*, 57 Ill. 274.

Though the statute says that a party may apply for relief from a judgment "taken against him," this does not preclude the party who recovers judgment from applying for relief hereunder, for he may by the judgment have lost part of what he claimed: *Montgomery v. Ellis*, 6 How. Pr. 326.

Neglect of an attorney is neglect of the party, and if excusable will be ground for relief: *Austin v. Nelson*, 11 Mo. 192; *Spruelling v. Thompson*, 12 Ind. 477. Neglect arising from illness has been held excusable: *Luscomb v. Maloy*, 26 Iowa, 444; *Bristor v. Galvin*, 62 Ind. 352.

The mistake which will relieve must be a mutual, honest mistake of the party or his attorney: *McKinley v. Tuttle*, 34 Cal. 235; *Pausi v. Boswell*, 12 Heisk. 323.

The power of the court is not curtailed in substance by this section: *Hatch v. Central Nat. Bank*, 78 N. Y. 487; *Vanderbilt v. Schreyer*, 81 N. Y. 646; *In Matter of City of Buffalo*, 78 N. Y. 362; *Brown v. Brown*, 58 N. Y. 609; and a judgment entered upon demurrer may be relieved against, as well as any other: *Vanderbilt v. Schreyer*, 81 N. Y. 646. Even after the satisfaction of a judgment in favor of the plaintiff, it is within the discretion of the court to vacate it and to amend the complaint by adding new causes of action, although by so doing the statute of limitations is avoided: *Hatch v. Central Nat. Bank*, 78 N. Y. 487. The power to open defaults is within the court's discretion: *Dougherty v. Nevada Bank*, 68 Cal. 275; *Hitchcock v. McElrath*, 69 Cal. 634. A judgment of default entered before the time for answering has expired may be set aside on motion: *Harnish v. Brumer*, 71 Cal. 156; but only by the party aggrieved: *In re Newman*, 75 Cal. 213; or where it has been rendered in the absence of the plaintiff and his attorney, when the latter resided at a considerable distance from the place of trial, and had reason to believe that the case would not be tried at the time it was taken up: *Cameron v. Carroll*, 67 Cal. 500; *Dougherty v. Nevada Bank*, 68 Cal. 275; or where it was rendered against Indians unacquainted with judicial proceedings, ignorant and helpless, and who were, with few excep-



tions, incapable of speaking the English language: *Byrne v. Alas*, 68 Cal. 479. A void judgment of default may be set aside on motion, without reference to the limitation of time expressed in the above section: *People v. Greene*, 74 Cal. 400; but void judgments are not ones of "mistake, inadvertence, surprise, or excusable neglect," within the meaning of the above section: *Baker v. O'Riordan*, 65 Cal. 368; compare *California Beet S. Co. v. Porter*, 65 Cal. 369. So a default entered through inadvertence of clerks, they having no power to enter it, may be set aside on motion without reference to the time expressed in the above section: *Wharton v. Harlan*, 68 Cal. 422; *Hog's Back etc. Co. v. New Basil Co.*, 65 Cal. 22.

Under this section a motion to set aside the default of a defendant who has been served with summons, and has not answered, on the ground of "surprise," must be made within six months after the default was entered: *Wharton v. Harlan*, 68 Cal. 422. Where a motion to vacate a judgment taken by default is made upon the ground of "mistake, inadvertence, surprise, or excusable neglect," and also upon the ground of fraud, the time expressed in the above section does not apply. It will be presumed on appeal that the order was granted on the ground of fraud: *Dinsmore v. Adams*, 66 N. Y. 618.

For further discussion of this topic, see Freeman on Judgments, c. 7.

### *Amendments, how made.*

§ 222. [110.] When any pleading or proceeding is amended before trial, mere clerical errors excepted, it shall be done by filing a new pleading, to be called the amended complaint, or otherwise, as the case may be. Such amended pleading shall be complete in itself, without reference to the original, or any preceding amended one.

### *Pleadings not in proper form may be stricken out.*

§ 223. [111.] Any pleading not duly verified and subscribed may, on motion of the adverse party, be stricken out of the case. When any pleading contains more than one cause of action or defense, if the same be not pleaded separately, such pleading may, on motion of the adverse party, be stricken out of the case. When a motion to strike out is allowed, the court may, upon such terms as may be proper, allow the party to file an amended pleading; or if the motion be disallowed, and it appear to have been made in good faith, the court may, upon like terms, allow the party to plead over.

**Striking out pleadings.** — If a complaint contains more than one cause of action, they must be separately stated, or the pleading will be liable to be stricken out for duplicity. An objection to duplicity in pleading is to be made by a motion to strike out, rather than by a special demurrer, as at

common law: *McKay v. Campbell*, 1 Saw. 374.

When a pleading is filed in good faith, the question whether it contains facts constituting a cause of action should be tried on demurrer, and not on motion to strike out: *Cline v. Cline*, 3 Or. 355.

### *Defendant designated by fictitious name when true name not known.*

§ 224. [112.] When the plaintiff shall be ignorant of the name of the defendant, it shall be so stated in his pleading, and such defendant may be designated in any pleading or proceeding by any name, and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

**Fictitious name.** — This section applies to an unknown infant: *Wheeler v. Scully*, 50 N. Y. 667. The names must be stated as fictitious: *Ford v. Doyle*, 37 Cal. 346. The ignorance of the name must of course be real, and not feigned; it must not be willful ignorance, or such as might be removed by mere inquiry or a resort to means of information easily accessible. When the names of the defendants

who are sued by fictitious names are ascertained, whether before or after service of process, the complaint must be amended by inserting their true names: *McKinlay v. Castro*, 42 Cal. 570; *McKinlay v. Tuttle*, 42 Cal. 577; *Campbell v. Adams*, 50 Cal. 205; *Baldwin v. Morgan*, 50 Cal. 585; *Farris v. Merritt*, 63 Cal. 118. A party, sued by a fictitious name, when his real name is substituted becomes a party

from the commencement of the action: *Sacramento v. Spencer*, 53 Cal. 737; *Farris v. Merritt*, 63 Cal. 118. When defendants who are sued by fictitious names appear and answer the complaint, their answer is not a waiver of an amendment of the complaint describing defendants by their true names. The averment that John Doe ousted the plaintiffs from possession will not support a judgment that the plaintiffs recover possession from Castro: *McKinlay v. Tuttle*, 42 Cal. 577. But the omission by plaintiff to insert the true name when discovered renders the judgment irregular only, and not void, and therefore unimpeachable on collateral attack: *Campbell v. Adams*, 50 Cal. 205. But it will be reversed on appeal: *Baldwin v. Morgan*, 50 Cal. 585. Or defendants may have the action dismissed on motion, where no offer is made to insert the true names of the defendants: *Rosencrantz v. Rogers*, 40 Cal. 489. But if judgment is rendered against the defendant in his true name, the appellate court, on affirming judgment, will direct the court below to substitute the true name in the complaint: *Muthon v. S. R. T. R. Co.*, 49 Cal. 269. Where there is no allegation that the name of defendant is unknown, there is no foundation for the bringing of the action against a fictitious person, and consequently

no authority to make service of the summons by publication: *People v. Herman*, 45 Cal. 692.

There is a difference between a wrong and a fictitious name. In the former case, if the party, the man sued, appears, and not pleading misnomer in abatement, answers, whether by the real name or the name given him in the complaint, the judgment binds him: *McClery v. Everding*, 54 Cal. 168. And suing a party by a wrong name, where he is not concerned in that branch of the suit in which relief is granted, is immaterial: *Parrott v. Byers*, 40 Cal. 614.

Service of copy of complaint amended by inserting the true name of a defendant sued by fictitious name is not necessary: *Brock v. Martinovich*, 55 Cal. 516.

Where a person is not named as a party to the action, or served with summons, but files an answer which recites that he was sued under a certain fictitious name, to which no objection is made, and the case is tried and judgment rendered against him, he is bound by such judgment. The non-insertion of his true name by amendment to the complaint does not render the judgment void on a collateral attack: *Johnston v. San Francisco Savings Union*, 75 Cal. 134. See *Irving v. Carpentier*, 70 Cal. 23.

### *Harmless defects shall be disregarded.*

§ 225. [113.] The court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect.

**Immaterial errors disregarded.** — The above provision is most beneficial, and the courts believe in construing it liberally: *Began v. O'Reilly*, 32 Cal. 11; applying it to errors of description in a pleading as well as to errors in other respects: *Peters v. Foss*, 20 Cal. 586. Whenever facts are not expressly stated which are so essential to a recovery that without proof of them on the trial a verdict could not have been rendered under the direction of the court, the want of the express statement is cured by the verdict, provided the complaint contains terms sufficiently general to comprehend the facts in fair and reasonable intendment: *Garner v. Marshall*, 9 Cal. 269; Stephen's Pleadings, 149; *Jackson v. Pesked*, 1 Maule & S. 234. And in an action of ejectment, the court held that the date of ouster, which was alleged to have taken place in June, 1856, whilst the title of the plaintiffs is alleged to have accrued only in May, 1859, was probably a clerical error, but if not, it could not be taken advantage of after verdict: *Coryell v. Cain*, 16 Cal. 574. So the designation of a contract by an improper

term cannot be allowed to take away a substantial right where all the circumstances attending it are fully detailed: *Goleffroy v. Caldwell*, 2 Cal. 489. And a defect in an answer was disregarded in *Hess v. Bolinger*, 48 Cal. 349; and so was a failure to rule on a demurrer where there was a trial on the merits: *Ferrier v. Ferrier*, 64 Cal. 23. So where some portions of an answer are insufficient, but enough matter is well pleaded to constitute a good defense: *Younglove v. Nixon*, 61 Cal. 301. Verdict for "defendant," and judgment for costs in favor of both defendants, is an immaterial error: *Willard v. Archer*, 63 Cal. 31. Error which does not affect the substantial rights of the losing party in the court below cannot be complained of by him, and furnishes no ground for reversing the judgment: See cases cited in note to *Dikeman v. Parrish*, 47 Am. Dec. 465; *Frankford Bridge Co. v. Williams*, 35 Am. Dec. 155; *Lee v. Ashbrook*, 55 Am. Dec. 110; *Kilburn v. Ritchie*, 56 Am. Dec. 326; *Johnson's Ex'x v. Jennings's Adm'r*, 60 Am. Dec. 323.

### *Supplemental pleadings, when allowed.*

§ 226. [114.] The court may, on motion, allow supplemental pleadings showing facts which occurred after the former pleadings were filed.

**Supplemental pleadings.** — The object of supplemental pleadings is to admit facts occurring after the original pleading.

**Supplemental complaint.** — A supplemental complaint is allowed where facts have occurred subsequently to the original pleading which



will vary the relief to which plaintiff was entitled when he filed such original pleading: *Hasbrouck v. Shuster*, 4 Barb. 285; *Penman v. Slocum*, 41 N. Y. 53; *McCaslan v. Latimer*, 17 S. C. 123; but not for the purpose of supplying facts which, being necessary to the maintenance of the action, have been omitted from the original pleading: *Dillman v. Dillman*, 90 Ind. 585. An attaching creditor has a right to file a supplemental complaint, where he has obtained a temporary injunction, before judgment in an action at law, restraining the foreclosure of a fraudulent chattel mortgage of attached property, showing the rendition of judgment in the action at law: *Meacham Arms Co. v. Stwarts*, 2 Wash. 412. The facts which are allowed so to be set up are such as are connected with the subject-matter of the cause in the original pleading: *Wetmore v. Truslow*, 51 N. Y. 338; *Carney v. Taylor*, 4 Kan. 178; *Watson v. Thibou*, 17 Abb. Pr. 184; *Holly v. Graff*, 29 Hun, 443; and a new cause cannot be substituted: *Andrews v. Andrews*, 3 Wash. 286; *Tiffany v. Boorman*, 2 Hun, 643; *Cohn v. Huson*, 5 Civ. Proc. Rep. 324; *Buckley v. Buckley*, 12 Nev. 423; *Moon v. Johnson*, 14 S. C. 434. And where no cause of action exists under the original pleading, a supplemental complaint cannot supply matters so as to constitute a good cause of action: *Lowry v. Harris*, 12 Minn. 255; *Bostwick v. Menck*, 4 Daly, 68; *Smith v. Smith*, 22 Kan. 699; *Muller v. Earle*, 5 Jones & S. 388. But it is the only proper way to bring in facts occurring after filing of the original pleading: *Hoyt v. Sheldon*, 4 Abb. Pr. 59; 6 Duer, 661; *Hornfager v. Hornfager*, 6 How. Pr. 13; *Ormsbee v. Brown*, 50 Barb. 436. See *Paulson v. Noonan*, 72 Cal. 243. In *quo warranto*, a supplemental complaint claim-

ing damages in consequence of defendant's intrusion into the office may be filed with leave to answer: *People v. Nolan*, 101 N. Y. 539.

The allowance of a motion to file a supplemental pleading is discretionary, the action of the court being subject to review for abuse of discretion: *Palmer v. Murray*, 18 How. Pr. 545; *Medbury v. Swan*, 46 N. Y. 200; *Sage v. Mosher*, 17 How. Pr. 367; *Latham v. Richards*, 15 Hun, 129; *Fleischman v. Bennett*, 79 N. Y. 579; and the application will be denied if the same object can be accomplished by a separate action then pending: *Sage v. Mosher*, 17 How. Pr. 367.

The supplemental pleading is governed by all the rules applicable to similar original pleadings: *Dann v. Baker*, 12 How. Pr. 521; *Goddard v. Benson*, 15 Abb. Pr. 191.

*Supplemental answer.*—The same general rules that govern supplemental complaints will control supplemental answers, and the defendant will be allowed to set up any new matter occurring subsequent to the filing of his answer, or any new cause of defense so arising: *White v. Allen*, 3 Or. 103; *McMahon v. Allen*, 12 How. Pr. 39; 1 Hilt. 103; *Hendricks v. Decker*, 35 Barb. 298; *Hall v. Olney*, 65 Barb. 27; *Lampson v. McQueen*, 15 How. Pr. 345; *Williams v. Hernon*, 16 Abb. Pr. 173.

There is a clear distinction between a supplementary answer and an amendment which sets up a defense which was in existence at the filing of the former pleading: *Holladay v. Elliot*, 3 Or. 340.

A supplemental answer is not a waiver of all former pleas not inconsistent with it: *Hamlin v. Kinney*, 2 Or. 91; *Medbury v. Swan*, 46 N. Y. 200.



## TITLE VI.

## OF PROVISIONAL REMEDIES.

## CHAPTER I. — OF ARREST AND BAIL.

## II. — OF CLAIM TO POSSESSION OF PERSONAL PROPERTY.

## III. — OF INJUNCTIONS AND RESTRAINING ORDERS.

## IV. — OF ATTACHMENT OF PROPERTY.

## V. — OF RECEIVERS AND DEPOSIT IN COURT.

## CHAPTER I.

## OF ARREST AND BAIL.

- § 228. No arrest except as provided by statute.
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*No arrest except as provided by statute.*

§ 228. [115.] No person shall be arrested or held to bail in any civil action except upon the order of the court where the action is brought, or a judge of the supreme court.

The organization of the courts of the state, as effected by the constitution (art. 4), and the prohibition of imprisonment for debt (art. 1, sec. 17), appear to make it questionable whether the statutes upon this subject in the code of 1881 are in harmony with the constitution. A statute to meet the constitutional

question was prepared by the commissioner, but was not passed by the legislature. Consequently the statute as contained in the code of 1881 is reincorporated in this code.

See chapter 14 of title 9, on the subject of *re creat.*

*Defendant, when subject to arrest.*

§ 229. [116.] The defendant may be arrested in the following cases:—

1. In an action for the recovery of damages, on a cause of action not arising out of contract, where the defendant is a non-resident of the state, or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring, or for wrongfully taking, detaining, or converting property;

2. In an action for a fine or penalty, or on a promise to marry, or for money received, or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or by an attorney, or by an officer or agent of a corporation in the course of his employment as such, or by any factor, agent, broker, or other person in a fiduciary capacity, or for any misconduct or neglect in office or in a professional employment;

3. In an action to recover the possession of personal property unjustly detained, when the property, or any part thereof, has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff, and with intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof;

4. When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking, detention, or conversion of which the action is brought;

5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors;

6. When the action is to prevent threatened injury to or destruction of property, in which the party bringing the action has some right, interest, or title, which will be impaired or destroyed by such injury or destruction, and the danger is imminent that such property will be destroyed or its value impaired, to the injury of the plaintiff;

7. On the final judgment or order of any court in this state, while the same remains in force, when the defendant, having no property subject to execution, or not sufficient to satisfy such judgment, has money which he ought to apply in payment upon such judgment, which he refuses to apply, with intent to defraud the plaintiff, or when he refuses to comply with a legal order of the court, with intent to defraud the plaintiff; or when any one or more of the causes exist for which an arrest is allowed in the first class of cases mentioned in this section.

*Proof required to obtain order.*

§ 230. The court or judge making the order of arrest shall first be satisfied, by the affidavit of the party, or his agent or attorney, and other proof under oath, exclusive of the complaint, that the case is

one in which an arrest is provided for in section two hundred and twenty-nine, and that one or more of the prescribed causes exist, which proof shall be in writing, and, together with the order, be filed with the clerk before he shall issue any warrant for the arrest. [January 28, 1888, § 1. In effect immediately.]

**Arrest, generally.** — As to the writ of *ne exeat* in United States circuit courts, see *Lewis v. Shainwald*, 7 Saw. 403. A reasonably clear case should be made out to authorize the granting of an order of arrest; it should not be granted where its propriety depends on a doubtful and important question of law: *Cormier v. Hawkins*, 69 N. Y. 188.

The provisions of the code as to obtaining orders of arrest should be strictly construed: *South I. N. & I. Co. v. Sherwin*, 1 N. Y. Civ. Proc. Rep. 44.

**Affidavit must state facts;** it is not sufficient to refer to the complaint or to any other paper for the facts: *McGilvery v. Moorhead*, 2 Cal. 609. The affidavit must make out a *prima facie* case against the defendant: *McGilvery v. Moorhead*, 2 Cal. 609; *Griswold v. Sweet*, 49 How. Pr. 171. An affidavit that defendant has "disposed of his property with intent to defraud his creditors" is insufficient, unless the facts to warrant such conclusion are stated: *Frost v. Willard*, 9 Barb. 440; *Muller v. Perrin*, 14 Abb., N. S., 95. Where the facts are stated positively, and not on information and belief, it is not necessary to state the source of affiant's knowledge, or his means of information: *Pierson v. Freeman*, 77 N. Y. 589. Other cases maintaining the necessity of stating in the affidavit all the essential facts showing a good cause of action and a proper case for an arrest are: *Dreyfus v. Otis*, 54 How. Pr. 405; *Weeks v. Selling*, 53 How. Pr. 35; *Anderson v. Hunt*, 55 How. Pr. 336; *Brown v. Brockett*, 55 How. Pr. 32; *Howe S. M. Co. v. Pettibone*, 74 N. Y. 68.

If the affidavit is on information and belief, the sources of information ought to be stated as well as the reasons why the person communicating it did not himself make the affidavit: *Bell v. Mali*, 11 How. 254.

If the affidavit is deemed sufficient by the judge who issues the order of arrest, the party applying for it will be protected in an action for false imprisonment: *Dusy v. Helm*, 59 Cal. 188.

**Defects in the affidavit are waived** by giving bail: *Mattoon v. Eder*, 6 Cal. 59; but *contra*, *Mackay v. Lewis*, 7 Hun, 83; *Warren v. Wendell*, 13 Abb. 187.

**As to the jurisdiction of the court** to order an arrest under this section, and of the protection which such an order affords the party applying therefor, see *Dusy v. Helm*, 59 Cal. 188.

**Arrest made before filing complaint** is illegal: *Ex parte Cohen*, 6 Cal. 318.

**Caution in granting order.** — The validity of the order of arrest is to be determined by the law existing at the time of the arrest thereunder, and not by that at the time the order was issued: *Hecht v. Levy*, 20 Hun, 53. An order of arrest should not be granted where its propriety depends on a doubtful and im-

portant question of law: *Cormier v. Hawkins*, 69 N. Y. 188.

Every civil arrest presupposes an existing right of action, and therefore if one cannot show himself entitled to maintain his action, he is not entitled to a writ of arrest: *Nerille v. Nerille*, 22 How. Pr. 500; *Rolfe v. Delmar*, 7 Rolle, 80; *Wheelwright v. Joseph*, 5 Maule & S. 93. A previous arrest in an action exempts the defendant from arrest in another action, if for the same cause, although the second action is brought in a different court and under a different form: *American Flask Co. v. Son*, 7 Rob. 233; 3 Abb. Pr., N. S., 333; *Wright v. Rutterman*, 1 Abb. Pr., N. S., 428; 4 Rob. 704; *People v. Kellen*, 1 Abb. Pr., N. S., 432; *Hernandez v. Carnobes*, 10 How. 433; 4 Duer, 642. Where a defendant has been arrested and discharged under the provisions of the code, he cannot be rearrested for the same cause of action: *Matter of Johnson*, 7 Rob. 269; *McGilvery v. Moorhead*, 2 Cal. 609. But the rule seems to be otherwise where the second action is not vexatious: *People v. Tweed*, 63 N. Y. 202; and whether it is so is a question of fact: *People v. Tweed*, 63 N. Y. 202. The rule against double arrest does not apply where the first process is absolutely void: *Schadle v. Chase*, 16 How. Pr. 413.

The right to arrest does not pass by assignment of a non-assignable chose in action, but the assignee of an assignable chose in action is entitled to all the rights and remedies of the assignor, including the right of arrest: *King v. Kirby*, 28 Barb. 49; *Grocers' National Bank v. Clark*, 32 How. 160; 48 Barb. 26.

**Joining causes of action.** — If the plaintiff unites in his complaint causes of action, to some of which the remedy by arrest and bail does not attach, he loses his rights under this section; and this applies to provisional remedies generally: *Lambert v. Snow*, 2 Hilt. 501; *Smith v. Knapp*, 30 N. Y. 581; *Madge v. Ping*, 71 N. Y. 608; *Am. U. Tel. Co. v. Middleton*, 80 N. Y. 408, 412. So also where the order of arrest might have been granted for part of an entire demand: *Easton v. Cassidy*, 21 Hun, 459. If the plaintiff would resort to his provisional remedy, he must bring separate actions: *McGovern v. Puyn*, 32 Barb. 83. Where the defendant was discharged because of improper union of causes of action, and the plaintiff commenced new proceedings upon the same facts, but for a single cause of action, the order of arrest in this second action was set aside as vexatious: *Young v. Weeks*, 7 Daly, 115.

As to arrest and attachment of property at the same time, it is said that while both these remedies may be pursued to insure a probable satisfaction of the plaintiff's demand, the arrest of the defendant and attaching of his property to the full amount of the claim will not be allowed: See *People v. Tweed*, 5 Hun, 382; 63 N. Y. 202; *Rockford etc. R. R. Co. v. Boody*, 56 N. Y. 456.



When an arrest has been procured by means of any trick or fraud, the party so arrested will be discharged on motion: *Benninghoff v. Oswell*, 37 How. 235; *Metcalf v. Clark*, 41 Barb. 45; *Carpenter v. Spooner*, 2 Sand. 717; *Goupil v. Simonson*, 3 Abb. 474.

**Exemptions.** — Ambassadors and foreign ministers and their servants are exempt: Acts of Congress, April 30, 1790, secs. 25, 26; consuls and vice-consuls: Acts of Congress, 1789, c. 20, sec. 9; members of Congress: U. S. Const., art. 1, sec. 6; United States soldiers and sailors: Acts of Congress, March 16, 1802, sec. 23; July 11, 1798, sec. 5. Witnesses are privileged from arrest, and so are suitors under certain circumstances: See the extended note to *May v. Shumway*, 77 Am. Dec. 401 et seq. Attor-

neys have been held privileged from arrest while in attendance on a court: *Humphrey v. Cumming*, 5 Wend. 90; *Secor v. Bell*, 18 Johns. 52; and so have jurors: *McNeil's Case*, 3 Mass. 288; *Edme's Case*, 9 Serg. & R. 147.

Whenever such privilege is conferred, from motives of public policy, as in the case of exemption from arrest of ambassadors, consuls, etc., the right cannot be waived: *Valurind v. Thompson*, 7 N. Y. 576; *Davis v. Packard*, 7 Pet. 276. But wherever such privilege is personal, as in case of a witness or attorney, it may be waived by act of the parties: *Pollard v. Union Pacific R. R. Co.*, 7 Abb. Pr., N. S., 79; *Stewart v. Howard*, 15 Barb. 26; *Cole v. McClellan*, 4 Hill, 59; *Brown v. Getchell*, 11 Mass. 11.

### *Court or judge must fix bail.*

§ 231. [118.] The court or judge making the order shall, in all cases, specify therein the amount in which the defendant shall be held to bail, which shall, in no case, exceed the demand of the plaintiff, and one hundred dollars in addition thereto, which amount the clerk shall indorse upon the writ, and the court shall also, in the order, fix the amount of the bond to be given by the plaintiff, as provided in the next succeeding section, which amount shall in no case be less than one hundred dollars.

**Defective bond.** — If the bond on arrest fails to comply with the statute, the defect may be cured by filing a new bond before the

hearing of a motion to aside the order: *Pember v. Schuller*, 58 How. Pr. 511.

### *Bond required of plaintiff.*

§ 232. [119.] Before any clerk shall issue a warrant for the arrest of the defendant, he shall require the plaintiff to place on file in his office a copy of the order granting the warrant, unless the same was made in open court, and appears in the minutes, the original affidavit and proofs upon which the order was made, and a bond, on behalf of the plaintiff, in such an amount as the court or judge may have fixed in the order, with sureties to the satisfaction of the clerk, conditioned to pay to the defendant all damages which he shall suffer and all expenses he shall incur by reason of such arrest or imprisonment, if the order shall be vacated in the manner provided for in the next succeeding section, or if the plaintiff fail to recover in his action.

### *Defendant may move to vacate order — Proceedings thereon.*

§ 233. [120.] The defendant may, on motion, apply to the court to vacate the order of arrest, on the ground of insufficiency of the proof, or he may show that the facts alleged upon which the order issued are untrue, or he may apply to have the amount of bail reduced. If the court, upon any such motion, shall vacate the order, the defendant shall be discharged from the arrest, and any bond he may have given shall be canceled, but the action, unless dismissed for

other cause, shall be conducted in the same manner as in cases where complaint and notice were duly served and filed.

**Vacating order of arrest.** — Giving bail does not operate as a waiver of defendant's right to move to vacate a writ of arrest: *Warren v. Wendell*, 13 Abb. Pr. 187; *Wicker v. Harmon*, 12 Abb. Pr. 476. The question of jurisdiction can be raised upon a motion to vacate the order of arrest: *American Union Tel. Co. v. Middleton*, 80 N. Y. 408; and on the hearing of such a motion, the allegations positively made in the affidavit on which the order was granted, which are not denied or avoided in the moving papers, will be taken as true: *Pierson v. Freeman*, 77 N. Y. 589.

**Complaint and damages for malicious arrest.** — In the complaint for such an arrest in civil cases, it must be averred or shown that the proceedings in which the arrest was made had terminated favorably for the defendant: *Ferguson v. Tobey*, 1 Wash. 275. And the plaintiff cannot be asked, in an action for damages for malicious arrest and prosecution, to state the amount of damages he sustained by the alleged tort; the witness must state facts, and let the jury estimate the damages. In mitigation of damages for imprisonment, it may be shown that defendant refused to accept bail: *Ferguson v. Tobey*, 1 Wash. 275.

*Warrant must not issue till complaint is filed.*

§ 234. [121.] When an order of arrest is granted prior to the filing of the complaint, the warrant shall not issue until the complaint is filed with the clerk, and a copy of said complaint shall be served on the defendant with the warrant; but an order of arrest may be granted at any time after the action is commenced, and before judgment is satisfied, when the party seeking the order shall comply with the preceding provisions in regard to arrests.

*Warrant must state the cause of arrest.*

§ 235. [125.] The warrant shall, in all cases, contain a short statement of the alleged causes for which the order was granted, and also the amount for which bail is required.

*Defendant entitled to copy of warrant.*

§ 236. [122.] The warrant must be delivered to the sheriff, who, upon arresting the defendant, must deliver to him a copy thereof.

*How warrant executed — Fees of sheriff.*

§ 237. [123.] The sheriff shall execute the warrant by arresting the defendant, and keeping him in custody until discharged by law. And the plaintiff, in the first instance, shall be liable for the sheriff's fees, for the food and maintenance of any person under arrest, which, if required by the sheriff, shall be paid weekly in advance. And such fees so paid shall be added to the costs taxed or accruing in the case, and be collected as other costs. And if the plaintiff shall neglect to pay such fees for three days after a demand, in writing, upon the plaintiff or his attorney for payment, the sheriff may discharge defendant out of custody.

*Conditions of bail bond.*

§ 238. [124.] The defendant may give bail by causing a bond to be executed by two or more sufficient sureties, stating their places of residence and occupations, conditioned that the defendant shall at all

times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment rendered therein; or if he be arrested for the cause mentioned in the third subdivision of section two hundred and twenty-nine, it shall be further conditioned that the specific article of property, or instrument of writing which is the subject-matter of the writ, shall be forthcoming, to abide any order which shall be made therein; or if he be arrested for the cause mentioned in the sixth subdivision of said section, it shall be further conditioned that he will not commit the injury or destruction alleged to be threatened in the affidavit or proofs on which the arrest is ordered.

### *Surrender of defendant.*

§ 239. [126.] At any time before a failure to comply with their bonds, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:—

1. A certified copy of the bail bond shall be delivered to the sheriff, who shall retain the defendant in his custody thereon as upon an order of arrest, and by a certificate in writing, acknowledge the surrender.

2. Upon the production of a copy of the bail bond and sheriff's certificate, a judge of the superior court may, upon a notice to the plaintiff of eight days, with a copy of the certificate, order that the bail be exonerated, and on filing the order and the papers used on such application, they shall be exonerated accordingly. But this section does not apply to an arrest for the cause mentioned in the sixth subdivision of section two hundred and twenty-nine.

**Surrender of defendant.** — Bail who have not justified may surrender the defendant: *In re Taylor*, 7 How. Pr. 212. Whether one or more less than all the bail can surrender the defendant, see *In re Taylor*, 7 How. Pr. 212. Where the bail is indemnified, he will not be released on his application for leave to surrender the defendant: *Mills v. Hildreth*, 7 Hun, 298; *Bank v. Reynolds*, 12 Abb. Pr. 81. Defendant's offer to surrender himself discharges his sureties: *Babb v. Oakley*, 5 Cal. 93. An application for exonerateur of bail is too late after the bail has become charged: *Hissing v. Hart*, 39 N. Y. Sup. Ct. 411; *Star F. I. Co. v. Godet*, 34 N. Y. Sup. Ct. 359. On being sur-

rendered, the defendant is remitted to all his original rights and disabilities: *McCallum v. Barnard*, 58 How. Pr. 168; and may be again discharged upon filing another bond: *McCallum v. Barnard*, 58 How. Pr. 168. Where the judgment is not such as will warrant a writ of *capias ad satisfaciendum* to be issued under it, the bail will not be charged for neglecting to surrender the judgment debtor: *Mattoon v. Eder*, 6 Cal. 57. It is not necessary that a *capias ad satisfaciendum* should issue, and be returned *non est inventus* before the bail are liable: *Mattoon v. Eder*, 6 Cal. 61.

"Sheriff," as used in this section, includes constable: *Hume v. Norris*, 5 Or. 478.

### *Bail may arrest defendant when.*

§ 240. [127.] For the purpose of surrendering the defendant, the bail, at any time or place before they are finally discharged, may themselves arrest him, or, by written authority indorsed upon a certified copy of the bond, may empower any person of suitable age and discretion to do so.



*Proceeding against bail.*

§ 241. [128.] In case of failure to comply with the condition of the bond, the bail can be proceeded against by action only.

*Exoneration of bail.*

§ 242. [129.] The bail may be exonerated either by the death of the defendant, or his imprisonment in the penitentiary, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in exoneration thereof, within twenty days after commencement of the action against the bail, or within such further time as may be granted by the court.

**Bail, how exonerated.** — On the death of the principal, bail will be entitled to an *exonerateur* on motion: *Merritt v. Thompson*, 1 Hilt. 550. Bail may for their own security be permitted to defend the action against their principal: *Jewett v. Crane*, 35 Barb. 208. If after judgment the bail refuse to surrender the defendant, but instead pay the judgment, this will not discharge their liability as bail: *Appleby v. Robinson*, 44 Barb. 316. The court may extend the time for surrender of bail for good cause: *Brady v. Brundage*, 59 N. Y. 310; but in an application therefor it must be shown that the bail are not indemnified: *Bank v. Reynolds*, 12 Abb. Pr. 81. As to what is sufficient cause, it was held in *Bank v. Reynolds*, 12 Abb.

Pr. 81, that absence from the state of the principal constituted good cause; and so with sickness of the principal or bail: *Baker v. Curtis*, 10 Abb. Pr. 279. The excuse must always be substantial and sufficient: *Doughlass v. Habersstro*, 19 Hun, 1. And see, further, *Van Rensselaer v. Hopkins*, Cole. & C. Cas. 482; *Star F. I. Co. v. Godet*, 34 N. Y. Sup. Ct. 359; and see also the note to *Bank v. Reynolds*, 12 Abb. Pr. 81, where cases on exoneration of bail are collected. An exoneration, by the legal discharge of the principal within twenty days after commencement of the action against the bail, is matter of right; but after that time it is a discretionary matter not reviewable: *Mills v. Hildreth*, 81 N. Y. 91.

*Return of sheriff—Exceptions to bail.*

§ 243. [130.] Within the time limited for that purpose, the sheriff must deliver the order of arrest to the clerk, with his return indorsed thereon, and the bond of the bail, or a copy thereof. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he must be deemed to have accepted it, and the sheriff shall be exonerated from liability.

*Notice of justification.*

§ 244. [131.] On the receipt of notice, the sheriff or defendant may, within ten days thereafter, give to the plaintiff or his attorney notice of the justification of the same, or their bail (specifying the places of residences and occupations of the latter), before judgment [the judge] of the court or justice of the peace, at a specified time and place, the time to be not less than five days nor more than ten thereafter. In case other bail be given, there must be a new bond in the form prescribed in section two hundred and thirty-eight.

*Qualifications of bail.*

§ 245. [132.] The qualifications of the bail shall be as follows:—

1. Each of them shall be a resident of the state; but no counselor or attorney at law, sheriff, clerk of the superior court, or other officer of such court, shall be permitted to become bail in any action.

2. Each of the bail shall be worth the amount specified in the order of arrest, or the amount to which the order may be reduced, as provided in this chapter, over and above all debts and liabilities, and exclusive of property exempt from execution; but the judge or justice, on justification, may allow more than two sureties to justify, severally, in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

**Qualifications of bail.** — That the common-law disqualifications of bail remain unaffected by the code, see *Wheeler v. Wilcox*, 7 Abb. 73; *Mills v. Clarke*, 4 Bosw. 632. One who occupied a portion of a building as an office was deemed a householder for purposes of bail: *Somerset Savings Bank v. Huyck*, 33

How. 323. One who has title to real estate is a freeholder, irrespective of the extent of his interest or the value thereof: *People v. Scott*, 8 Hun, 566; *People v. Hynds*, 30 N. Y. 470. Plaintiff cannot treat disqualified bail as a nullity, but must except to it: *Miles v. Clarke*, 4 Bosw. 632.

### *Justification, how made.*

§ 246. [133.] For the purpose of justification, each of the bail must attend before the judge or justice of the peace at the time and place mentioned in the notice, and may be examined on oath on the part of the plaintiff touching his sufficiency, in such manner as the judge or justice of the peace, in his discretion, may think proper. The examination must be reduced to writing and subscribed by the bail, if required by the plaintiff.

**Justification of bail.** — The sureties must answer fairly, and if, from their refusal to answer pertinent and material questions, or otherwise, it appear that they cannot respond in the necessary amounts, they should be rejected:

*Mokelumne Hill Co. v. Woodbury*, 10 Cal. 189.

The justification need only be made after exception to the sufficiency of the sureties: *Holcomb v. Teal*, 4 Or. 353.

### *Order when bail found sufficient.*

§ 247. [134.] If the judge or justice find the bail sufficient, he shall indorse his allowance thereof on the bond, and cause it to be filed with the clerk, and the sheriff shall thereupon be exonerated from liability.

**Allowance of bail.** — Justification of bail is not complete until these requisites are complied with: *O'Neil v. Durkee*, 12 How. Pr. 94;

*McKenzie v. Smith*, 48 N. Y. 143. It seems that rejection of one of bail is a rejection of all: *O'Neil v. Durkee*, 12 How. Pr. 94.

### *Deposit of money instead of bail.*

§ 248. [135.] The defendant may at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff must thereupon give the defendant a certificate of deposit, and the defendant shall be discharged from custody.

**Deposit with sheriff, etc.** — A deposit under this section is treated as money of the defendant, for the purpose of the execution: *Hermann v. Anderson*, 8 Abb. Pr., N. S., 155; *Com'l Warehouse v. Graber*, 45 N. Y. 393.

Sheriff refusing proper bail is liable to an action therefor: *Richards v. Porter*, 7 Johns. 137; *Brady v. Brundage*, 2 Thomp. & C. 621.

**Amount of bail.** — No less amount of bail

than the sum mentioned in the writ can be received; for the object of bail is to render it certain that execution will be satisfied, and receiving a less amount would not produce that result: *People v. Tweed*, 5 Hun, 382. The amount of bail required is a matter of discretion, not reviewable. So held where the amount was three million dollars, and the amount sought to be recovered double that sum: *People v. Tweed*, 63 N. Y. 202.

*Sheriff must pay bail money into court.*

§ 249. [136.] The sheriff shall, within ten days after the deposit, pay the same into court, and take from the officer receiving the same two certificates of such payment, the one of which he must deliver to the plaintiff and the other to the defendant. For any default in making such payment, the same proceeding may be had on the official bond of the sheriff to collect the sum deposited, as in case of delinquency.

*Bail may be substituted for money.*

§ 250. [137.] If the money be deposited, as provided in the last two sections, bail may be given and justified, upon notice as hereinbefore provided, at any time before judgment; and thereupon the judge before whom justification is had shall direct in the order of allowance that the money deposited be refunded by the sheriff or clerk to the defendant, and it shall be refunded accordingly.

**Refunding deposit upon giving of bail.** — The deposit will be refunded only to defendant, though deposited by others; and then only after giving and justification of bail on notice: *Herrman v. Aaronson*, 3 Abb. Pr., N. S., 389; *Commercial Warehouse v. Graber*, 45 N. Y. 393.

*Disposition of bail money after judgment.*

§ 251. [138.] When money shall have been so deposited, if it remain on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk shall, under the direction of the court, apply the same in the satisfaction thereof, and, after satisfying judgment, refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk shall refund to him the whole sum deposited and remaining unapplied.

*Liability of sheriff for escape.*

§ 252. [139.] If, after being arrested, the defendant escapes or be rescued, the sheriff himself shall be liable as bail; but he may discharge himself from such liability by giving bail at any time before judgment.

**Liability of sheriff as bail, and his discharge.** — The sheriff is liable as bail if he permit the defendant to go at large and escape: *Bensel v. Lynch*, 44 N. Y. 162; or refusing to arrest him: *Cosgrove v. Bowe*, 4 N. Y. Law Bull. 7.

The sheriff may rearrest defendant as bail, without process: *Sarlos v. Mecerques*, 9 How. 188; *Seaver v. Genner*, 10 Abb. Pr. 256; *Metcalf v. Stryker*, 31 N. Y. 255; and in this way

may exonerate himself: *Douglass v. Haberstro*, 19 Hun, 1. But a sheriff who has arrested a defendant, and discharged him on receiving bail, has no right to rearrest him until the bail have failed to justify as prescribed by law. And where he has rearrested the defendant, on receiving notice from the plaintiff's attorney of non-acceptance of the bail, he is liable to an action for false imprisonment: *Arteaga v. Conner*, 88 N. Y. 403.

*Judgment — Sheriff as bail.*

§ 253. [140.] If the judgment be recovered against the sheriff upon his liability as bail, and an execution thereon be returned unsatisfied, the same proceedings may be had on the official bond of the sheriff to collect the deficiency as in other cases of delinquency.



*Bail liable to sheriff when.*

§ 254. [141.] The bail taken on arrest shall, unless they justify, or other bail be given or justified, be liable to the sheriff, by action, for the damages which he may sustain by reason of such omission.

**When bail liable to sheriff.** — The sheriff cannot sue under this section until he himself has sustained damage as bail in consequence of their failure to justify: *Clapp v. Schutt*, 44 N. Y. 104; but see *Willett v. Lasselie*, 19 Abb. Pr. 272. The judgment against the sheriff is evidence of sustaining such damage: *Toll v. Alford*, 64 Barb. 568.

## CHAPTER II.

### OF CLAIM TO POSSESSION OF PERSONAL PROPERTY.

- § 255. Plaintiff may claim immediate delivery.
- § 256. Affidavit required when delivery claimed.
- § 257. Bond — Service of bond and affidavit.
- § 258. Exceptions to, and justification of sureties.
- § 259. Redelivery bond by defendant.
- § 260. Justification of defendant's sureties.
- § 261. Qualifications of sureties.
- § 262. Building may be broken open by sheriff to take property.
- § 263. Sheriff must safely keep property.
- § 264. Proceedings upon claim of property by third person.
- § 265. Return of sheriff.

*Plaintiff may claim immediate delivery.*

§ 255. [142.] The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property as herein provided.

**Claim and delivery, generally.** — The common-law action of replevin is abolished, and the provisions of this chapter take its place: *De Thomas v. Witherby*, 61 Cal. 97; *Roberts v. Randel*, 3 Sand. 707; 5 How. 327; *Nichols v. Michael*, 23 N. Y. 269; *Rockwell v. Saunders*, 19 Barb. 481; but many of the rules applicable to replevin apply to this proceeding: *Moser v. Jenkins*, 5 Or. 447.

**For what property it lies.** — "Claim and delivery" lies for personal property, as did replevin, and the decisions in replevin suits, as to what is personal property within this sense, apply. It lies for chattels of every description, and includes all species of animate and inanimate movable tangible property: *Eddy v. Davis*, 35 Vt. 248; *Graff v. Shannon*, 7 Iowa, 508. Title to land may be inquired into where this remedy is invoked to recover hay cut upon premises alleged to be owned by plaintiff: *Laurendeau v. Fugelli*, 21 Pac. Rep. 29.

**Money.** — It is the proper remedy to recover specific money which can be identified. Thus one may recover a package of gold coin sealed up in a leather bag: *Skidmore v. Taylor*, 29 Cal. 619; *Sharon v. Nunan*, 11 Pac. C. L. J. 162. A safe in the possession of McC., belonging to W., F., & Co., for whom, as also for plaintiff, he was agent, contained six thousand dollars in coin. Of this sum, four hun-

dred dollars belonged to W., F., & Co., the balance to plaintiff. The sheriff, under a writ against McC., seized one thousand eight hundred dollars of the money in the safe as his property, and put it in a bag. Plaintiff then claimed the money as his, McC. being present, and not objecting. It was held that this amounted to a segregation of one thousand eight hundred dollars from the mass of coin in the safe, so as to sustain the action by plaintiff: *Griiffith v. Bogardus*, 14 Cal. 410.

**Fixtures.** — Personal property attached to and becoming part of the realty cannot be recovered in this proceeding: *Fryatt v. Sullivan Co.*, 5 Hill, 117; *Ricketts v. Dorrel*, 55 Ind. 470. But fixtures wrongfully severed from the premises become personal property, and may be recovered in this action: *Sands v. Pfeiffer*, 10 Cal. 258; *Brown v. Caldwell*, 10 Serg. & R. 118; *Heaton v. Findlay*, 12 Pa. St. 304.

**Growing crops and growing trees.** — Growing trees are part of the realty, but when severed may be recovered under this statute: *Cresson v. Stout*, 17 Johns. 116; *Harlan v. Harlan*, 15 Pa. St. 514. So grass cut from the freehold has been held personal, and recoverable: *Johnson v. Barber*, 5 Gilm. 426; and so of other crops: *Bull v. Griswold*, 19 Ill. 632; *Langdon v. Paul*, 22 Vt. 205. But replevin for hay cut on public lands cannot be maintained by a

prior possessor against one who was in adverse possession, claiming a pre-emption right entered, when he cut the hay: *Page v. Fowler*, 28 Cal. 605; 37 Cal. 100. And while the owner may recover for use and occupation, he can in no case be held to be the owner of the crops grown and actually harvested on the land by the defendant while in possession: 39 Cal. 412. So also *Pennybecker v. McDougal*, 46 Cal. 661. In *Martin v. Thompson*, 62 Cal. 618, affirmed in *Martin v. Dunand*, 62 Cal. 622, the court reviewed the earlier cases, and came to the conclusion that the action could not be maintained for the recovery of grain sown and harvested by the defendant on lands of which he claimed adverse possession; and this though his title is void: *Emerson v. Whitaker*, 83 Cal. 147.

*Personal effects* cannot generally be taken from one's person on replevin: *Marham v. Day*, 16 Gray, 214; 77 Am. Dec. 409.

**Plaintiff must have right to immediate and exclusive possession.** — The plaintiff must have the right to the immediate and exclusive possession of the property: *Sires v. Newton*, 1 Wash. 356; *Middlesworth v. Sedgwick*, 10 Cal. 392; *Reese v. Harris*, 27 Ala. 306; *McIsaac v. Hobbs*, 8 Dana, 268; *Hilger v. Edwards*, 5 Nev. 84; *Forth v. Pursley*, 82 Ill. 152; *Barry v. O'Brien*, 103 Mass. 531; *Russell v. Minor*, 22 Wend. 659; and no other title is ordinarily necessary to sustain the proceeding: *Crocker v. Mann*, 3 Mo. 472; *Prater v. Frazier*, 11 Ark. 249; and this whether the claimant has ever had possession or not: *Lazard v. Wheeler*, 22 Cal. 139. In any case where the ownership is in one, and the right of possession in another, the latter is entitled to recover possession under this section: *Childs v. Childs*, 13 Wis. 20; *McLaughlin v. Patti*, 27 Cal. 452; as in the case of a bailee: *Bowen v. Fenner*, 40 Barb. 385; *Summons v. Austin*, 36 Mo. 308; and this though he is only entitled to the immediate possession for a special purpose: *McLaughlin v. Patti*, 27 Cal. 452; at the time the suit was begun: *Rucker v. Donovan*, 13 Kan. 251. Against the owner the party must have a special property: *Eisendrath v. Knauer*, 64 Ill. 402. A pledgee who advances money on the faith of goods not in the actual possession of the consignee cannot hold them against the consignor and owner: *Chicago Taylor Printing Press Co. v. Lowell*, 60 Cal. 454. The purchaser of a partner's interest in a portion of the firm property cannot maintain replevin against a *bona fide* purchaser from the firm: *Bernheim v. Porter*, 3 West Coast Rep. 434. One partner cannot sustain an action against another partner for the delivery of personal property belonging to the partnership: *Buckley v. Carlisle*, 2 Cal. 420.

Tenant in common may maintain replevin against his co-tenant who had taken possession of the common property and converted it to his own use: *Schwartz v. Skinner*, 47 Cal. 3. But not in the case of a delivery by one to the other to effect a sale and division of the proceeds: *Hewlett v. Owens*, 50 Cal. 474. The action will not lie against a co-tenant in the exclusive possession of the common property: *Hill v. Segar*, 2 West Coast Rep. 673 (Utah). One who has no title to personal property, except by virtue of a contract with the owner to

own it on the performance of certain conditions, cannot maintain an action to recover possession of it: *Cardinell v. Bennett*, 52 Cal. 476.

**Against whom maintainable.** — As a general rule, replevin or claim and delivery do not lie against any one not in actual or constructive possession of the goods when demand was made or suit brought: *Ames v. Mississippi B. Co.*, 8 Minn. 470; *Brockway v. Burnap*, 8 How. Pr. 188; *Hall v. White*, 106 Mass. 600; *Grace v. Mitchell*, 31 Wis. 536. A mere wrongful taking, without a wrongful detention, is not sufficient: *Savage v. Perkins*, 11 How. Pr. 17; *Paul v. Luttrell*, 1 Col. 317. But it lies against one wrongfully detaining, though the taking was rightful: *Surles v. Sweeney*, 11 Or. 21; *Esson v. Tarbell*, 9 Cush. 407; *Waterman v. Matteson*, 4 R. I. 539. The taking or detention must be wrongful. See the head "Demand" in this note.

**Demand.** — It is a general rule that where the possession of the property was originally acquired by tort, or the party has subsequently done any act amounting to a conversion to his own use, no demand previous to the institution of the proceedings is necessary: *Moorhouse v. Donaca*, 14 Or. 430; *Ledley v. Hays*, 1 Cal. 160; *Sargent v. Sturm*, 23 Cal. 359; *Moore v. Murdock*, 26 Cal. 524; *Boulware v. Craddock*, 30 Cal. 190; *Sharon v. Nunan*, 11 Pac. C. L. J. 162; *Bussing v. Rice*, 2 Cush. 48; *Connah v. Hale*, 23 Wend. 462; *Fernald v. Chase*, 37 Me. 292; *Gardner v. Boothe*, 31 Ala. 190; and this though the defendant in possession acquired the same without any imputation of fraud or intention to do wrong: *Surles v. Sweeney*, 11 Or. 21; as where a sheriff under an execution seizes property in possession of a third person: *Stone v. O'Brien*, 4 West Coast Rep. 243 (Col.). But where the taking was lawful, a demand is necessary in order to hold the defendant in damages: *Daumiel v. Goham*, 6 Cal. 43; *Taylor v. Seymour*, 6 Cal. 512; *Killey v. Scannell*, 12 Cal. 73; *Bacon v. Robson*, 53 Cal. 399; *Brown v. Cook*, 9 Johns. 361; *Boughton v. Bruce*, 20 Wend. 234; *Seaver v. Dingley*, 3 Me. 307. Where the demand and refusal are necessary, they must be alleged, otherwise the complaint is fatally defective: *Campbell v. Jones*, 38 Cal. 507; and they must be proved: *Bacon v. Robson*, 53 Cal. 399. The demand is proper if made of the one who has possession at the time: *Woodworth v. Knowlton*, 22 Cal. 164.

**Return to or recovery by defendant.** — To entitle the defendant to recover the value of the property on a dismissal of the complaint, the answer must contain some allegation or prayer relative to the change of possession from defendant to plaintiff: *Gould v. Scannell*, 13 Cal. 430. Thus the court in *Pico v. Pico*, 56 Cal. 453, said: "Our conclusion is, that it is not necessary to allege affirmatively that defendant or a third person is entitled to the possession of the specific property sued for. The general denial, if the plaintiff fails to prove his averments, determines that property taken from defendant by the writ of 'replevin' should be restored to him. Nevertheless, a defendant cannot have judgment for a return of the property or its value unless he has claimed a return in his answer"; citing *Gould v. Scannell*, 13 Cal. 430. The defendant can-



not allege a taking by the plaintiff of other property than that mentioned in the complaint, and ask its return: *Lovesohn v. Ward*, 45 Cal. 8.

The power of the court to refuse to return the property to the defendant who has lost his rights, pending the action, is employed, on equitable principles, to prevent further litigation: *O'Connor v. Blake*, 29 Cal. 47; *Pico v. Pico*, 56 Cal. 453.

Destruction of replevied property, even by act of God, pending the proceeding, will not excuse the plaintiff against whom judgment has gone from paying the value thereof to the defendant: *De Thomas v. Witherby*, 61 Cal. 92, in which the question was elaborately considered. If it appear at the trial that the property has been hopelessly lost or destroyed, a failure to render judgment for its possession would not be error for which the judgment would be reversed: *Brocn v. Johnson*, 45 Cal. 77. Where the property has been delivered to the plaintiff, and the action is dismissed without trial, a judgment requiring merely that plaintiff return the property described in plaintiff's complaint to defendant without an alternative judgment for its value, is not erroneous: *Kneebone v. Kneebone*, 83 Cal. 645.

**Ownership, value, and evidence.** — Where plaintiff alleges ownership generally, defendant need not in his answer set up that a bill of sale under which plaintiff holds is a mortgage, in order to show that fact: *Kerron v. North Pac. L. & M. Co.*, 24 Pac. Rep. 445.

The defendant in a replevin suit to recover the possession of specific personal property, under the general denial, may prove ownership or the right of possession in a third person. In such action it is error to instruct the jury that "the plaintiff claims that the defendant detains her property," and that defendant denies such detention; it is misleading as tending to exclude from the consideration of the jury the question of ownership: *Chamberlin v. Winn*, 20 Pac. Rep. 780; 24 Pac. Rep. 446; and defendant may show that plaintiff holds under a mortgage only, where the latter alleges ownership; and plaintiff, failing to establish ownership, will not be allowed, in such a case, to prove the right of possession by virtue of a special property, and be allowed to amend: *Kerron v. North Pacific etc. Co.*, 24 Pac. Rep. 445; *Silsby v. Aldridge*, 23 Pac. Rep. 856; *Marsh v. Wade*, 20 Pac. Rep. 578; *Byrd v. Forbes*, 3 Wash. 318.

A debtor mortgaged his stock of goods to a creditor, gave him possession thereof, with authority to sell at once and apply the proceeds on the debt. The sheriff, with knowledge of all these facts, seized the goods on attachments of other creditors of the mortgagor and sold them beyond recall. *Held*, in an action for damages for such taking, that the value of the goods need not be alleged; the damages were alleged to have been two thousand dollars, which was sufficient, the action being upon the tort of the officer: *Lery v. Sheehan*, 23 Pac. Rep. 802.

### *Affidavit required when delivery claimed.*

§ 256. [143.] When a delivery is claimed, an affidavit shall be made by the plaintiff, or by some one in his behalf, showing,—

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof, by virtue of a special property therein, the facts in respect to which shall be set forth;

2. That the property is wrongfully detained by defendant;

3. That the same has not been taken for a tax, assessment, or fine pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or if so seized, that it is by law exempt from such seizure; and

4. The actual value of the property.

**Affidavit for delivery.** — The requisites of the statute must be strictly complied with: *Westenberger v. Wheaton*, 8 Kan. 169; for this affidavit is the foundation of the jurisdiction of the court to order delivery: *Carlton v. Dixon*, 12 Or. 144.

**Description of property.** — That the affidavit should contain an accurate description of the property, see *Taylor v. Riddle*, 35 Ill. 567.

**Who may make.** — The affidavit may be made by plaintiff or some one in his behalf, and when made by an agent for the plaintiff, its averments must be as positive as those required from the principal: *Frink v. Flanagan*, 1 Gilm. 37. It must be in writing and signed by the party making it: *Eddy v. Beai*, 34 Ind. 161.

**Ownership or right to possession.** — If the plaintiff claims as owner, his affidavit need not set up facts proving such ownership; his affidavit "that he is the owner" is, in this respect, sufficient: *Burns v. Robbins*, 1 Code Rep. 62; *Vandenburgh v. Van Valkenburg*, 8 Barb. 217. But if the property is claimed by virtue of a special property therein, the affidavits must show the facts in respect to such special property, to the end that the court may see upon what facts a special property and right of possession is made out: *Depew v. Leal*, 2 Abb. 131.

**Value.** — The statement of value in the affidavit estops the plaintiff from asserting a different one: *Wiseman v. Lynn*, 39 Ind. 259;



*Trimble v. State*, 4 Blackf. 435; *Mattoon v. Pearce*, 12 Mass. 406.

*Statement that property was not taken for tax or fine, or on execution or attachment.* — This requirement is said to be imperative: *Phenix v. Clark*, 2 Mich. 327; *Mt. Carbon v. Andrews*, 53 Ill. 182. A statement that it was not taken for any legal tax was held insufficient, for this was an admission that it was taken for some tax: *McCloughry v. Crantzenberg*, 39 Ill. 123; and so with a statement that it was not taken in execution for any tax, assessment, or fine: *Campbell v. Head*, 13 Ill. 126.

**Additional affidavits.** — The court may allow additional affidavits to be read, or the plaintiff may file a supplemental affidavit to supply a defect: *Depew v. Leal*, 2 Abb. 131.

**Amendments.** — Where the affidavit is objected to for insufficiency, the court will permit an amendment as of course: *Spalding v. Spalding*, 3 How. 297; 1 Code Rep. 64.

**Opposing affidavits.** — In *O'Reilly v. Good*, 18 Abb. 106, 42 Barb. 521, it was held that the affidavit of the defendant and of a collector, that the goods were taken for a tax, were sufficient to set aside a proceeding under this section. See also *Stockwell v. Vietch*, 15 Abb. 412.

**Waiver.** — A general appearance in the action waives all irregularities in the affidavit: *Wisconsin M. & F. Ins. Co. Bank v. Hobbs*, 22 How. 494; *Hyde v. Patterson*, 1 Abb. 248.

### *Bond — Service of bond and affidavit.*

§ 257. [144.] Upon the receipt of the affidavit, and a bond to the defendant, executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property as stated in the affidavit, for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit and bond by delivering the same to him personally, if he can be found, or his agent, from whose possession the property is taken; or if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion; or if neither have any known place of abode, by putting them in the post-office, directed to the defendant, at the post-office nearest his place of residence.

**Undertaking.** — A deposit of money will not answer in place of the undertaking: *Cummings v. Gann*, 52 Pa. St. 488. The sheriff is guilty of trespass if he make the delivery without a bond: *Dearborn v. Kelley*, 3 Allen, 486; *Armstrong v. Burrell*, 12 Wend. 303. The bond is as essential as the affidavit: *Smith v. McFall*, 18 Wend. 521. A substantial compliance with the provisions of this section is, however, sufficient: *Wingate v. Brooks*, 3 Cal. 112. So where an undertaking, by mistake, ran to the sheriff, instead of the party to be protected by it, and was afterwards corrected; this did not invalidate the bond: *Turner v. Billagrandi*, 2 Cal. 522. This bond may be assigned by the sheriff: *Wingate v. Brooks*, 3 Cal. 112.

**Responsibility on undertaking.** — A party who sues out a writ of replevin from a justice of the peace having no jurisdiction, and obtains the property, cannot, in an action on the replevin bond, set up as a defense the want of the jurisdiction of the justice. Neither can he be allowed to show that the property replevied was his own. The conditions of the bond are to prosecute the suit with success, or return the property: *McDermott v. Isbell*, 4

Cal. 114; *Flagg v. Tyler*, 3 Mass. 303; *Gibbs v. Bartlett*, 2 Watts & S. 29. Where the defendant in a replevin suit failed to claim the return of the property in his answer, and the jury found a verdict for the defendant, on which the court rendered judgment against plaintiffs for costs, which were paid, it was held that the payment of the judgment was a complete discharge of plaintiffs' sureties in the undertaking: *Chambers v. Waters*, 7 Cal. 390. To the extent in which the conditions of the undertaking are not complied with, the action is against the sureties for damages arising from a failure to return the property, not for damage for the original taking and detention; these latter should be found in the replevin suit: *Ginaca v. Atwood*, 8 Cal. 448.

Where an undertaking was entitled in a justice's court, and was for the return of the property, "if return thereof be adjudged by the said court," a judgment in the county court was held not to fulfill the condition of the undertaking: *Mitchum v. Stanton*, 49 Cal. 304. A dismissal stands upon the same footing as a nonsuit, leaving the parties to settle, in an action upon the undertaking, those matters

which, if the original suit were prosecuted, it would be necessary to determine in the first instance. A failure to prosecute is a breach of the undertaking; and the legal and necessary result is, that the sureties to the undertaking are liable for whatever injury the defendant has sustained, limited as above mentioned: *Mills v. Gleason*, 21 Cal. 280.

A recovery cannot be had on a bond purporting to be a joint bond of the principal and sureties, but signed by the latter only; but it is otherwise as to undertakings under our system. They are original and independent contracts on the part of the sureties, and the signature of the principal is not required: *Sacramento v. Dunlap*, 14 Cal. 421. And the effect is not to divest either the title or the lien of the other party. If the title could be divested by the delivery of the replevin bond, the unsuccessful party could always make his election to keep the property

or pay the value: *Hunt v. Robinson*, 11 Cal. 277.

The complaint on the undertaking given under this section is insufficient if it refers only to the section, without setting forth the material portions of the undertaking: *Clary v. Rollins*, 24 Cal. 147. It is necessary to allege and prove that the property was delivered to the person requiring it, and for whom the bond was given: *Nickerson v. Chatterton*, 7 Cal. 568.

Where the plaintiff brought a suit in replevin, gave a bond, and obtained possession of the property, and defendant gave a bond and retook the property, and plaintiff then discontinued his suit, it was held that an action for damages would lie for breach of the bond: *Meigs v. Keach*, 1 Wash. 305. But where a replevin suit in which a bond is given is dismissed, and no judgment is rendered in favor of the obligee in the bond, no action will lie by him on the bond: *Boyer v. Fowler*, 1 Wash. 101.

### *Exceptions to and justification of sureties.*

§ 258. [145.] The defendant may, within three days after the service of a copy of the affidavit and bond, give notice to the sheriff that he excepts to the sufficiency of the sureties; if he fail to do so, he shall be deemed to have waived all objections to them. When the defendant excepts, the sureties shall justify on notice in like manner as bail on arrest, and the sheriff shall be responsible for the sufficiency of the sureties until the objection to them is either waived as above provided, or until they shall justify, or new sureties shall be substituted and justify. If the defendant except to the sureties, he cannot reclaim the property, as provided in the next section.

### *Redelivery bond by defendant.*

§ 259. [146.] At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a bond, executed by one or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within three days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section two hundred and sixty-four.

### *Justification of defendant's sureties.*

§ 260. [147.] The defendant's sureties, upon a notice to the plaintiff or his attorney of not less than two nor more than six days, shall justify in the same manner as bail upon arrest; upon such justification, the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties until they justify, or until justification is completed or expressly waived, and may



retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff.

*Qualifications of sureties.*

§ 261. [148.] The qualification of sureties and their justification shall be as prescribed in respect to bail upon an order of arrest.

*Building may be broken open by sheriff to take property.*

§ 262. [149.] If the property, or any part thereof, be concealed in a building or inclosure, the sheriff shall publicly demand its delivery. If it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession, and if necessary, he may call to his aid the power of his county.

*Sheriff must safely keep property.*

§ 263. [150.] When the sheriff shall have taken the property as herein provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking and his necessary expenses for keeping the same.

*Proceedings upon claim of property by third person.*

§ 264. [151.] If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or his right to the possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff before the delivery of the property to the plaintiff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand, indemnify the sheriff against such claim by a bond, executed by two sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property, as specified in the affidavit of plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and freeholders or householders of the county; and no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff, unless made as aforesaid; and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity.

**Claim by third person.** — This section only applies when the property has been taken by the officer in the discharge of his duty: *King v. Orser*, 4 Duer, 43. If the officer takes the property from the defendant or his agent, the process is a complete justification, and no action lies against him: *Shipman v. Clark*, 4 Denio, 446; *Foster v. Pettibone*, 20 Barb. 350; *State v. Jennings*, 14 Ohio St. 73; *Williard v. Kimball*, 10 Allen, 211. But if he takes the property of a person not a defendant in the

writ from the true owner, an action lies: *King v. Orser*, 4 Duer, 431; *Stimpson v. Reynolds*, 14 Barb. 506. If the officer's proceedings are regular, the mode prescribed by this section is the only mode of making a valid claim by a third person: *Edgerton v. Ross*, 6 Abb. 189. If, in an undertaking to indemnify a sheriff for replevying property claimed by a person other than defendant in the writ, the obligors undertake to indemnify him from any damage he may sustain by reason of any costs, suits,



judgments, and executions that may come or judgment has been recovered against him unless he first pay the judgment: *Lott v. Mitchell*, 32 Cal. 23.

### *Return of sheriff.*

§ 265. The sheriff shall file the affidavit, with the proceedings thereon, with the clerk of the court in which the action is pending within twenty days after taking the property mentioned therein. [February 25, 1891, § 1.]

## CHAPTER III.

### OF INJUNCTIONS AND RESTRAINING ORDERS.

- § 266. Injunctions and restraining orders, by whom granted.
- § 267. In what cases granted.
- § 268. Injunction against malicious erection of structures.
- § 269. At what time granted.
- § 270. No injunction without notice except in case of emergency.
- § 271. Affidavits on application for injunction.
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- § 277. Injunction, who bound by.
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- § 280. Attachment for violating injunction.
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- § 283. Motion to vacate or modify.
- § 284. Damages upon dissolution of injunction.
- § 285. When damages may include rents and waste.
- § 286. Proceedings upon motion to reinstate.
- § 287. Judge may make any order that could be made by court.

### *Injunctions and restraining orders, by whom granted.*

§ 266. [153.] Restraining orders and injunctions may be granted by the superior court, or by any judge thereof.

The words of this section as it appears in the code of 1881, which distinguished between term time and vacation, are omitted as being abrogated by the constitution declaring the court always open, and those providing for the granting of injunctions and restraining orders by the judges of the supreme court, as abrogated by section 4, of article 4, of the constitution, defining the original jurisdiction of the supreme court, such orders being omitted in that section. Distinction between court and judge: See § 36, *ante*.

**Form of injunction.** — No particular form is requisite; the substantial thing is an authentic notification to the defendants of the mandate of the judge, which they must then, at their peril, obey: *Summers v. Furish*, 10 Cal. 353.

**Granting injunction at chambers.** —

An injunction granted *ex parte* by the judge at chambers becomes the act of the court, and may be enforced in the same way: *Sullivan v. Triunfo G. & S. M. Co.*, 33 Cal. 385.

**Injunction order**, unless the words are clear, will not be construed as restraining acts which are beneficial to the plaintiff: *Wilkinson v. First Nat. Fire Ins. Co.*, 72 N. Y. 499.

**Service.** — An injunction may be served by any person authorized to serve a summons: *Golden Gate etc. Co. v. Superior Court*, 65 Cal. 187. As to how served, see *Eureka Lake etc. Co. v. Superior Court*, 66 Cal. 311.

**Cessation of restraining order.** — In an action for an injunction, the force of a restraining order previously issued ceases upon the granting of an injunction *pendente lite*: *Cohen v. Gray*, 70 Cal. 85.

*In what cases granted.*

§ 267. [154.] When it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which during the litigation would produce great injury to the plaintiff; or when, during the litigation, it appears that the defendant is doing, or threatening, or is about to do, or is procuring, or is suffering some act to be done, in violation of the plaintiff's rights respecting the subject of the action, tending to render the judgment ineffectual; or where such relief, or any part thereof, consists in restraining proceedings upon any final order or judgment, — an injunction may be granted to restrain such act or proceedings until the further order of the court, which may afterwards be dissolved or modified upon motion. And where it appears, in the complaint, at the commencement of the action, or during the pendency thereof, by affidavit, that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, a temporary injunction may be granted to restrain the removal or disposition of his property.

**Injunction, generally.** — *Right to relief must be clear*, and free from all reasonable doubt: *Tongue v. Gaston*, 10 Or. 338; *Agate v. Lobenstein*, 4 Daly, 62; *Minnig's Appeal*, 82 Pa. St. 373; *State v. McGlynn*, 20 Cal. 233; and the court will take into consideration the nature and extent of the injury which plaintiff will suffer if the order is withheld, and also the consequences to others if the order is granted, and will grant or withhold relief, according to the exigencies of the case: *Heath v. Gold Exchange*, 38 How. Pr. 168; *Berkeley v. Smith*, 27 Gratt. 892. Where the action grows out of an illegal demand, an injunction will not be granted: *Pond v. Smith*, 4 Conn. 297; *Smith v. Lockwood*, 13 Barb. 209. The right to relief should appear on the face of the complaint. An amended complaint supersedes the original; but if the cause of action, as it should do, remains the same, an injunction founded on the original complaint remains good; and it is settled by the authorities that an amendment may be made on leave, without prejudice to an injunction previously granted: *Barber v. Reynolds*, 33 Cal. 498; *Selden v. Vermilyea*, Sand. Ch. 573; 1 Hoff. Ch. 301; *Warburton v. London etc. Co.*, 2 Beav. 254; *Pratt v. Archer*, 1 Sim. & St. 433; *Pickering v. Hars*, 2 Sim. 488; *Furness v. Brown*, 8 How. 59; *Walker v. Walker*, 3 Ga. 302.

**Remedy at law.** — Plaintiff is not entitled to injunction when he has a plain, speedy, adequate, and sufficient remedy at law: *De Witt v. Hays*, 2 Cal. 469; approved: *Robinson v. Guar*, 6 Cal. 275; *Trinity County v. McCammon*, 25 Cal. 120; *Hager v. Shindler*, 29 Cal. 55; *Bucknall v. Story*, 36 Cal. 71; *Balcom v. Julien*, 22 How. Pr. 349; *Harkinson's Appeal*, 78 Pa. St. 196; *Richards v. Kirkpatrick*, 53 Cal. 433. Thus where plaintiff states a good cause of action at law for the recovery of an interest in real

property, equitable relief will not be granted, although allegations in the complaint were made of irreparable injury, inadequate remedy at law, multiplicity of suits, etc., and were not denied by defendant: *Meeker v. Gilbert*, 3 Wash. 369. Where all the equities of the bill are denied, the injunction should not be granted: *Wellman v. Harker*, 3 Or. 353. Where the injury can be compensated in damages, an injunction will not be granted: *Wilson v. City Point*, 39 Wis. 160; nor will it be granted where relief can be obtained by other ordinary process: *Ward v. Kelsey*, 14 Abb. Pr. 106; *People v. Mattier*, 2 Abb. Pr., N. S., 289; or where notice of pendency of the action is as effectual: *Stevenson v. Fagerweather*, 21 How. Pr. 449. So an injunction will not be granted where one can avoid loss by his own act; as in the case of a transferee of stock still standing in the name of the transferor, where such transferee seeks to enjoin the sale of the stock as belonging to the transferor: *Farmers' Nat. Gold Bank v. Wilson*, 55 How. Pr. 600.

**Irreparable injury.** — The injury must be such as cannot be adequately compensated in damages, or it must be irremediable, or lead to irremediable injury: *Portland v. Baker*, 12 Or. 356; *West Point L. Co. v. Regment*, 45 N. Y. 703; *Weber v. Gage*, 39 N. H. 182; *Middletown v. Franklin*, 3 Cal. 241; *Waldron v. Marsh*, 5 Cal. 120; *Gregory v. Hay*, 3 Cal. 334; *Goodrich v. Moore*, 72 Am. Dec. 74; *Pensacola etc. R. R. Co. v. Spratt*, 91 Am. Dec. 747. Where no injury beyond a general averment of breach of contract is alleged, an injunction will be refused: *Western U. Tel. Co. v. Philadelphia R. R. Co.*, Phila. 494.

Continued diversion of water is irreparable injury: See *Mudge v. Salisbury*, 110 N. Y. 413; *Lux v. Haggin*, 69 Cal. 265; *Lythe Creek Water Co. v. Perdew*, 65 Cal. 477; *Johnson v. Superior*



*Court*, 65 Cal. 567. It is only in equity that future injury can be restrained: *Tuolumne Water Co. v. Chapman*, 8 Cal. 397; and the diversion of water must be continuing: *Coker v. Simpson*, 7 Cal. 341. In a suit to test the priority of appropriation of water, an injunction to prevent future injury is proper: *Marius v. Bicknell*, 10 Cal. 217. One of two or more owners of a water right may be enjoined from diverting more than of right belongs to him; he will be restrained: *Lorenz v. Jacob*, 63 Cal. 73. One who conducts water into a stream may yet be restrained from diverting any of the water unless he can show that he diverts no more than he turned into it: *Wilcox v. Henschel*, 64 Cal. 461.

An assignee of a lessor of chattels may obtain an injunction to restrain the sheriff from selling them as the original lessor's goods, though in the lessee's possession. The lessee may not care or be able to protect them: *Ford v. Riehy*, 10 Cal. 449. An injunction should issue to restrain and control the action of a trustee during the pendency of a trust when his acts are prejudicial to the rights of his beneficiary: *Bingham v. City of Walla Walla*, 3 Wash. 68; and to restrain the foreclosure of a fraudulent chattel mortgage: *Meacham Arms Co. v. Swarts*, 2 Wash. 412. And bona fide settlers and claimants on the public domain, whether the land be surveyed or not, will be protected by injunction from waste or irreparable injury, if they are in actual possession: *Colwell v. Smith*, 1 Wash. 92.

The mere allegation of irreparable injury is not sufficient; the facts must be shown: *Barnett v. Whitesides*, 13 Cal. 156; *Branch Turpike Co. v. Yuba Co.*, 13 Cal. 190. Nor will an allegation amounting to a mere statement of opinion suffice: *Hoke v. Perdue*, 62 Cal. 545.

A threatened entry by a water company to make excavations, etc., under proceedings in eminent domain, where the company and the sheriff are insolvent, is sufficient to found an injunction: *Bensley v. Mountain L. W. Co.*, 13 Cal. 312; see also *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 551; *Stone v. Com. R. R. Co.*, 18 Eng. Ch. 122; *Agar v. Regents Canal Co.*, Coop. 77; *Bonaparte v. Camden etc. R. R. Co.*, 1 Bald. 205. And a plaintiff is entitled to an injunction where the injuries are calculated to destroy the entire value of his lands for all useful purposes: *Woodward v. Lutz*, 21 Cal. 448.

A person attempting to erect a wharf in the navigable waters of the bay of San Francisco, under a contract with the harbor commissioners, in front of a private wharf, should be enjoined if the commissioners in letting the contract have not substantially followed the statute giving them authority: *Cowell v. Martin*, 43 Cal. 605.

Where an administrator conspires with others, and institutes proceedings in a probate court, to procure the sale of property upon fraudulent claims allowed by the administrator, a court of equity has jurisdiction to interfere by injunction; but if the proceedings are regular on their face, and the probate court has jurisdiction, the relief granted will be confined to an injunction: *Larue v. Friedman*, 49 Cal. 278.

Irreparable injury following from the mere passage of an ordinance void on its face will

warrant the interposition of equity to prevent its attempted enforcement: *S. V. W. W. v. Bartlett*, 63 Cal. 245.

Discharge of debris into navigable streams is a nuisance that will be enjoined: *Woodruff v. North Bloomfield Mining Co.*, 9 Saw. 441; *People v. Gold Run Mining Co.*, 66 Cal. 158, 155; *Hobbs v. Amador etc. Canal Co.*, 66 Cal. 161. See these cases for elaborate discussions of the questions involved.

*Delay.* — The party must not be guilty of improper delay in applying for an injunction: *Long v. Cross*, 5 Jones Eq. 323. As to whether there is any laches must be determined by the facts: *Binney's Case*, 2 Bland, 99.

*Discretion of court.* — A party cannot demand an injunction as a matter of right. Granting, continuing, or dissolving injunctions rests very much in the discretion of the court, to be governed by the nature of the case: *Strasser v. Moonelis*, 108 N. Y. 611; *Young v. Campbell*, 75 N. Y. 525; *Calkin v. Manhattan Oil Co.*, 65 N. Y. 557. And this discretion is not affected by the fact that the object of an action may be defeated by refusing a temporary injunction: *Young v. Campbell*, 75 N. Y. 525; *Hicks v. Michael*, 15 Cal. 107; *White v. Nunan*, 60 Cal. 406; *Gower v. Andrew*, 59 Cal. 119; *Goldstein v. Kelley*, 51 Cal. 301; *Hine v. Stephens*, 33 Conn. 497; *Society v. Davis*, 16 Abb. Pr., N. S., 373; but this is not an arbitrary discretion, but is to be exercised in accordance with the rules of law and equity, and without abuse: *Hobart v. Ford*, 6 Nev. 77; *Ex parte Hays*, 26 Ark. 510. When, therefore, all the equities of the complaint are denied by the affidavits on the part of the defense, it is not an abuse of discretion to refuse to grant a temporary injunction: *Kohler v. Los Angeles*, 39 Cal. 510. So, also, it is largely discretionary with the court, on the coming in of the answer, to modify or dissolve a preliminary injunction, and the action of the court will not be reversed on appeal, except for palpable error or abuse of discretion: *Fowler v. Heimroth*, 1 West Coast Rep. 484; *Ejfford v. S. P. R. R. Co.*, 52 Cal. 277; *Codot v. C. P. R. R. Co.*, 52 Cal. 65; *Patterson v. Supervisors*, 50 Cal. 344. Cases of palpable error are, however, excepted, and the rule itself is one which applies more especially to preliminary injunctions: *Richard v. Dower*, 64 Cal. 62. But the supreme court will reverse where an injunction is refused in a case in which it should have been granted; as where an agent uses the information which he obtains as such to the prejudice of his employer and to the advantage of himself: *Gower v. Andrew*, 59 Cal. 119.

*Cloud on title.* — The execution of a document will not be restrained if it would not, when executed, be a cloud on plaintiff's title. Cases of a patent: *Taylor v. Underhill*, 40 Cal. 471; a deed on a tax sale: *Burr v. Hunt*, 18 Cal. 307; a sheriff's deed: *Pirley v. Huggins*, 15 Cal. 128; *Goldstein v. Kelly*, 51 Cal. 301; *Schugler v. Boughton*, 2 West Coast Rep. 899. If a cloud will be created by an execution sale and sheriff's deed, it will be enjoined: *Hall v. Theisen*, 61 Cal. 524, 526; *White v. Nunan*, 60 Cal. 406; *Vogler v. Montgomery*, 54 Mo. 578; so with a judicial sale: *Butler v. Johnson*, 111 N. Y. 204. As to injunctions to prevent the clouding of titles by execution sales, see extended note to *Carlin v. Hunt*, 62 Am. Dec. 523. A sale for



taxes will not be restrained if obviously void on the face of the proceedings: *Bucknell v. Story*, 36 Mo. 70; *Houghton v. Austin*, 47 Mo. 647; *North. Pac. R. R. Co. v. Carland*, 5 Mont. 146. So of any other illegal act which will necessarily cast a cloud upon plaintiff's title and naturally diminish its value: *De Witt v. Van Schoyk*, 110 N. Y. 7.

**Waste.** — An injunction to stay waste is now granted almost as a matter of course: *Markham v. Howell*, 38 Ga. 508; and so threats to commit waste authorize an injunction: *London v. Warfield*, 5 J. J. Marsh. 196. But mere apprehension that waste will be committed is not sufficient: *Hanson v. Gardiner*, 7 Ves. 307. Excavating and working a mine, cutting timber therefor, by one tenant in common, is not waste which can be restrained by injunction: *McCord v. Oakland Quicksilver Mining Co.*, 64 Cal. 134, — a valuable decision. But an entry upon land, and digging up and removing the fruit-trees thereon, is an injury to the inheritance in the nature of waste, which courts of equity will enjoin: *Silva v. Garcia*, 59 Cal. 591; *Hicks v. Michael*, 15 Cal. 115; *Merced Mining Co. v. Fremont*, 7 Cal. 319; *More v. Massini*, 32 Cal. 590. Tearing down or destroying demised premises is waste which the landlord may restrain: *Davenport v. Magoon*, 13 Or. 3. In an action to restrain the commission of waste, it must appear that plaintiff is entitled to the reversion; and in an action to restrain a tenant from removing buildings erected by him, it must be shown that the security for the rent will be left inadequate: *Perrine v. Marsden*, 34 Cal. 15; *Buckout v. Swift*, 27 Cal. 433. As to injunction to prevent waste, see, further, *Hunt v. Steese*, 75 Cal. 620.

**Trespass.** — Courts of equity at first refused to enjoin trespass, and the courts yet decline in most cases to do so; but there are exceptional cases, where equity will interpose, but a strong case must be had. It will interpose for the purpose of quieting a possession, or preventing a multiplicity of actions, or where the value of inheritance is put in jeopardy, or where irreparable mischief is threatened in relation to mines, quarries, or woodland, whether the same result from the nature of the injury itself or from the insolvency of the party committing it. Mining and taking ores, etc.: *Merced Mining Co. v. Fremont*, 7 Cal. 320; 68 Am. Dec. 262; *More v. Massini*, 32 Cal. 592; cutting trees: *Buckalew v. Estell*, 5 Cal. 108; *Douglass v. Mayor of Placerville*, 18 Cal. 643; cutting grain: *Corcoran v. Doll*, 35 Cal. 476; *West v. Smith*, 52 Cal. 322; generally: *Smith v. Gardner*, 13 Or. 221; *More v. Ord*, 15 Cal. 206; *Tomlinson v. Rubio*, 16 Cal. 206; *Brennan v. Gaston*, 17 Cal. 373; *Hicks v. Compton*, 18 Cal. 209; *Leach v. Day*, 27 Cal. 645; *West v. Walker*, 3 N. J. Eq. 279; *Van Winkle v. Curtis*, 2 N. J. Eq. 422; *Kerlin v. West*, 3 N. J. Eq. 449. But to justify the relief the title must be clearly in the plaintiff or admitted: *Gause v. Perkins*, 3 Jones, 177. An action at law cannot be maintained for trespass when plaintiff is totally disseised, and defendant is in adverse possession: *Ruffetto v. Fiori*, 50 Cal. 363; *Felton v. Justice*, 51 Cal. 529. *A fortiori* in such a case a court of equity will not intervene to restrain the commission of threatened trespasses. In an action to enjoin future trespasses upon land,

the court should limit the order to plaintiff's land: *Moore v. Massini*, 43 Cal. 389. An injunction should be granted to restrain an adjoining owner from cutting down a lot by grading so as to permanently injure the premises: *Price v. Knott*, 8 Or. 438. Costs cannot be recovered by the plaintiff when the court finds the defendant not guilty of the trespasses charged: *Lawrence v. Getchell*, 3 West Coast Rep. 619. Repeated trespasses are not of themselves sufficient to justify the interference by injunction; complainant should allege insolvency of defendant, or irreparable injury, or inadequacy of money compensation: *Mechanics' Foundry v. Ryall*, 62 Cal. 416. The solvency of the defendant, who was about to construct a tunnel through plaintiff's land, thereby causing irreparable injury, does not give any greater right to commit the trespass; the case belongs to the class in which no allegation of insolvency is necessary: *Richards v. Dower*, 64 Cal. 62.

An action to restrain the continuance or repetition of a trespass of a character to produce irreparable injury and for damages already suffered is an equitable action, and the issues of fact raised by the pleadings should be tried by the court, unless the court sees fit to submit any or all of them to a jury: *McLaughlin v. Del Re*, 64 Cal. 472. As to trespass, see, further, *Mechanics' Foundry v. Ryall*, 75 Cal. 601.

**Taxes.** — In all cases involving simply the question of taxation, the issue is strictly one at common law, and courts of equity can take no cognizance thereof: *Minturn v. Hays*, 2 Cal. 593. There must be some additional circumstance bringing the case within the jurisdiction of equity, as that the result would be irreparable injury, multiplicity of suits, or a cloud upon title: *Dows v. Chicago*, 11 Wall. 108; *Heywood v. Buffalo*, 14 N. Y. 534; *Railroad Tax Cases*, 92 U. S. 575. A fraudulent and oppressive refusal of the assessor to exercise his honest judgment in the assessment of property will be relieved by an injunction against the collection of the tax; and it is not necessary in a complaint for that purpose to allege fraud where the allegations of fact, if true, would establish fraud as a conclusion of law: *Arden v. King Co.*, 23 Pac. Rep. 409. But a taxpayer cannot enjoin the collection of county taxes on the ground that he has, in former years, paid county taxes on his property illegally assessed and collected: *Fremont v. Early*, 11 Cal. 361. Nor when it does not appear that the complainant would sustain an irreparable injury, or the sale would cast a cloud on his title: *Dean v. Davis*, 51 Cal. 406. A tax-payer cannot enjoin the circulation of municipal bonds void in the hands of a *bona fide* holder: *McCoy v. Briant*, 53 Cal. 248. A property holder cannot restrain the performance of a ministerial duty cast by law upon supervisors merely upon the ground that the effect might be, at some future time, to subject his property to taxation: *Patterson v. Yuba Co.*, 13 Cal. 175. A person seeking to enjoin the collection of a tax must show that there is error, to his prejudice, to be corrected in the list. A board not meeting as required by law, or the fact that no notice of their meeting has been given, is not sufficient: *Cowell v. Doub*, 12 Cal. 273; and the injury resulting to the owner from the col-

lection must be irreparable: *Ritter v. Patch*, 12 Cal. 298; *Berri v. Patch*, 12 Cal. 299. So where part of the lands in a levee district subject to assessment are omitted, collection of the assessment will be restrained: *Levee Dist. No. 1 v. Huber*, 57 Cal. 41; *Hoke v. Perdue*, 62 Cal. 545.

A court of equity might perhaps restrain a sale for taxes if it appeared that the enforcement of the tax would lead to a multiplicity of suits: *S. & L. Society v. Austin*, 46 Cal. 416; *Dows v. Chicago*, 11 Wall. 110; but the supreme court expressed a strong opinion against the propriety of issuing injunctions to restrain the collection of taxes, in *C. P. R. R. Co. v. Corcoran*, 48 Cal. 65. Where, in an action to enforce a lien on lands for delinquent taxes, there was no service of summons, and no appearance, and the court commissioner draughted the decree, reciting that the summons had been served, and the judge, deceived by the false recital, signed it, and at the sheriff's sale, under the decree, the court commissioner became the purchaser, and obtained a sheriff's deed, the court restrained the purchaser from setting up the judgment as an estoppel: *Martin v. Parsons*, 49 Cal. 94; see *Burnsley v. Powell*, 1 Ves. Sr. 119, 285; *McMillan v. Reynolds*, 11 Cal. 372; *Gulian v. Erwin*, Hopk. Ch. 48; *Dobson v. Pierce*, 12 N. Y. 164; *Bridgeport Bank v. Eldridge*, 28 Conn. 556; *Murray v. Dake*, 46 Cal. 645.

A sale for taxes obviously void on the face of the proceedings will not be restrained: *Bucknell v. Story*, 36 Cal. 70; *Houghton v. Austin*, 47 Cal. 647. And the complaint which seeks the injunction must show that the sale will create a cloud on the title: *Hull v. Theisen*, 61 Cal. 524; 61 Cal. 526. As to the duty to allege and show that all taxes properly due have been paid before an injunction will be granted to restrain a sale, see *Gillette v. Denver*, 21 Fed. Rep. 822. For an elaborate discussion concerning the use of injunctions to restrain the collection of taxes and assessments, see note to *Hottel v. Mayor etc. of Baltimore*, 69 Am. Dec. 198-205.

**Creditors' suits.** — An execution creditor may have an injunction to prevent a debtor and his transferees from disposing of property to his detriment: See *Edgar v. Clevenger*, 2 N. J. Eq. 258; *Rose v. Bevan*, 69 Am. Dec. 170. In a suit to set aside a conveyance, where an injunction is asked, the complaint must aver that conveyance, etc., was made with intent to hinder, delay, or defraud creditors. The debtor's insolvency is evidence of this: *Hager v. Shindler*, 29 Cal. 59; and it has been said that insolvency must be averred: *Harris v. Taylor*, 15 Cal. 349.

**Miscellaneous.** — Where an injunction restrains defendant, "his agents and servants," but the sheriff is not a formal party, he is nevertheless bound to obey on being notified in writing of the order: *Buffondeau v. Edmondson*, 17 Cal. 440; 79 Am. Dec. 139. An order granting or continuing a preliminary injunction during the pendency of an action, made before the defendant has answered, in no way affects the cause in a trial upon the merits. The plaintiff still has the burden of maintaining the issues joined: *Peck v. Goodberlett*, 109 N. Y. 180. As to when a judgment granting an injunction perpetually restraining the prosecu-

tion of an action at law is proper, see *Crane v. McDonald*, 118 N. Y. 648. Any person who invades the rights of the owner of a ferry franchise by running a ferry himself is liable for any damages he thus causes the owner, and may be restrained by the court: *Mayor etc. v. Starin*, 106 N. Y. 1. As to when an injunction is proper to restrain a railroad corporation from interfering with the franchises and rights of another similar corporation, see *Rochester etc. R. R. Co. v. New York etc. R. R. Co.*, 110 N. Y. 128.

If the plaintiff is entitled to an injunction before a first trial, and it is ordered, and the cause is afterwards tried and a new trial granted, the plaintiff is still entitled to retain his injunction till trial. The mere granting of the new trial does not place him in a position different from that in which he was prior to the first trial: *Hess v. Winder*, 34 Cal. 272. Courts of equity have wisely refused to lay down any limits to their right to grant injunctions. The right must be exercised with due caution, and in proper cases only: *Merced Mining Co. v. Fremont*, 7 Cal. 325; 68 Am. Dec. 262. Where the complainant's rights are certain, the court cannot consider the inconvenience which will result to the defendant: *Woodruff v. North Bloomfield M. Co.*, 9 Saw. 441.

**After judgment at law.** — After verdict and neglect to apply for a new trial within the time appointed, a court of equity will not entertain a bill for an injunction on the ground that the original demand was unconscientious: *Phelps v. Peabody*, 7 Cal. 53; nor where the party might have applied to the court to set aside the judgment or verdict, and has not done so: *Borkland v. Thornton*, 12 Cal. 440; nor where he moves for a new trial, and fails: *Collins v. Butler*, 14 Cal. 223; nor in any case where the remedy by motion in the other court is ample: *Imlay v. Carpentier*, 14 Cal. 173; *Aldrich v. Stephens*, 49 Cal. 676; or the facts were known and might have been raised as a defense: *Beaudry v. Felch*, 47 Cal. 183. So equity will not restrain proceedings under a judgment rendered in an action prosecuted by a plaintiff, the initial of whose christian name, and not the whole name, was given: *Boyd v. Plutner*, 5 Mont. 226. Courts of equity only interpose on equitable grounds to do justice, where, from their organization or otherwise, the common-law tribunals are incapable of rendering it: *Gregory v. Ford*, 14 Cal. 144.

**Effect of appeal.** — An injunction is not dissolved or superseded by the taking of an appeal from the order granting it: *Merced Mining Co. v. Fremont*, 7 Cal. 130; 68 Am. Dec. 262. Nor has the appellate court power to stay the operation of an injunction pending an appeal: *Swift v. Sheppard*, 64 Cal. 423.

When on appeal the complaint under which an injunction issued was held insufficient, the court below, on the proceedings being remanded, will dissolve the writ, unless prior to the motion the complaint is amended so as to support the decree: *Pjister v. Wade*, 59 Cal. 273.

Pending an appeal from an order refusing to dissolve a temporary injunction, the lower court has jurisdiction to go on and try the case: *Bliss v. Superior Court*, 62 Cal. 543. The



court has no power, after judgment against the plaintiff in an action, and pending an appeal by him therefrom, to grant an injunction or to revive or continue a temporary injunction previously granted: *Spears v. Mathews*, 66 N. Y. 127. A temporary injunction, incidental to an action, to remain in force until further order

of court, is abrogated by a final judgment in the action, in favor of the plaintiff, and which makes no provision concerning the continuance of the injunction, and grants no further injunction. And defendant's appeal will not modify the legal effect of the judgment in this particular: *Gardner v. Gardner*, 87 N. Y. 14.

*Injunction against malicious erection of structures.*

§ 268. An injunction may be granted to restrain the malicious erection, by any owner or lessee of land, of any structure intended to spite, injure, or annoy an adjoining proprietor. And where any owner or lessee of land has maliciously erected such a structure with such intent, a mandatory injunction will lie to compel its abatement and removal. [November 28, 1883, § 2.]

This statute provided for immediate taking effect; but the title thereof was insufficient under the decision of the supreme court in

*Harland v. Territory*, 3 Wash. 131. Congress, however, passed an act validating it.

*At what time granted.*

§ 269. [155.] The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment in that proceeding.

*No injunction without notice, except in case of emergency.*

§ 270. [156.] No injunction shall be granted until it shall appear to the court or judge granting it that some one or more of the opposite party concerned has had reasonable notice of the time and place of making application, except that in cases of emergency, to be shown in the complaint, the court may grant a restraining order until notice can be given and hearing had thereon.

*Affidavits on application for injunction.*

§ 271. [157.] On the hearing of an application for an injunction, each party may read affidavits.

*Terms and conditions may be imposed.*

§ 272. [158.] Upon the granting or continuing an injunction, such terms and conditions may be imposed upon the party obtaining it as may be deemed equitable.

*Bond required before granting.*

§ 273. [159.] No injunction or restraining order shall be granted until the party asking it shall enter into a bond, in such a sum as shall be fixed by the court or judge granting the order, with surety to the satisfaction of the clerk of the superior court, to the adverse party affected thereby, conditioned to pay all damages and costs which may accrue by reason of the injunction or restraining order. The sureties shall, if required by the clerk, justify in like manner as bail upon an arrest, and until they so justify, the clerk shall be responsible for their sufficiency.



**Undertaking.** — An order for an injunction must be deemed inoperative until the undertaking is given; otherwise the party enjoined would have no security for damages: *Elliott v. Osborne*, 1 Cal. 397. And an injunction should never be granted until defendants are secured by proper bonds: *Pattison v. Yuba Co.*, 12 Cal. 106. This section requiring a bond applies equally where the injunction is granted *ex parte*, as well as on an order to show cause: *McCracken v. Harris*, 54 Cal. 81.

**Responsibility on undertaking.** — The undertaking to be given on the granting of a temporary injunction must conform in terms or in substance to the requirements of the code therefor, and the liability of the sureties is according to those terms: *Palmerv. Foley*, 71 N. Y. 106. An action on the undertaking cannot be maintained until the suit in which the injunction issued is disposed of by a final decree or judgment: *Clark v. Clayton*, 61 Cal. 634, where the action was brought on the bond after the dissolution of the injunction, and prior to the trial of the suit in which it issued: *Dougherty v. Dore*, 63 Cal. 170. The dissolution of an injunction is a technical breach of the injunction bond: *Stone v. Carson*, 1 Or. 100; and an action on the bond is not prematurely brought where the injunction is dissolved and a demurrer sustained to the complaint, on the ground of the insufficiency of the complaint, which is not amended, nor anything done in the case, and the action on the bond is

instituted twenty-one days after service of notice of the ruling on the demurrer: *Bennett v. Pardin*, 63 Cal. 154. A judgment dismissing a suit (in which a temporary injunction has been granted) for want of prosecution amounts to a determination by the court that the injunction was improperly granted, and after such judgment, suit lies upon the undertaking; and it seems the grounds of the injunction cannot be inquired into in suit upon an injunction bond: *Dowling v. Polack*, 18 Cal. 625. In an action on an undertaking on injunction, it is no defense that the business which defendants enjoined was a public nuisance: *Cunningham v. Breed*, 4 Cal. 384. A bond, though given to more than one obligee, and using no words expressing a several obligation, creates a liability to the obligees severally. The party beneficially entitled to the fruits of the action may sue: *Summers v. Farish*, 10 Cal. 351; *Browner v. Davis*, 15 Cal. 11; *Prader v. Purkett*, 13 Cal. 588; *Lally v. Wise*, 28 Cal. 542. And the parties cannot maintain a joint action unless their damages are joint: *Fowler v. Frisbie*, 37 Cal. 34.

**Counsel fees** paid to procure the dissolution of the injunction, but not such as are paid for defending the entire case, are recoverable on the bond: *Newton v. Russell*, 87 N. Y. 527; and extended note to *Trapnall v. McAfee*, 77 Am. Dec. 158-160, concerning dissolution of injunctions and suits on injunction bonds: *Bustament v. Stewart*, 55 Cal. 115; *Porter v. Hopkins*, 63 Cal. 53.

*No second bond unless first be insufficient.*

§ 274. [160.] When an injunction is granted upon the hearing, after a temporary restraining order, the plaintiff shall not be required to enter into a second bond, unless the former shall be deemed insufficient, but the plaintiff and his surety shall remain liable upon his original bond.

*Order takes place of writ.*

§ 275. [161.] It shall not be necessary to issue a writ of injunction, but the clerk shall issue a copy of the order or injunction duly certified by him, which shall be forthwith served by delivering the same to the adverse party.

*Plaintiff after judgment may be required to release errors.*

§ 276. [162.] In application to stay proceedings after judgment, the plaintiff shall indorse upon his complaint a release of errors in the judgment whenever required to do so by the judge or court.

*Injunction, who bound by.*

§ 277. [163.] An order of injunction shall bind every person and officer restrained from the time he is informed thereof.

**See section 280 and note.** — An injunction enjoining a corporation, its officers, agents, and employees, and all persons acting under it, from continuing or maintaining a dam, is binding upon all persons acting as agents of the

corporation "with full notice and knowledge of the issuance and service of the injunction" upon the corporation, although the agents were not personally served: *Morton v. Superior Court*, 65 Cal. 496.

*Order need not be served when.*

§ 278. [164.] When notice of the application for an injunction has been served upon the adverse party, it shall not be necessary to serve the order upon him, but he shall be bound by the injunction as soon as the bond required of the plaintiff is executed and delivered to the proper officer.

*Money collected on enjoined judgment to be paid into court.*

§ 279. [165.] Money collected upon a judgment afterward enjoined, remaining in the hands of the collecting officer, shall be paid to the clerk of the court granting the injunction, subject to the order of the court.

*Attachment for violating injunction.*

§ 280. [166.] Whenever it shall appear to any court granting an order of injunction, or judge thereof, by affidavit, that any person has willfully disobeyed the order after notice thereof, such court or judge shall award an attachment for contempt against the party charged, or a rule to show cause why it should not issue. The attachment or rule shall be issued by the clerk of the court, and directed to the sheriff, and shall be served by him.

**Disobedience to order.** — Where a party disobeys or violates an injunction, it is a contempt, and punishable as such: *People v. Placer Co.*, 27 Cal. 151. But acts of defendant, who has had an order modified without notice to plaintiff, in violation of the original injunction, are not contempt of court: *Fremont v. Merced Mining Co.*, 9 Cal. 18. When a party to an injunction doubts its significance or extent, he is not to disobey it with a view to test it in this particular, but he should apply to the court for a modification or instruction: *Wells, Fargo, & Co. v. Oregon R. & N. Co.*, 9 Saw. 601. Corporations other than municipal may be punished for contempt for violation of an injunction: *Golden Gate C. H. M. Co. v. Superior Court*, 65 Cal. 187; *Mayor etc. v. New York etc. Ferry Co.*, 64 N. Y. 622; *Golden Gate Min. Co. v. Superior Court*, 65 Cal. 187; and each act violative of an injunction is a separate contempt: See case last cited. The violation of an injunction cannot be excused on the ground that it is more extensive in its restraints than the complaint. Though irregular, it is not void, and the defendant's duty is to obey it: See case last cited.

*Arrest upon such attachment.*

§ 281. [167.] The attachment for contempt shall be immediately served by arresting the party charged, and bringing him into court, if in session, to be dealt with as in other cases of contempt; and the court shall also take all necessary measures to secure and indemnify the plaintiff against damages in the premises.

*Person may be required to give bond for appearance.*

§ 282. If the court is not in session the officer making the arrest shall cause the person to enter into a bond, with surety, to be approved by the officer, conditioned that he personally appear in open court whenever his appearance shall be required, to answer such contempt, and that he will pay to the plaintiff all his damages and costs occasioned by the breach of the order; and in default thereof, he shall be committed to the jail of the county until he shall enter into such bond with surety, or be otherwise legally discharged. [Feb. 26, 1891, § 1.]



*Motion to vacate or modify.*

§ 283. Motions to dissolve or modify injunctions may be made in open court, or before a judge of the superior court, at any time after reasonable notice to the adverse party. [*February 25, 1891, § 1.*]

**Dissolution or modification of injunction.** — The privilege of moving for a dissolution upon filing an answer is limited to cases where the injunction is originally granted without notice: *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 551; *Natoma W. & M. Co. v. Parker*, 16 Cal. 83. If the injunction is granted upon notice, the remedy is by appeal: *Curtis v. Sutter*, 15 Cal. 265. The general rule is, that when the answer denies all the equity of the complaint, the injunction will be dissolved: *Crandall v. Woods*, 6 Cal. 452; *Real D. M. M. Co. v. Pond M. Co.*, 23 Cal. 84. But this rule is not of universal application; the court must exercise a sound discretion: *Bank of Monroe v. Schirmerhorn*, Clarke Ch. 300; *Cox v. Mayor etc.*, 18 Ga. 735. And the supreme court will not interfere, except in case of abuse of discretion: *Godley v. Godley*, 39 Cal. 166; *McCreery v. Brown*, 42 Cal. 457; *Rogers v. Tennant*, 45 Cal. 186; *Payne v. McKinley*, 54 Cal. 532; *Parrott v. Floyd*, 54 Cal. 534; *White v. Nunan*, 60 Cal. 406; *Hiller v. Collins*, 63 Cal. 235. And see *Morris v. Jersey*, 12 N. J. Eq. 227; *Dent v. Summerville*, 12 Ga. 5; *Loyless v. Howell*, 15 Ga. 554; *Doughty v. Summerville*, 7 N. J. Eq. 629.

Unless all the equities of the complaint are denied by the answer, there is no error in refusing to dissolve the injunction on complaint and answer: *Fuhn v. Weber*, 38 Cal. 637. Nor if the denials in the answer are on information and belief, when the denials are met by plaintiff's counter-affidavits: *Hiller v. Collins*, 63 Cal. 235.

The appellate court will not reverse an order dissolving an injunction where there is nothing in the record to show on what the court below acted on the hearing and determination of the motion to dissolve: *Fowler v. Heimroth*, 1 West Coast Rep. 484. An injunction will not be retained where the acts sought to be restrained have been performed before the order was made or served: *Delger v. Johnson*, 44 Cal. 185. But an appeal will not be dismissed, though the term of the officers sought to be enjoined has expired, and the statute under which they were acting has been repealed: *Cohen v. Gray*, 54 Cal. 595.

**Modification of injunction** is within the discretion of the court granting the same: *Hobbs v. Amador & Sac. Can. Co.*, 66 Cal. 161. See, as to dissolution, *Hefflon v. Bowers*, 72 Cal. 270.

*Damages upon dissolution of injunction.*

§ 284. [170.] When an injunction to stay proceedings after judgment for debt or damages shall be dissolved, the court shall award such damages, not exceeding ten per cent, on the judgment, as the court may deem right, against the party in whose favor the injunction issued.

**Defendant must not enhance damages.** He must do all that he reasonably can to diminish the damages, but he is not bound to incur any hazard, and may take such a course as experienced men would deem proper, though

the result shows that another course would have reduced the damages: *Roberts v. White*, 73 N. Y. 375.

**Concerning counsel fees** as proper items of damage, see note to § 273, *ante*.

*When damages may include rents and waste.*

§ 285. [171.] If an injunction to stay proceedings after verdict or judgment in an action for the recovery of real estate, or the possession thereof, be dissolved, the damages assessed against the party obtaining the injunction shall include the reasonable rents and profits of the lands recovered, and all waste committed after granting injunction.

*Proceedings upon motion to reinstate.*

§ 286. [172.] Upon an order being made dissolving or modifying an order of injunction, the plaintiff may move the court to reinstate the order, and the court may, in its discretion, allow the motion, and appoint a time for hearing the same before the court, or a time and place for hearing before some judge thereof, and upon the hearing, the parties may produce such additional affidavits or depositions as



the court shall direct, and the order of injunction shall be dissolved, modified, or reinstated, as the court or judge may deem right. Until the hearing of the motion to reinstate the order of injunction, the order to dissolve or modify it shall be suspended.

**As to various questions of pleading and practice** concerning injunctions, see *Kelly v. Kriess*, 68 Cal. 210; *Golden Gate Min. Co. v. Superior Court*, 65 Cal. 187; *Lux v. Haggin*, 69 Cal. 255; *Moore v. Clear Lake Water-works*, 68 Cal. 146.

*Judge may make any order that could be made by court.*

§ 287. [173.] The judge of the superior court shall have power to make every order which, by the provisions of this chapter, may be made by the court.

The words "in vacation" and "in term time" are omitted, as abrogated by the constitution, article 4, section 6.

## CHAPTER IV.

### OF ATTACHMENT OF PROPERTY.

- § 288. Plaintiff may have attachment after commencing action.
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- § 311. Garnishment of debt on negotiable paper.
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- § 313. Collection of judgment when attached property is insufficient — Surplus of attached property.
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- § 316. Discharge of attachment on counter-bond.
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- § 322. This chapter to be liberally construed.
- § 323. Orders by judge at chambers.
- § 324. Word "sheriff" applies to constables — Application of this chapter in justices' courts.

*Plaintiff may have attachment after commencing action.*

§ 288. The plaintiff at the time of commencing an action, or at any time afterward before judgment, may have the property of the defendant, or that of any one or more of several defendants, attached in the manner hereinafter prescribed, as security for the satisfaction of such judgment as he may recover. [February 3, 1886, § 1. In effect immediately.]

**Attachment, generally.** — The proceedings by attachment are statutory and special, and must be strictly pursued. When a party relies upon his attachment lien as a remedy, he must strictly follow the provisions of the statute: *Roberts & Co. v. Landecker*, 9 Cal. 262; and the statute will be construed strictly in favor of the person against whom the remedy by attachment may be employed: *Wade on Attachments*, secs. 2, 3; *Hughes v. Martin*, 1 Ark. 386; *Gumon v. Raymond*, 1 Conn. 44; 6 Am. Dec. 200; *Thornburg v. Haad*, 7 Cal. 554; *Sherwood v. Read*, 7 Hill, 431.

The remedy is not a distinct proceeding in the nature of an action *in rem*, but is auxiliary to an action at law, and designed to secure the payment of any judgment the plaintiff may obtain: *Low v. Adams*, 6 Cal. 277; *Bray v. Mc-*

*Clury*, 55 Mo. 128; though it is said that when there is no personal service of process or appearance the proceeding is one *in rem*: *Miller, J., in Cooper v. Reynolds*, 10 Wall. 308.

**Time for issuing.** — An attachment issued prior to issuance of summons is void: *Low v. Henry*, 9 Cal. 538. But the papers may all be presented together, provided the attachment is not issued before the summons is issued: *Wheeler v. Farmer*, 38 Cal. 215. And the summons need not be served prior to issuance of the writ: *Wallace v. Castle*, 68 N. Y. 370.

**Attachment lien**, its origin and nature, continuance and dissolution: See the note to *Franklin Bank v. Bachelier*, 39 Am. Dec. 606.

**An auxiliary proceeding.** — Attachment is but auxiliary, and not an original proceeding: *Nisqually Mill Co. v. Taylor*, 1 Wash. 1.

*When and by whom the writ is issued — Affidavit for.*

§ 289. The writ of attachment shall be issued by the clerk of the court in which the action is pending; but before any such writ of attachment shall issue, the plaintiff, or some one in his behalf, shall make and file with such clerk an affidavit showing that the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all just credits and offsets), and that the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud any creditor of the defendant, and either, —

1. That the defendant is a foreign corporation; or
2. That the defendant is not a resident of this state; or
3. That the defendant conceals himself so that the ordinary process of law cannot be served upon him; or
4. That the defendant has absconded or absented himself from his usual place of abode in this state, so that the ordinary process of law cannot be served upon him; or
5. That the defendant has removed or is about to remove any of his property from this state, with intent to delay or defraud his creditors; or
6. That the defendant has assigned, secreted, or disposed of, or is about to assign, secrete, or dispose of, any of his property, with intent to delay or defraud his creditors; or
7. That the defendant is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or



8. That the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; or

9. That the damages for which the action is brought are for injuries arising from the commission of some felony, or for the seduction of some female. [February 3, 1886, § 2. In effect immediately.]

**Issuance of writ by clerk** has been held to be ministerial in its nature: *Rayburn v. Brackett*, 2 Kan. 227; but in *Matthews v. Ansley*, 31 Ala. 20, the court held that such act was judicial. In *Wade on Attachment*, the author considers the act quasi judicial: Sec. 120.

The clerk must issue attachments within a reasonable time, and in the order in which they are demanded. If he claims his fees, he must say so, or he must not delay on that account: *Lick v. Madden*, 25 Cal. 206. If the prior applicant is not in attendance when his writ is ready, the clerk must not delay another: *Lick v. Madden*, 36 Cal. 210.

**Affidavit.** — An affidavit being required by statute, it is the affidavit which brings the power of the court into action; and if there be no affidavit, the whole attachment proceeding is incurably void: *Inman v. Allport*, 65 Ill. 340; *Endel v. Leibrock*, 33 Ohio St. 254. So if there be irregularities or insufficiencies in the affidavit, other than mere formal defects, they will invalidate the writ, and be ground for dissolution of the attachment, and are not, like other irregularities, waived by plea to the merits: *Maple v. Tunis*, 53 Am. Dec. 779; *Clark v. Smith*, 1 Ill. 285; *Kruse v. Wilson*, 79 Ill. 233; *Halley v. Jackson*, 48 Md. 254; *Hargadine v. Van Horn*, 72 Mo. 370; *Bray v. McClury*, 55 Mo. 128; *Cadwell v. Colgate*, 7 Barb. 253; *Murray v. Hankin*, 65 How. Pr. 511; *Zerega v. Benoist*, 7 Rob. (N. Y.) 199; *Endel v. Leibrock*, 33 Ohio St. 254; *Stewart v. Mitchell*, 10 Heisk. 488; the reason being, that where the proceedings are attacked on the ground of insufficiency of the affidavit, the attack is made, not on the ground of mere irregularities in the proceedings, but because of the want of a proper foundation for the exercise of jurisdiction by attachment: *Maple v. Tunis*, 53 Am. Dec. 779; *Smith v. Luce*, 14 Wend. 237; *Conrad v. McGee*, 9 Yerg. 428; *Stewart v. Mitchell*, 10 Heisk. 488; *Rumbough v. White*, 11 Heisk. 260; *Mantz v. Hendley*, 2 Hen. & M. 308; *Whitney v. Brunette*, 15 Wis. 61. But a defective affidavit in attachment, drawn in the alternative, is not a cause for disturbing a judgment: *Nisqually Mill Co. v. Taylor*, 1 Wash. 1. The affidavit may be cured by supplemental affidavit: *Nisqually Mill Co. v. Taylor*, 1 Wash. 1.

The affidavit is part of the record: *Staples v. Fairchild*, 3 N. Y. 141; *Maples v. Tunis*, 53 Am. Dec. 779; *Goss v. Commissioners*, 4 Col. 468; *Shirers v. Wilson*, 5 Har. & J. 130; *Ford v. Woodward*, 2 Smedes & M. 260; *Watt v. Carnes*, 4 Heisk. 532; *Conrad v. McGee*, 9 Yerg. 428; and if none appear on the record, in case of a collateral attack, no evidence (except perhaps of loss or destruction) is admissible to prove that one was made, and even a recital in the writ to the effect that one was made will not prove the fact nor sustain the

proceeding: *Bond v. Patterson*, 1 Blackf. 34; though in *Biggs v. Blue*, 5 McLean, 148, it was held, on collateral attack, where no affidavit appeared on the record, that the court could not presume that there was no affidavit because none appeared on the record, for the clerk, in copying up the record, might have inadvertently omitted it.

**Form and contents.** — The affidavit must contain the matter required by the statute, and substantially as here provided: *Cheadle v. Riddle*, 6 Ark. 480; *Irvin v. Howard*, 37 Ga. 18; *Drake v. Hager*, 10 Iowa, 556. The words of the statute need not be followed, but the words in the affidavit must be equivalent to those in the statute: *Donnell v. Williams*, 21 Hun, 216.

Unless required by statute, the affidavit made by a person other than the plaintiff need not show why plaintiff did not make it: *White v. Stanley*, 29 Ohio St. 423; or what means he had of knowing the facts: *Gilkeson v. Knight*, 71 Mo. 403.

The affidavit need not state the probative facts necessary to establish the ultimate facts required by statute: *Crawford v. Roberts*, 8 Or. 324; *Wheeler v. Farmer*, 38 Cal. 215; *Weaver Hayward*, 41 Cal. 118; but an affidavit which merely avers that the defendant is indebted, etc., on an express or implied contract, is insufficient: *Hawley v. Delmas*, 4 Cal. 195. Nor can an affidavit be in the alternative; to state that the debt has not been secured, or if so secured, the security has become valueless, in the language of the code is insufficient: *Wilke v. Cohn*, 54 Cal. 212; *Merced Bank v. Morton*, 57 Cal. 360; and compare *Norcross v. Nunan*, 61 Cal. 640, 641; *Harvey v. Foster*, 64 Cal. 296. It was decided in this last case that, notwithstanding this irregularity in the affidavit, other attaching creditors could not take advantage thereof; while the defendant might have procured the dissolving of the writ, yet its lien remained as to other creditors. If the affidavit state that the demand is on a contract for the direct payment of money, and then sets out how it accrued, it will be sufficient: *Bowers v. London Bank of Utah*, 3 Utah, 417.

An affidavit wholly omitting the statement of the amount of the indebtedness is fatally defective: *Marshall v. Alley*, 25 Tex. 342. In stating the amount of the indebtedness, it is no objection, however, that the plaintiff might have claimed more than he did: *Henrie v. Sarscasey*, 5 Blackf. 273. But the statement of the sum should be certain: *Lathrop v. Snyder*, 16 Wis. 293.

An omission to state that the sum was due over and above all counterclaims and set-offs, as required by the statute, was held a fatal defect: *Donnell v. Williams*, 21 Hun, 216; *Ruppert v. Hong*, 87 N. Y. 141.

But no statement as to how the debt accrued



being required, an omission to so state is not objectionable: *Starke v. Marshall*, 3 Ala. 44; *O'Brien v. Daniel*, 2 Blackf. 290; *Irvin v. Howard*, 37 Ga. 18.

The omission to state that the writ is not sought to hinder, delay, or defraud creditors is a fatal defect, and, it is held, cannot be supplied by amendment: *Hall v. Brazelton*, 40

Ala. 406; and it is held that the denial of intention must be in the disjunctive, and that a denial of intention to hinder, delay, and defraud is insufficient: See *Moody v. Lery*, 58 Tex. 532; *Lamkin v. Douglass*, 27 Hun, 517.

As to irregularities in affidavits, generally, and the effect thereof, see the note to *Friedenberg v. Pierson*, 79 Am. Dec. 164 et seq.

### *Attachment on debt not yet due.*

§ 290. An action may be commenced and the property of a debtor may be attached previous to the time when the debt becomes due, when nothing but time is wanting to fix an absolute indebtedness, and when the affidavit, in addition to that fact, states,—

1. That the defendant is about to dispose of his property with intent to defraud his creditors; or

2. That the defendant is about to remove from the state, and refuses to make any arrangements for securing the payment of the debt when it falls due, and which contemplated removal was not known to the plaintiff at the time the debt was contracted; or

3. That the defendant has disposed of his property, in whole or in part, with intent to defraud his creditors; or

4. That the debt was incurred for property obtained under false pretenses. [*February 3, 1886, § 3. In effect immediately.*]

### *Answer, when must be filed in case debt is not due.*

§ 291. If the debt or demand for which the attachment is sued out is not due at the time of the commencement of the action, the defendant is not required to file any pleadings until the maturity of such debt or demand, but he may, in his discretion, do so, and go to trial as early as the cause is reached. [*February 3, 1886, § 4. In effect immediately.*]

### *No judgment without consent unless debt due.*

§ 292. No final judgment shall be rendered in such action, unless the party consents, as in the last section, until the debt or demand upon which it is based becomes due. But property of a perishable nature may be sold as in other cases of attachment. [*February 3, 1886, § 5. In effect immediately.*]

### *Bond for attachment.*

§ 293. Before the writ of attachment shall issue, the plaintiff, or some one in his behalf, shall execute and file with the clerk a bond or undertaking, with two or more sureties, in a sum in no case less than three hundred dollars in the superior court, nor less than fifty dollars in a justice's court, and double the amount for which plaintiff demands judgment, conditioned that the plaintiff will prosecute his action without delay, and will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by

reason of the attachment, not exceeding the amount specified in such bond or undertaking, as the penalty thereof, should the same be wrongfully, oppressively, or maliciously sued out. With said bond or undertaking, there shall also be filed the affidavit of the sureties, from which it must appear that such sureties are qualified, and that they are, taken together, worth the sum specified in the bond or undertaking, over and above all debts and liabilities and property exempt from execution. No person not qualified to become bail upon arrest shall be qualified to become surety upon a bond or undertaking for an attachment. [February 3, 1886, § 6. In effect immediately.]

**Form of undertaking.** — A common-law bond embracing the requisite conditions is sufficient: *Curiae v. Packard*, 29 Cal. 194; *Cook v. Boyd*, 16 B. Mon. 556. The only remedy, if the bond is insufficient, is to have the property reattached: See *Dudley v. Goodrich*, 16 Barb. 189; *Hartford v. Pendleton*, 4 Abb. Pr. 460.

**Undertaking.** — The filing of an undertaking is a jurisdictional requisite, and absence of a bond will render the subsequent proceedings void: *Alabama Bank v. Fitzpatrick*, 4 Humph. 311; *Van Loon v. Lyons*, 61 N. Y. 22; *Tiffany v. Lord*, 65 N. Y. 310. So where the undertaking was executed after the writ had been levied and attachment dismissed by the plaintiff, it was held void: *Benedict v. Bray*, 2 Cal. 254.

**Form of.** — The form of bond prescribed by the statute should be followed: *Simon v. Stetter*, 25 Kan. 155; and this form has been held to be exclusive of any other: *Amos v. Allmet*, 2 Smedes & M. 215; though a common-law bond has been held sufficient: *Barnes v. Webster*, 16 Mo. 258; 57 Am. Dec. 232. Where a bond is required, the court cannot take money or other valuable securities in lieu thereof: *Bate v. McDonald*, 41 Hun, 219.

A word omitted by mistake where the wording of the statute is followed, and it is apparent what word was intended, may be supplied without first reforming the contract: *Frankel v. Stern*, 44 Cal. 168.

**Qualifications of sureties.** — See qualifications of bail.

**Liability of sureties.** — Damages for depreciation of real estate during attachment, where possession was not taken under the writ, were held too remote: *Heath v. Lent*, 1 Cal. 412. The surety is not liable as a trespasser, but only on his contract: *McDonald v. Fett*, 49 Cal. 354. The recitals in statutory undertakings are conclusive of the facts stated: *McMillan v. Dana*, 18 Cal. 339. In an action against several, where the bond was "to pay whatever judgment may be rendered against said defendants," and judgment was obtained against one only, the sureties were held liable on the bond for the amount of the judgment: *Heinemann v. Eder*, 17 Cal. 433. An action having been brought against the sheriff for taking goods not belonging to the attachment debtor, and a judgment having been obtained therein against the sheriff, a subsequent action for trespass will not lie against him for the same matter, nor against the attaching creditor, or his sureties on the attachment bond: *Dawson v. Baum*, 3 Wash. 464.

**Actions on attachment bonds:** See the extended note to *Burton v. Knapp*, 81 Am. Dec. 467, discussing this topic.

If sureties on attachment bond did not justify, the attachment will hold between an attaching creditor and mortgagee; failure to justify is mere irregularity which can be cured: *Baxter v. Smith*, 2 Wash. 97.

### *Additional security, when may be required.*

§ 294. The defendant may, at any time before judgment, move the court or judge for additional security on the part of the plaintiff, and if, on such motion, the court or judge is satisfied that the surety in the plaintiff's bond has removed from this state, or is not sufficient, the attachment may be vacated, and restitution directed of any property taken under it, unless in a reasonable time, to be fixed by the court or judge, further security is given by the plaintiff in form as provided in section two hundred and ninety-three. [February 3, 1886, § 7. In effect immediately.]

### *Measure of damages in action on attachment bond.*

§ 295. In an action on such bond, the plaintiff therein may recover, if he shows that the attachment was wrongfully sued out, and that

there was no reasonable cause to believe the ground upon which the same was issued to be true, the actual damages sustained and reasonable attorney's fees to be fixed by the court; and if it be shown that such attachment was sued out maliciously, he may recover exemplary damages, nor need he wait until the principal suit is determined before suing on the bond. [*February 3, 1886, § 8. In effect immediately.*]

*Writ is directed to sheriff—What it must contain—Property attachable.*

§ 296. The writ of attachment shall be directed to the sheriff of any county in which property of the defendant may be, and shall require him to attach and safely keep the property of such defendant within his county, to the requisite amount, which shall be stated in conformity with the affidavit. The sheriff shall in all cases attach the amount of property directed, if sufficient not exempt from execution be found in his county, giving that in which the defendant has a legal and unquestionable title a preference over that in which his title is doubtful or only equitable, and he shall, as nearly as the circumstances of the case will permit, levy upon property fifty per cent greater in valuation than the amount which plaintiff in his affidavit claims to be due. When property is seized on attachment, the court may allow to the officer having charge thereof such compensation for his trouble and expenses in keeping the same as shall be reasonable and just. [*February 3, 1886, § 9. In effect immediately.*]

**Writ.**—Amount of indebtedness must be stated in conformity with the complaint, or the writ will be void: *Bowers v. Union Bank of Utah*, 3 Utah, 417; though in *Reed v. Kentucky Bank*, 5 Blackf. 227, it was held that the writ was not void as against defendant because it stated a less sum.

Where issued to several counties, each writ bears the force and effect of an original writ, and is to be issued as such, and not as a duplicate: *Saunders v. Columbus L. I. Co.*, 43 Miss. 553.

**What property attachable.**—Any interest that the mortgagor may have in mortgaged property in the hands of the mortgagee can be reached by process of garnishment, but the mortgagee's possession cannot be disturbed: *Mursh v. Wade*, 20 Pac. C. Rep. 578, 582. Property in the custody of the law or in the hands of a receiver appointed by a competent court cannot be attached without permission of the court: *Yuba Co. v. Adams*, 7 Cal. 35; *Adams v. Haskell*, 6 Cal. 113. But as to receiver, see *Adams v. Woods*, 9 Cal. 24. A sheriff cannot attach money collected by him on an execution and in his own hands: *Clymer v. Willis*, 3 Cal. 363. That the interest one has in sheep belonging to another and to be cared for on shares cannot be attached, see *Tucky v. Wingate*, 52 Cal. 319.

**Corporate stock.**—The person in whose name a mortgagor's shares stand on the books is the only proper garnishee: *Edwards v. Beugnot*, 7

Cal. 162. One in whose name stock stands which has been assigned as security has an attachable interest: *Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 600. A person who purchases at a sheriff's sale stocks of an incorporation, knowing that he certificates of such stocks have been previously hypothecated, is chargeable with notice of such fact, and takes the same subject to the claim of the pledgee: *Weston v. Bear River etc. Co.*, 6 Cal. 429. An assignment, by the delivery of the certificate, without transfer on the books of a corporation, is not sufficient to defeat an attachment: *Weston v. Bear River etc. Co.*, 5 Cal. 186; *Naglee v. P. W. Co.*, 20 Cal. 533; *Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 600; unless the purchaser under the attachment has notice of the transfer, in which case the transfer is good: *Weston v. Bear River etc. Co.*, 6 Cal. 425; *Strout v. Natoma W. Co.*, 9 Cal. 78.

**Partnership interests** may be attached for individual debts: *Wright v. Ward*, 65 Cal. 525; but a separate creditor attaching the interest of one member of a firm acquires merely a lien upon anything coming to the partner after a settlement of the partnership affairs: *Robinson v. Tevis*, 38 Cal. 614; *Naglee v. Minturn*, 8 Cal. 540.

**Exempt property.**—All property subject to execution is attachable, and the only property or interests not attachable are such as are exempt from execution. As to what is so exempt, see chapter on exemptions.



*Writs may be issued to different counties — Costs in such cases.*

§ 297. Writs of attachment may be issued from the superior courts to different counties, and several may, at the option of the plaintiff, be issued at the same time, or in succession and subsequently, until sufficient property has been attached; but only those executed shall be taxed in the costs, unless otherwise ordered by the court, and if more property is attached in the aggregate than the plaintiff is entitled to have held, the surplus must be abandoned and the plaintiff pay all costs incurred in relation to such surplus. After the first writ shall have issued, it shall not be necessary for the plaintiff to file any further affidavit or bond, but he shall be entitled to as many writs as may be necessary to secure the amount claimed. [*February 3, 1886, § 10. In effect immediately.*]

*Order in which different attachments shall be levied.*

§ 298. Where there are several attachments against the same defendant, they shall be executed in the order in which they were received by the sheriff. [*February 3, 1886, § 11. In effect immediately.*]

**Priority of attachments.** — Where a sheriff has possession of mortgaged goods by consent of mortgagor and mortgagee, the levy of an attachment upon the same by a deputy sheriff, where he takes actual possession, will prevail over the rights acquired by another creditor who had, prior to such levy, placed a writ of attachment in the hands of the sheriff, but which was not levied until after the deputy had made his levy: *Meacham Arms Co. v. Strong*, 3 Wash. 61.

*When sheriff may pursue property which has been removed from county.*

§ 299. If, after an attachment has been placed in the hands of the sheriff, any property of the defendant is moved from the county, the sheriff may pursue and attach the same in an adjoining county, within twenty-four hours after removal. [*February 3, 1886, § 12. In effect immediately.*]

*Manner of executing the writ.*

§ 300. The sheriff to whom the writ is directed and delivered must execute the same without delay, as follows: —

1. Real property shall be attached by filing a copy of the writ, together with a description of the property attached, with the county auditor of the county in which the attached real estate is situated.

2. Personal property capable of manual delivery shall be attached by taking into custody.

3. Stock or shares, or interest in stock or shares, of any corporation, association, or company shall be attached by leaving with the president or other head of the same, or the secretary, cashier, or managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached in pursuance of such writ.

4. Debts and credits and other personal property not capable of manual delivery shall be attached by leaving with the person owing

such debts, or having in his possession or under his control such credits or other personal property, a copy of the writ and a notice in writing that the debts owing by him to the defendant, or the credits and other personal property in his possession or under his control, are attached in pursuance of such writ. [February 3, 1886, § 13. In effect immediately.]

**Writ, how executed, generally.** — The sheriff must execute the writ without delay, and with reasonable diligence: *Wheaton v. Nerille*, 19 Cal. 45. He is responsible only for unreasonably, or not reasonably, executing process. He is not bound to start on the instant of receiving a writ to execute it, without regard to anything else. Reasonable diligence in the execution of process depends upon the particular facts. The sheriff and his deputy are one person in law, so far as to make the former responsible for the acts of the latter, but not so far as to require of the sheriff impossibilities or to impose unconscionable exactions: *Whitney v. Butterfield*, 13 Cal. 335. Where defendant's property is already in the sheriff's possession under a previous attachment, all he has to do to effect a valid levy is to return the attachment: *O'Connor v. Blake*, 29 Cal. 315.

He must serve the attachments in the order in which they come into his hands: *Lick v. Madden*, 25 Cal. 206.

**Real property.** — From the fact that levy on real estate is not accompanied by any overt act, the statute must be strictly construed: *Tomlinson v. Stiles*, 28 N. J. L. 201. A levy cannot be made by leaving a copy on the premises, unless it appears that the premises were not occupied: *Mickey v. Stratton*, 5 Saw. 475; and the return should show that fact: *Mickey v. Stratton*, 5 Saw. 475. And service by leaving a copy on the premises is not good, unless the copy was left in a conspicuous place thereon: *Mickey v. Stratton*, 5 Saw. 475. It is a copy of the writ, and not a notice thereof, which must be left: *Sharp v. Baird*, 43 Cal. 577.

There have been numerous decisions as to what is real property within this section. It includes any interest, legal or equitable: *Fish v. Forlie*, 58 Cal. 373; as, for example, the interest of a judgment debtor, whose real estate has been sold under execution, until the time for redemption is past: *Knight v. Fair*, 9 Cal. 118; *McMillan v. Richards*, 9 Cal. 415; an mining claim so far as not exempted by law: *McKeon v. Bisbee*, 9 Cal. 142; also the pay-dirt and tailings: *Jones v. Jackson*, 9 Cal. 237; though the claim be mortgaged: *Halsey v. Martin*, 22 Cal. 645; the indebtedness of the purchase price of real estate: *Ross v. Heintzen*, 36 Cal. 313; the interest of a street-railroad company in a street, arising out of its statutory authority to lay down a track in the streets of a city and run cars for hire: *N. B. etc. Co.'s Appeal*, 32 Cal. 499.

When the judgment debtor has an interest in a small, well-defined parcel of a larger tract, it is extremely irregular, to say the least, to levy upon his interest in the general tract, instead of the particular parcel; probably the owner in possession of the larger tract would be entitled to enjoin a sale, except of the

smaller defined portion: *Logan v. Hale*, 42 Cal. 650.

**Personal property capable of manual delivery.** — The sheriff must actually take into his possession or control property of this description: *Byrd v. Forbes*, 3 Wash. 324; 13 Pac. Rep. 715; *State v. Cornelius*, 5 Or. 46; or the levy will be void: *Rix v. Silknitter*, 57 Iowa, 262. A levy on goods capable of manual delivery which the officer does not see or have in his possession is void: *Herron v. Hughes*, 25 Iowa, 556.

For a full discussion of the topic of attachment of personalty generally, see the note to *Hollister v. Goodale*, 21 Am. Dec. 677.

**Personal property not capable of manual delivery.** — Personal property in possession of third persons is attachable under the fourth subdivision of this section: *Spaulding v. Kennedy*, 6 Or. 208. Execution of an attachment against a safe by posting a notice on it is insufficient: *Schneider v. Sears*, 13 Or. 70. In attaching the interest of a partner in the firm property for an individual debt, the sheriff may take possession of the entire firm assets under such writ, and transfer the possession to the judgment purchaser, who then becomes a co-tenant with the other partners: *Wright v. Ward*, 65 Cal. 525. The sheriff may levy upon property owned jointly by defendant and another, and take it into possession: *Waldman v. Broder*, 10 Cal. 378. So he can seize property held in common on a writ issued against one of the co-tenants: *Veach v. Adams*, 51 Cal. 609. For a contest between an attaching creditor of a co-tenant's interest and a mortgagee of a mortgage given for owelty of partition, see *Whitney v. McCoy*, 60 Cal. 627.

The sheriff cannot maintain an action for the recovery of a debt or credit levied upon: *Sublette v. Melhado*, 1 Cal. 104. Money in the hands of the sheriff, collected on execution, is not a "debt" due to the execution plaintiff: *Clymer v. Willis*, 3 Cal. 365.

It was said that the test is, whether defendant could maintain against the garnishee an action of debt. If so, the liability is attachable, but not otherwise: *Hassie v. G. I. W. U. Cong.*, 35 Cal. 386. It is essential that a credit exist at the time of the attachment: *Norris v. Burgojne*, 4 Cal. 409. And if the defendant has assigned all that is due him under a contract with the garnishee, the garnishment reaches neither that which has been assigned nor that which will become due on further performance under the contract: *Early v. Redwood City*, 57 Cal. 157. So the indebtedness of the maker of a note before its maturity is not attachable: *Gregory v. Higgins*, 10 Cal. 339. Creditor of judgment creditor cannot garnish judgment debtor: *Norton v. Winter*, 1 Or. 47; *Despain v. Crow*, 14 Or. 404.



Where a tort has been committed against defendant, until defendant elects to treat the tortfeasor as his debtor, the defendant's creditors cannot do so: *Davis v. Mitchell*, 34 Cal. 81; *Johnson v. Lamping*, 34 Cal. 298; *Lewis v. Dubose*, 29 Ala. 219; Drake on Attachments, 545; but the general policy of the code would seem to be to make all choses in action available to the creditor as property of the debtor. Moneys placed by A in B's hands to pay third persons, who, however, did not agree to look to B, were held attachable as A's moneys: *Chandler v. Booth*, 11 Cal. 342. But where the sheriff sold the interest of the creditor in a judgment, but the creditor had sold it for a valuable consideration, and the title was already gone before the levy, the court held that between the two *bona fide* purchasers of a chose in action not negotiable, the purchaser first in time was prior in right: *Fore v. Manlove*, 18 Cal. 438. After delivery and presentation of an order by defendant on the garnishee for the whole debt, the debt cannot be attached by defendant's creditor: *Wheatley v. Strobe*, 12 Cal. 92; *Pierce v. Robinson*, 13 Cal. 116; *Pope v. Huth*, 14 Cal. 403; Drake on Attachments, c. 37; *Black v. Paul*, 10 Mo. 103; *Lovely v. Caldwell*, 4 Ala. 684; *Corser v. Craig*, 1 Wash. C. C. 424.

If an execution is placed in the hands of a sheriff, with directions to levy on a sum of money in the hands of a corporation, and he exhibits the execution to the company and de-

mands the money, the facts that the company, while admitting that it has the money, refuses to deliver it to the sheriff, and that the sheriff cannot seize or take manual possession of the money, and that the plaintiff's attorney has notice of these things at the time, do not excuse the sheriff for failing to levy the execution, whether the company has the money as a distinct sum belonging to the defendant, or he is its creditor for the amount: *Howe v. White*, 49 Cal. 658. An assignee for the benefit of creditors cannot be garnished at the suit of assignor's debtor before the assignment has been impeached: *Hecht v. Green*, 61 Cal. 269. The creditor of a corporation may garnish another corporation which is a stockholder in the defendant corporation: *Hughes v. Oregonian Ry Co.*, 11 Or. 158. But a stockholder in a corporation cannot be garnished for its debts to the extent of his unpaid assessments: *McKelvey v. Crockett*, 18 Nev. 238. An executor or administrator cannot be garnished for the amount of an allowed claim: *Norton v. Haydon*, 18 Nev. 247.

*Wrongful levy.* — Where a wrongful levy is made by a sheriff acting under express direction of the attaching creditor, and the person wronged by such levy obtains judgment against the sheriff, the sheriff may recover indemnity against the attaching creditor under whose direction he acted: *Standley v. Marsh*, 20 Pac. Rep. 592.

### *Examination of defendant touching his property.*

§ 301. Whenever it appears by the affidavit of the plaintiff, or by the return of the attachment, that no property is known to the plaintiff or officer on which the attachment can be executed, or not enough to satisfy the plaintiff's claim, and it being shown to the court or judge by affidavit that the defendant has property within the state not exempt, the defendant may be required by such court or judge to attend before the court or judge, or referee appointed by the court or judge, and give information on oath respecting the same. [February 3, 1886, § 14. In effect immediately.]

### *Receiver appointed for attached property.*

§ 302. The court before whom the action is pending, or the judge thereof, may at any time appoint a receiver to take possession of property attached under the provisions of this chapter, and to collect, manage, and control the same, and pay over the proceeds according to the nature of the property and the exigency of the case. [February 3, 1886, § 15. In effect immediately.]

"Chapter" substituted for "act," being identical.

### *Sale of property before judgment — Collection of debts due defendant.*

§ 303. If any of the property attached be perishable, or in danger of serious and immediate waste or decay, the sheriff shall sell the same in the manner in which such property is sold on execution. Whenever it shall be made to appear satisfactorily to the court or judge that the interest of the parties to the action will be subserved by a sale of



any attached property, the court or judge may order such property to be sold in the same manner as like property is sold under execution. Such order shall be made only upon notice to the adverse party or his attorney, in case such party shall have been personally served with a summons in the action. Debts and credits attached may be collected by the sheriff, if the same can be done without suit, and the sheriff's receipt shall be a sufficient discharge for the amount paid. [February 3, 1886, § 16. *In effect immediately.*]

**What is perishable property.** — It is held that property, to be perishable, must be of a kind likely to decay; and that property which will merely lose its value by change of fashion is not perishable: *Fisk v. Spring*, 25 Hun, 367.

#### *Custody of money received under attachment.*

§ 304. All moneys received by the sheriff under the provisions of this chapter and all other attached property shall be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment recovered previous to the issuing of the attachment. [February 3, 1886, § 17. *In effect immediately.*]

See note to § 302.

#### *Liability of third persons for property in their possession.*

§ 305. All persons having in their possession or under their control any credits or other personal property belonging to the defendant or owing any debts to the defendant at the time of the service upon them of a copy of the writ and notice, as provided in subdivision four of section three hundred, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property, or debts, until the attachment be discharged or any judgment recovered by him be satisfied. [February 3, 1886, § 18. *In effect immediately.*]

#### *Garnishment of sheriffs, constables, judgment debtors, etc.*

§ 306. A sheriff or constable may be garnished for money of the defendant in his hands. So may a judgment debtor of the defendant when the judgment has not been previously assigned on the record, or by writing filed in the office of the clerk, and by him minuted as an assignment on the margin of the execution docket, and also an executor or administrator may be garnished for money due from the decedent to the defendant. [February 3, 1886, § 19. *In effect immediately.*]

#### *How money in court is attached.*

§ 307. When the property to be attached is a fund in court, the execution of a writ of attachment shall be by leaving with the clerk of the court [a copy] thereof, with notice in writing specifying the fund. [February 3, 1886, § 20. *In effect immediately.*]

*Return of sheriff — Examination of garnishee.*

§ 308. The sheriff shall make a full inventory of the property attached, and return the same with the writ. To enable him to make such return as to debts and credits attached, he shall request at the time of service the party owing the debt or having the credit to give him a memorandum in writing stating the amount and description of each, and if such memorandum be refused, he shall return the fact of the refusal with the writ. The party refusing to give the memorandum may be required to attend before the court or judge, or a referee appointed by the court or judge, and answer under oath respecting such debts or credits or other property. If, when duly summoned, he fail to appear and answer the interrogatories propounded to him, without sufficient excuse for his delinquency, he shall be presumed to be indebted to the defendant to the full amount of the plaintiff's demand. But for a mere failure to appear, he is not liable to pay the amount of plaintiff's judgment until he has had an opportunity to show cause against the issuing of an execution. [February 3, 1886, § 21. In effect immediately.]

**Return.** — The statute contains no express provision requiring that all the acts necessary to a valid levy shall be set out in the return: *Ritter v. Scannell*, 11 Cal. 238. But it is the duty of the sheriff to set them out: *Sharp v. Baird*, 43 Cal. 577.

The return is not conclusive, but is *prima facie* evidence of the facts stated: *Nichols v. Patten*, 18 Me. 231; 36 Am. Dec. 713; *Palmer v. Thayer*, 28 Conn. 237; *Pomroy v. Parmlee*, 9 Iowa, 140.

**Lien of attachment.** — The lien of an attachment of real property is not perfected until the statutory acts have been performed: *Wheaton v. Neville*, 19 Cal. 45. The effect of attachment of real property is to create a lien: *State v. Cornelius*, 5 Or. 46. The attachment creditor is not affected by a prior unrecorded deed: *Bochreinger v. Creighton*, 10 Or. 42.

**Garnishee to answer.** — The order here provided for is process, and must be served on the garnishee personally, and service on his attorney is not sufficient. But appearance, either in person or by attorney, is equivalent to personal service: *Carter v. Koshland*, 12 Or. 492; *Curry v. Woodward*, 50 Ala. 258.

Where a garnishee answers on oath that he was released by the plaintiff, and that the plaintiff had abandoned his examination, he should be discharged by the court, unless his answer is controverted by the affidavit of the plaintiff: *Ogden v. Mills*, 3 Cal. 253. He can only be required to answer as to his liability to the debtor at the time of the service of the

garnishment: *Norris v. Burgoyne*, 4 Cal. 409. Where B was garnished in a suit against C, the day before he accepted an order drawn by A in favor of C, but failed to inform C thereof, and C, for a valuable consideration, sold the order, as indorsed, to D, an innocent purchaser, it was held that B was estopped from setting up against it any antecedent matter, and is liable to D for the full amount thereof: *Garwood v. Simpson*, 8 Cal. 101. A plaintiff who has sued out an attachment, and given the necessary notice to a garnishee that the property in his hands is attached, and subsequently the garnishee fraudulently disposes of the property, may waive his lien on the property, and bring suit for the value of the property against the garnishee: *Roberts & Co. v. Landecker*, 9 Cal. 262.

**Answer of garnishee.** — An answer is required; no demurrer by the garnishee is authorized: *Faull v. Alaska G. & S. M. Co.*, 8 Saw. 420. The requirement to appear and be examined does not create an adversary proceeding; and the garnishee cannot be required to turn over property, unless on the hearing he admits that he has the property of the defendant in his possession or under his control: *Coombs v. Davis*, 2 Wash. 466; *Weisbach v. Arnold*, 3 Wash. 111; and if he claim a lien upon the property, the garnishee cannot be required to turn over the same to the sheriff until such lien is first satisfied: *Coombs v. Davis*, 2 Wash. 466.

*Judgment against garnishee.*

§ 309. If, upon the examination of such garnishee, as provided in the last section, it appears that the garnishee was indebted to the defendant, or had any credits or other property of the defendant in his possession, or under his control at the time of the service of the copy

of the writ and notice upon him, as hereinbefore provided, or at any time subsequent thereto, he is liable to the plaintiff in case judgment is finally recovered by him to the full amount of that judgment, or to the amount of such indebtedness and of the credits or other personal property held by him, and a judgment shall be entered up against him accordingly. [*February 3, 1886, § 22. In effect immediately.*]

*If debt of garnishee not due, execution suspended.*

§ 310. If the debt of the garnishee to the defendant is not due, execution shall be suspended until its maturity. [*February 3, 1886, § 23. In effect immediately.*]

*Garnishment of debt on negotiable paper.*

§ 311. The garnishee shall not be made liable on a debt due by negotiable paper, unless such paper is delivered or the garnishee completely exonerated or indemnified from all liability thereon after he may have satisfied the judgment. [*February 3, 1886, § 24. In effect immediately.*]

*Subjection of attached property to the judgment.*

§ 312. If judgment be recovered by the plaintiff, the sheriff shall satisfy the same out of the property attached by him which has not been delivered to the defendant or claimant as in this chapter provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose, —

1. By applying on the execution issued on said judgment the proceeds of all sales of perishable or other property sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment.

2. If any balance remain due, he shall sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands.

Notice of the sale shall be given and the sale conducted as in other cases of sales on execution. [*February 3, 1886, § 25. In effect immediately.*]

See note to § 302.

**Sale, surplus, etc.:** *Berry v. Charlton*, 10 Or. 362.

Defendant may pay judgment; but a deposit or payment to the clerk is not payment: *Sageley v. Livermore*, 45 Cal. 616. Proceedings for sale of attached property are not a bar to an action commenced before sale for the re-

covery thereof as exempt if exemption was claimed in due time: *Berry v. Charlton*, 10 Or. 362.

When the attachment is satisfied, the property not disposed of, as well as surplus moneys, are subject to the rights of the debtor or his assignee: *Sexey v. Adkinson*, 40 Cal. 408.

*Collection of judgment when attached property is insufficient — Surplus of attached property.*

§ 313. If, after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, deducting his fees, to the pay-



ment of the judgment, any balance shall remain due, the sheriff shall proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the attached property remaining in his hands and any proceeds of the property attached unapplied on the judgment. [*February 3, 1886, § 26. In effect immediately.*]

*Execution to satisfy balance of judgment.*

§ 314. If the execution be returned unsatisfied, in whole or in part, the plaintiff may proceed as in other cases upon the return of an execution. [*February 3, 1886, § 27. In effect immediately.*]

*Return of property or money in case of judgment for defendant.*

§ 315. If the defendant recover judgment against the plaintiff, all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands, shall be delivered to the defendant or his agent. The order of attachment shall be discharged, and the property released therefrom. [*February 3, 1886, § 28. In effect immediately.*]

**Defendant, judgment for, ipso facto, dissolves attachment:** *O'Connor v. Blake*, 29 Cal. 316.

*Discharge of attachment on counter-bond.*

§ 316. If the defendant, at any time before judgment, causes a bond to be executed to the plaintiff with sufficient sureties, to be approved by the officer having the attachment, or after the return thereof, by the clerk, to the effect that he will perform the judgment of the court, the attachment shall be discharged and restitution made of property taken or proceeds thereof. The execution of such bond shall be deemed an appearance of such defendant to the action. [*February 3, 1886, § 29. In effect immediately.*]

**Bond for discharge of attachment.** — The bond or undertaking by defendant under this section operates as an absolute discharge of the property from attachment: *Duncan v. Thomas*, 1 Or. 314; the bond taking the place of the property, and the action losing its character as one in rem: *Benton v. Roberts*, 2 La. Ann. 243; *Barry v. Foyles*, 1 Pet. 311; *People v. Cameron*, 7 Ill. 468; *Cain v. Shakespeare*, 12 Phila. 196; *Fife v. Clark*, 2 McCord, 347.

A bond exacted for the release of an attachment on property which the sheriff knew was exempt from execution is void for want of consideration: *Servanti v. Lusk*, 43 Cal. 238. A substantial compliance with this section, in respect to the undertaking, is sufficient: *Heynemann v. Eder*, 17 Cal. 433; *Palmer v. Vance*, 13 Cal. 553. If the sheriff takes a sufficient statutory undertaking, he has no further responsibility: *Curia v. Packard*, 29 Cal. 194. The bond requires the return of the property on judgment for the plaintiff or payment of its value, and its terms are not complied with by

an offer of return, or by a return of a part: *Metrovich v. Jovovich*, 58 Cal. 341.

The bond, though not in the form here prescribed, may yet be valid as a common-law bond: *Smith v. Fargo*, 57 Cal. 157.

In an action on an undertaking given to release property from attachment, the complaint must state that the property was released upon the execution and delivery of the bond: *Laforge v. Magee*, 6 Cal. 651; *Williamson v. Blattan*, 9 Cal. 501; but it need not aver the redelivery of the property to defendant: *McMillan v. Dana*, 18 Cal. 339. As a general rule, the consideration for the undertaking must be alleged and proved: *Coburn v. Pearson*, 57 Cal. 306. So also demand upon the sureties must be alleged and proved: *Pierce v. Whiting*, 63 Cal. 538; *Morgan v. Menzies*, 60 Cal. 341. But the necessity for such demand is to be determined by the terms of the sureties' contract: See *Pierce v. Whiting*, 63 Cal. 538. At all events, judgment can never be rendered against the sureties on the bond until judgment against

the defendant in attachment: *Morning v. Alexander*, 10 Heisk. 606.

The sureties are discharged on tendering the full amount due to plaintiff, and the amount of such tender need not be paid into court: *Curiac v. Packard*, 29 Cal. 194. Tender by sureties of the full amount of judgment recovered is equivalent to payment or release by said plaintiff: *Norwood v. Kenfield*, 34 Cal. 329; *Curiac v. Packard*, 29 Cal. 194. So sureties on a rede-

livery bond are discharged by seizure of the same property upon attachment, in another suit, by the same sheriff: *Duncan v. Thomas*, 1 Or. 314.

When defendant gives a bond and obtains the release of property attached, and afterwards judgment is rendered against him, it may at the same time be rendered against his sureties, provided the amount does not exceed the stipulation of the bond: *Rodolph v. Mayer*, 1 Wash. 133.

*Bond for discharge is part of the record.*

§ 317. Such bond shall be part of the record, and if judgment go against the defendant, the same shall be entered against him and sureties. [*February 3, 1886, § 30. In effect immediately.*]

*Motion to discharge wrongful attachment.*

§ 318. The defendant may at any time after he has appeared in the action, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to the judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued. [*February 3 1886, § 31. In effect immediately.*]

**Discharge of attachment.** — Defendant must appear and answer, before he can move to discharge attachment: *Rodolph v. Mayer*, 1 Wash. 133. Order discharging attachment is a final order, not reviewable in appellate court: *Sufferin v. Chisholm*, 1 Wash. 486. If complaint is dismissed, though improperly, a writ of attachment founded on it falls; but such attachment is restored when an appeal from the erroneous decision: *Renton v. St. Louis*, 1 Wash.

215. But a transfer of the attached property in good faith, during the interval, is valid: *Renton v. St. Louis*, 1 Wash. 215. Where defendant's motion to discharge the attachment is denied, and he afterwards takes the property on counter-bond, the order denying the motion to discharge will not be reviewed in the appellate court, unless for the purpose of retaxing costs: *Kratz v. Dawson*, 3 Wash. 100.

*What affidavits used on motion to discharge.*

§ 319. If the motion be made upon affidavits upon the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence in addition to those on which the attachment was issued. [*February 3, 1886, § 32. In effect immediately.*]

*Attachment must be discharged when.*

§ 320. If upon application it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged. [*February 3, 1886, § 33. In effect immediately.*]

*When return of writ must be made — Return order of discharge.*

§ 321. The sheriff must return the writ of attachment with the summons, if issued at the same time, otherwise, within twenty days after its receipt, with a certificate of his proceedings indorsed thereon or attached thereto, and whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such copy may be filed in the offices of the county auditors in which

the notices of attachment have been filed, and be indexed in like manner. [*February 3, 1886, § 34. In effect immediately.*]

*This chapter to be liberally construed.*

§ 322. This chapter shall be liberally construed, and the plaintiff, at any time when objection is made thereto, shall be permitted to amend any defect in the complaint, affidavit, bond, writ, or other proceeding, and no attachment shall be quashed or dismissed, or the property attached released, if the defect in any of the proceedings has been or can be amended so as to show that a legal cause for the attachment existed at the time it was issued, and the court shall give the plaintiff a reasonable time to perfect such defective proceedings. The causes for attachment shall not be stated in the alternative. [*February 3, 1886, § 35. In effect immediately.*]

See note to § 302.

*Orders by judge at chambers.*

§ 323. The judge of any superior court shall have power to make every order which, by the provisions of this chapter, may be made by the court. [*February 3, 1886, § 36. In effect immediately.*]

See note to § 302. The words "in vacation" and "in term time" are omitted, as abrogated by the constitution.

*Word "sheriff" applies to constables — Application of this chapter in justices' courts.*

§ 324. The word "sheriff," as used in this chapter, is meant to apply to constables, when the proceedings are in a justice's court; and when the proceedings are in a justice's court, the justice is to be regarded as the clerk of the court for all purposes herein contemplated; *provided*, that nothing contained in this chapter shall be construed to confer upon a justice of the peace power to issue a writ of attachment to be served out of the county in which such justice shall have his office, or to confer upon a sheriff, constable, or other officer power or authority to serve a writ of attachment issued out of justice's court beyond the limits of the county in which such justice shall have his office, except in cases provided for in section two hundred and ninety-nine; *and provided further*, that nothing contained in this chapter shall be construed or held to authorize the attachment of real estate, or of any interest therein, under a writ of attachment issued out of any justice's court. [*February 3, 1886, § 37. In effect immediately.*]

See note to § 302.



## CHAPTER V.

## OF RECEIVERS, AND DEPOSITS IN COURT.

- § 325. Receiver defined.
- § 326. In what cases a receiver may be appointed.
- § 327. Bond of receiver.
- § 328. Receiver appointed on admission in pleading.
- § 329. Courts may punish for disobedience, and may order deposit in court.
- § 330. Custody of money deposited.
- § 331. Powers of receiver.
- § 332. Order when part of claim admitted.

*Receiver defined.*

§ 325. A receiver is a person appointed by a court or judicial officer to take charge of property during the pending of a civil action or proceeding, or upon a judgment, decree, or order therein, and to manage and dispose of it as the court or officer may direct. [*February 26, 1891, § 1.*]

*In what cases a receiver may be appointed.*

§ 326. [193.] A receiver may be appointed by the court in the following cases: —

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim;

2. In an action between partners, or other persons jointly interested in any property or fund;

3. In all actions where it is shown that the property, fund, or rents and profits in controversy are in danger of being lost, removed, or materially injured;

4. In an action by a mortgagee for the foreclosure of a mortgage and the sale of the mortgaged property, when it appears that such property is in danger of being lost, removed, or materially injured; or when such property is insufficient to discharge the debt, to secure the application of the rents and profits accruing, before a sale can be had;

5. When a corporation has been dissolved or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights;

6. And in such others cases as may be provided for by law, or when, in the discretion of the court, it may be necessary to secure ample justice to the parties; *provided*, that no party or attorney or other person interested in an action shall be appointed receiver therein.

**Appointment of receivers.** — Though the appointment of receivers, which was a part of equity jurisdiction, has been provided for by statute, the principles of equity must still be resorted to for guidance: See extended note to *Cortley v. Hathaway*, 64 Am. Dec. 482-495, showing when and over what property a receiver will be appointed.

A receiver has been defined as an indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation, and receive its rents, issues, and profits, and apply or dispose of them at the direction of the court, when it does not seem reasonable that either party should hold them: *Baker v. Backus*, 32 Ill. 79; *Chautauqua County Bank v. White*, 6 Barb. 589; *Waters v. Carroll*, 9 Yerg. 102; *Devendorf v. Dickinson*, 21 How. Pr. 275. The power of appointment of receiver is of a high and extraordinary nature, and will be exercised by courts with the utmost caution, and only under such special circumstances as demand summary relief: *Crawford v. Ross*, 39 Ga. 44; *Furlong v. Edwards*, 3 Md. 112; *Speights v. Peters*, 9 Gill, 472; *Blondheim v. Moore*, 11 Md. 365; *Patten v. Accessory Transit Co.*, 4 Abb. Pr. 235; and the right to the relief must be clearly shown, and also the fact that there is no other safe or expedient remedy: *Speights v. Peters*, 9 Gill, 472; *Oil Co. v. Petroleum Co.*, 6 Phila. 521. The pendency of a suit is essential to authorize the appointment of a receiver, save in the cases of infants and lunatics: *Anonymous*, 1 Atk. 578; *Ex parte Whitfield*, 2 Atk. 315; *Ex parte Mountfort*, 15 Ves. 445; *Crowder v. Moone*, 52 Ala. 220; *Baker v. Backus*, 32 Ill. 79; *Merchants' and Manufacturing Nat. Bank v. Circuit Judge*, 43 Mich. 292; *Jones v. Schall*, 45 Mich. 379; *Hardy v. McClellan*, 53 Miss. 507. A plaintiff seeking relief by appointment of a receiver must show that he has either a clear right to the property itself, some lien upon it, or that it constitutes a special fund to which he has a right to resort for the satisfaction of his claim, and that the possession of the property by defendant was obtained by fraud, or that the property itself, or the income arising from it, is in danger of loss from neglect, waste, misconduct, or insolvency of the defendant: *Mays v. Rose*, Freem. 718.

The cases generally agree that an application for appointment of a receiver is addressed to the sound discretion of the court: *Crane v. McCoy*, 1 Bond, 422; *Mays v. Rose*, Freem. 718; *Ex parte Walker*, 25 Ala. 81; *Verplank v. Caines*, 1 Johns. Ch. 57; but as to the extent of such discretion there has been some difference. In *Wilson v. Denis*, 1 Mont. 98, the court went so far as to hold that the power to appoint a receiver is a matter of arbitrary discretion on the part of the court to which the application is made, and could not be interfered with on appeal. In *Orphan Asylum v. McCuttee*, 1 Hopk. Ch. 435, the court remark: "It is said that the appointing of a receiver rests in discretion. This proposition does not teach much. A receiver is proper if the fund is in danger, and this principle reconciles the cases found in the books. There is no case in which the court appoints a receiver merely because the measure can do no harm."

The opposite party is, as a rule, entitled to notice of application for receiver, and to a hearing thereon: *Turgeon v. Brady*, 24 La. Ann. 348; *Nusbaum v. Stein*, 12 Md. 315; *Jones v. Schall*, 45 Mich. 379; *Mays v. Rose*, Freem. 703; *Whitehead v. Wooten*, 43 Miss. 523; *Tibbels v. Sargeant*, 14 N. J. Eq. 449; and notice will only be dispensed with in extreme cases,

where the delay required to give notice would result in irreparable loss or injury: *Crowder v. Moone*, 52 Ala. 220; *Williams v. Jenkins*, 11 Ga. 595; *Johns v. Johns*, 23 Ga. 31; *Baker v. Backus*, 32 Ill. 79; *French v. Gifford*, 30 Iowa, 148; *Triebert v. Burgess*, 11 Md. 542; *Clark v. Ridgley*, 1 Md. Ch. 70; *Whitehead v. Wooten*, 43 Miss. 523; *Field v. Ripley*, 20 How. Pr. 26; *Van Rensselaer v. Morris*, 1 Paige, 1; *Bloodgood v. Clarke*, 4 Paige, 574; *Sandford v. Sinclair*, 8 Paige, 373; *Cleveland etc. R. R. Co. v. Jewett*, 37 Ohio St. 649; *Oil Run Petroleum Co. v. Gale*, 6 W. Va. 525. A new receiver may be appointed on the death of a former receiver without notice: *Nicoll v. Boyd*, 90 N. Y. 516.

The appointment is made, generally, either to prevent fraud, protect property from injury, or preserve it from destruction, but the mere allegation of the facts is not sufficient to authorize a court to make the appointment. The plaintiff must establish such facts, and make out a strong case for relief, before the appointment will be made: *Baker v. Backus*, 32 Ill. 79; *Hamilton v. Accessory Transit Co.*, 3 Abb. Pr. 255; *Henshaw v. Wells*, 9 Humph. 568; *Barkhurst v. Kinsman*, 2 Blatchf. 78; *Crane v. McCoy*, 1 Bond, 422. A mere showing on information and belief of the party, or of his attorney, will not be sufficient: *Haines v. Carpenter*, 1 Woods, 262; *Davis v. Reeves*, 2 Lea, 649. A receiver will not be appointed in an improper case, though both parties consent: *Whipple v. Erie R. R. Co.*, 6 Blatchf. 271. A receiver will not generally be appointed to take charge of property which is not in possession of a party to the suit: *Scarles v. Jacksonville P. & M. R. R. Co.*, 2 Woods, 621; *Mays v. Wherry*, 3 Tenn. Ch. 34.

Before a receiver will be appointed, the applicant must show an apparent right to property in the possession of the adverse party, and that it is in danger of being lost or injured: *Twitty v. Logan*, 80 N. C. 69; *Lorenson v. Elson*, 88 N. C. 182. Receiver will be refused where plaintiff's claim to real property is apparently doubtful, and he makes the application merely on the ground of insolvency of the person in possession: *Cofer v. Echerson*, 6 Iowa, 502. In cases of controversy respecting title to property, the courts are reluctant to interfere against the legal title, and will do so only in cases of fraud or danger to the property: *Thompson v. Diffeenderfer*, 1 Md. Ch. 489; *Kipp v. Hanna*, 2 Bland, 31; *Rollins v. Henry*, 77 N. C. 467; *Lenox v. Notrebe*, Hemp. 225; *Overton v. Memphis etc. Ry Co.*, 3 McCrary, 436.

Claimant of the legal title out of possession can have receiver only on showing case of special circumstances in aid of equitable title: *Mapes v. Scott*, 4 Ill. App. 268. If plaintiff proves equitable title in himself, but neither legal nor equitable title in defendant, and that the property needs protection, a receiver will be appointed: *Cole v. O'Neil*, 3 Md. Ch. 174. Where, during a controversy as to the title to land, the parties interfere with each other forcibly and prevent harvesting, a receiver may be appointed: *Hlawacek v. Bohman*, 51 Wis. 92. In an action to recover possession of real estate and damages for detention, it is not proper to appoint a receiver of rents and



profits: *Thompson v. Sherrard*, 35 Barb. 593; *Burdell v. Burdell*, 54 How. Pr. 91; *Guernsey v. Powers*, 9 Hun, 78; unless the rents and profits are in danger, or exposed to loss: *Chase's Case*, 1 Bland, 206; 17 Am. Dec. 277; *Haas v. Chicago Building Society*, 89 Ill. 498; and insolvency of the party receiving the rents and profits does expose them to danger of loss, and is ground for appointment of a receiver: *Chase's Case*, 1 Bland, 205; 17 Am. Dec. 277, note 306; *Hughes v. Hatchett*, 55 Ala. 631; *Connelly v. Dickson*, 76 Ind. 440; *Nesbitt v. Turrentine*, 83 N. C. 535; so on misapplication of rents, a receiver will be appointed to properly apply them to interest or otherwise, as the case may require: *Stockman v. Wallis*, 30 N. J. Eq. 450; *Green v. Green*, 30 N. J. Eq. 451; and this will be done at the instance of creditors: *Beard v. Arbuckle*, 19 W. Va. 145. Where realty, the subject of a suit, is about to be sold for non-payment of taxes, a receiver may be appointed to properly manage the same: *Darusmont v. Patten*, 4 Lea. 597; but where the person in possession will pay the taxes, receiver will be dispensed with: *Darusmont v. Patten*, 4 Lea. 597; so in case a debtor in possession will give security for rents and profits: *Grantham v. Lucas*, 15 W. Va. 425. A party claiming under a lien, who has the same security as he had when the debt was incurred, is not entitled to a receiver if he merely wishes to divert the rents and profits to his use, and he shows no mismanagement: *Sales v. Lusk*, 18 N. W. Rep. 382 (Wis.). In the administration of estates in probate, a receiver is not generally appointed, as probate courts can grant proper relief, and in such cases it is only to prevent immediate irreparable injury that the appointment will be made: *Randle v. Carter*, 62 Ala. 95. A plaintiff may have a receiver appointed even when another receiver of the same funds has been appointed by another court in a different action, but the later appointment must be subject to the exercise of powers of previously appointed receivers, or of other prior judicial authority: *Bailey v. Belmont*, 10 Abb. Pr., N. S., 270; 33 N. Y. Sup. Ct. 239.

The jurisdiction of courts has been exercised by appointment of receivers over such matters as railway and bridge tolls: *De Winton v. Mayor of Brecon*, 26 Beav. 533; *Corington Deuchbridge v. Shepherd*, 21 How. 125; *State v. Northern Central R. R. Co.*, 18 Md. 193; profits and emoluments of an office, which were assignable: *Palmer v. Vaughn*, 3 Swanst. 173; assignable pensions: *Heald v. Hay*, 3 Giff. 467; profits of a solicitor's business: *Candler v. Candler*, Jacob, 225; machinery of steam vessels: *Brennan v. Preston*, 2 De Gex, M. & G. 531. Receiver may be appointed to carry on business: *Smith v. N. Y. Consolidated Stage Co.*, 15 Abb. Pr. 419; 28 How. Pr. 208; to receive the rents and profits of realty and of such personal estate as may be taken on execution, and of whatever is regarded in equity as assets: *Chaplin v. Young*, 33 Beav. 330; *Blanchard v. Cuthorne*, 4 Sim. 572; *Sloan v. Moore*, 37 Pa. St. 217. In proceedings in nature of a *quo warranto* to establish right to office, receiver will not be appointed to discharge duties of office or to receive the fees or emoluments: *Tuypan v. Gray*, 9 Paige, 507, affirming 7 Hill,

259. Where there is litigation as to whom a debt is due, and it is necessary to enforce the debt immediately, a receiver will be appointed: *Mills v. Pittman*, 1 Paige, 490; *Hamberlain v. Marble*, 24 Miss. 586. Though neither fraud nor misconduct are charged, a receiver may be appointed to take charge of property which may be transferred beyond possibility of identification: *Fidelity Ins. Co. v. Huber*, 13 Phila. 52.

**Corporations.** — A court may appoint a receiver where there are no persons authorized to take charge of the corporate property, or where fraud is shown in the defendant corporation, and its funds are in danger of being wasted or misapplied, or to prevent the removal of its property beyond the jurisdiction of the court: *Lawrence v. Greenwich Fire Ins. Co.*, 1 Paige, 587; *Conro v. Gray*, 4 How. Pr. 166; *Willis v. Corlies*, 2 Edw. Ch. 281; *Orphan Asylum v. McCartee*, 1 Hopk. Ch. 429; *Hand v. Dexter*, 41 Ga. 454; *North Carolina R. R. Co. v. Drew*, 3 Woods, 691; *Sanford v. Sinclair*, 8 Paige, 373; *Conro v. Port Henry Iron Co.*, 12 Barb. 27. Receiverships are granted with the greatest caution in cases of corporations, and only in event of pressing apparent necessity: *Patten v. Accessory Transit Co.*, 13 How. Pr. 502; 4 Abb. Pr. 235; and the power conferred must be strictly pursued: *Bangs v. McIntosh*, 23 Barb. 591.

**Partnerships.** — An application for a receiver, in a proceeding between partners for an account and settlement of their partnership affairs, is a proper subject of equity jurisdiction: *Sheppard v. Orenford*, 1 Kay & J. 491; *Allen v. Hawley*, 6 Fla. 142; 63 Am. Dec. 190; *Saylor v. Mockbie*, 9 Iowa, 209; *Gridley v. Conner*, 2 La. Ann. 87. The mere fact, however, that a bill prays for a dissolution is not sufficient ground for appointment of a receiver; the allegations must be such that if proved would entitle the plaintiff to a dissolution: *Goodman v. Whitcomb*, 1 Jacob & W. 569; *Pirtle v. Penn*, 3 Dana, 247; 28 Am. Dec. 70. And the bill must be so framed that a decree may be made thereon, either that the business be continued according to the partnership articles, or that the partnership be wholly ended and dissolved: *Const v. Harris*, Turn. & R. 517; *Stemmer's Appeal*, 58 Pa. St. 168.

Before an order will be made appointing a receiver, the plaintiff must show that there has been a dissolution, or that he is entitled thereto, and that no provision is made in the partnership agreement for a dissolution; or that the partnership is insolvent, and that his copartners are wasting or misapplying the assets; or generally, that there has been some breach of the partnership duty or violation of the partnership agreement: *Henn v. Walsh*, 2 Edw. Ch. 129; *Pirtle v. Penn*, 3 Dana, 247; 28 Am. Dec. 70; *Williamson v. Wilson*, 1 Bland, 418; *Allen v. Hawley*, 6 Fla. 142; 63 Am. Dec. 190. So as to warrant the apprehension that the property is in danger of being lost, and the object of the suit defeated: *Bard v. Bingham*, 54 Ala. 463; *Barnard v. Davies*, 54 Ala. 565; *Seighortner v. Weissenborn*, 20 N. J. Eq. 172; *Anonymous*, 2 Daly, 533.

**Trusts.** — The case must be a strong one to dispossess a trustee by appointing a receiver,



the courts being averse to the displacement of a trustee under an express trust, except for good cause shown: *Barkley v. Reay*, 2 Hare, 306; *Smith v. Smith*, 2 Younge & C. 361; *Orphan Asylum v. McCartee*, Hopk. Ch. 429; *Haines v. Carpenter*, 1 Woods, 262.

Where there is no evidence which shows the necessity of interference, and no showing that property is in danger, courts will not place a receiver over a trust estate in preference to the trustee: *Whitworth v. Whyddon*, 2 Macn. & G. 52; *Harrup v. Winslet*, 37 Ga. 655; *Leddel v. Starr*, 19 N. J. Eq. 163.

But if it is established that there has been misconduct, waste, improper disposition of the trust estate, or mismanagement or incompetency of the trustee, a case for appointment of receiver is made out: *Chase's Case*, 1 Bland, 206; 17 Am. Dec. 277; *Haines v. Carpenter*, 1 Woods, 262; *Jenkins v. Jenkins*, 1 Paige, 243. Provided it is shown that the trust estate is likely to suffer by the continuance of the trustee in authority: *Poythress v. Poythress*, 16 Ga. 406. And the same is true where by neglect the trustee has not done what, in his position as such, he should have done for the best interest of the estate, as where the rents have been allowed to fall in arrears, or where, by failing to get in personal property, it has been lost, or the like: *Wilson v. Wilson*, 2 Keen, 249; *Hart v. Tulk*, 6 Hare, 611; *Richards v. Perkins*, 3 Younge & C. 307.

**Tenants in common.** — Courts will not grant a receiver against a tenant in common except in cases of destructive waste or gross exclusion: *Ex parte Billingham*, 1 Amb. 164; *Ex parte Radcliffe*, 1 Jacob & W. 619; and the application will be denied except in extreme cases: *Scurrah v. Scurrah*, 14 Jur. 874; *Norway v. Rowe*, 19 Ves. 159; *Milbank v. Revett*, 2 Mer. 405; *Spratt v. Aheance*, 1 Jones Eq. 50. Upon a showing that his co-tenants are insolvent, that they are in possession, and are excluding him from the receipt of his share of the rents and profits, a tenant in common may have a receiver: *Williams v. Jenkins*, 11 Ga. 595; *Cassety v. Capps*, 3 Tenn. Ch. 524. So a receiver may be appointed where one of two co-tenants refuses to unite with the other in renting the premises, and all rent is therefore lost: *Pignolet v. Bush*, 28 How. Pr. 9.

**Debtor and creditor.** — In the absence of contrary statutory provision, a general contract creditor cannot, before judgment, have a receiver appointed against his debtor, on whose property he has acquired no lien: *Uhl v. Dillon*, 10 Md. 500; *Bayard v. Fellows*, 28 Barb. 451; *Hulse v. Wright*, Wright, 61; *McGoldrick v. Slevin*, 43 Ind. 522; *Hubbard v. Hubbard*, 14 Md. 356; *Nusbaum v. Stein*, 12 Md. 315; *Rich v. Levy*, 16 Md. 74; *Blondheim v. Moore*, 11 Md. 365; *Wiggins v. Armstrong*, 2 Johns. Ch. 144. But creditors having a special or equitable lien on a debtor's property may be entitled to protection of a receiver: *Bryan v. McCormick*, 1 Cox, 422; *Todd v. Lee*, 15 Wis. 365. But to entitle an equitable creditor to the relief, he must show that the property is in danger, or base his application on some other equity: *Davis v. Duke of Marlborough*, 2 Swanst. 137.

A judgment creditor who has taken out his execution at law, and finds that he is precluded from collecting the amount of his judgment by a prior title affecting the debtor's interest in the property, or generally, where the execution is returned unsatisfied, in whole or in part, will be entitled to the appointment of a receiver: *Curling v. Marquis of Townshend*, 19 Ves. 632; *Plaskett v. Dillon*, 2 Bligh, N. S., 239; *Bloodgood v. Clarke*, 4 Paige, 574; *Hadden v. Spuder*, 20 Johns. 554; *Lent v. McQueen*, 15 How. Pr. 313; *Darrow v. Lee*, 16 Abb. Pr. 215; *Herry v. Gibson*, 10 Bosw. 591; *Brown v. Nichols*, 42 N. Y. 26. Where the personal property is in danger, a receiver will be appointed as soon after judgment as the execution is put into the hands of the sheriff: *Smith v. Hurst*, 1 Coll. C. C. 705; *Rose v. Bevan*, 10 Md. 456.

**Mortgages.** — The remedy by appointment of a receiver of rents and profits in a foreclosure suit is an equitable one, and rests in the sound discretion of the court: *Milwaukee R. R. Co. v. Soutter*, 2 Wall. 510; *Verplank v. Caines*, 1 Johns. Ch. 57; *Syracuse Bank v. Tullman*, 31 Barb. 201; *Jacobs v. Gibson*, 9 Neb. 380; *Connelly v. Dickson*, 76 Ind. 440; *Rider v. Bagley*, 84 N. Y. 461; *Cone v. Paute*, 12 Heisk. 506. If, on the application, the validity of the mortgage is impeached on probable grounds, the application should be granted: *Leahy v. Arthur*, 1 Hogan, 92. The appointment should be made only where there is an imperative necessity therefor: *First National Bank v. Gage*, 79 Ill. 207; *Callanan v. Shaw*, 19 Iowa, 183; *Quincy v. Cheeseman*, 4 Sand. Ch. 405; *McLean v. Pressly*, 56 Ala. 211; *Oldham v. First National Bank*, 84 N. C. 304; *Morrison v. Buckner*, Hemp. 442. The property, or rents and profits, must be in danger to warrant the appointment of a receiver: *Chase's Case*, 1 Bland. 206; 17 Am. Dec. 277. Where the legal title to the mortgaged premises is in the mortgagee, as he may bring ejectment for the recovery of the possession, he is not entitled to a receiver: *Mahon v. Crothers*, 28 N. J. Eq. 568; *Williamson v. New Albany R. R. Co.*, 1 Biss. 201; *Williams v. Robinson*, 16 Conn. 524; *Beverly v. Brooke*, 4 Gratt. 209. As against a prior mortgagee in possession of the property under his mortgage, a receiver will not be granted in favor of a subsequent mortgagee as long as anything remains due to the prior mortgagee under his encumbrance. The remedy of the subsequent mortgagee is to pay off the prior encumbrance: See next subdivision.

**Compensation.** — If no measure of compensation is provided for by statute, the court may allow a receiver a reasonable compensation: *Martin v. Martin*, 14 Or. 165. In a proper case, the court may appoint a receiver in an insolvency proceeding, and he may receive his fees out of the property in his custody: *Lammon v. Giles*, 3 Wash. 117; but a receiver should not be appointed in a case concerning mortgaged property, where the allowance of his fees would be to the prejudice of the mortgagee: *Lammon v. Giles*, 3 Wash. 117.

**Receivers can be sued only by leave of court.** The question is a jurisdictional one, and may be raised at any stage of the case: *Brown v. Rauch*, 20 Pac. Rep. 785.

*Bond of receiver.*

§ 327. [194.] Before entering upon his duties, the receiver must be sworn to perform them faithfully, and, with one or more sureties approved by the court, execute a bond to such person as the court may direct, conditioned that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein.

*Receiver appointed on admission in pleading.*

§ 328. [195.] When it is admitted by the pleading or examination of a party that he has in his possession, or under his control, any money, or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the court.

**The money must be in possession of the party, otherwise the order will not be made:** the person in whose hands money is said to be has not received a portion thereof: *Id.*  
*Williams v. Dwinelle*, 51 Cal. 442. And so if

*Court may punish for disobedience, and may order to deposit in court.*

§ 329. [196.] Whenever, in the exercise of its authority, a court shall have ordered the deposit or delivery of money or other thing, and the order is disobeyed, the court, besides punishing the disobedience as for contempt, may make an order requiring the sheriff to take the money or thing, and deposit or deliver it, in conformity with the direction of the court.

*Custody of money deposited.*

§ 330. [197.] Money deposited or paid into a court in an action shall not be loaned out, unless with the consent of all parties having an interest in or making claim to the same.

*Powers of receiver.*

§ 331. [198.] The receiver shall have power, under control of the court, to bring and defend actions, to take and keep possession of the property, to receive rents, collect debts, and generally to do such acts respecting the property as the court may authorize.

*Order when part of claim admitted.*

§ 332. [199.] When the answer of the defendant admits part of the plaintiff's claim to be just, the court, on motion, may order the defendant to satisfy that part of the claim, and may enforce the order by execution or attachment.

## TITLE VII.

### OF ISSUES, TRIAL, AND JUDGMENT.

#### CHAPTER I.—OF ISSUES IN CIVIL ACTIONS.

##### II.—OF THE TRIAL OF CIVIL ACTIONS BY JURY.

##### III.—OF VERDICT.

##### IV.—OF TRIAL BY THE COURT.

##### V.—OF TRIAL BY REFEREE.

##### VI.—OF EXCEPTIONS.

##### VII.—OF NEW TRIALS.

##### VIII.—OF JUDGMENTS IN GENERAL.

##### IX.—OF JUDGMENT OF NONSUIT.

##### X.—OF JUDGMENT FOR WANT OF ANSWER.

##### XI.—OF JUDGMENT BY CONFESSION.

##### XII.—OF SUBMITTED CASES.

##### XIII.—OF ARBITRATION AND JUDGMENT THEREON.

##### XIV.—OF THE MODE OF TAKING AND ENTERING JUDGMENT.

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##### XVI.—OF THE REVIVAL OF JUDGMENTS.

#### CHAPTER I.

##### OF ISSUES IN CIVIL ACTIONS.

§ 333. Issue, when arises — Two kinds.

§ 334. Issues of law.

§ 335. Issues of fact.

§ 336. Issues of law and fact in same action.

#### *Issue, when arises — Two kinds.*

§ 333. [200.] Issue arises upon the pleading when a fact or conclusion of law is maintained by the one party, and controverted by the other, and are of two kinds:—

1. Of law; and
2. Of fact.

**Issues, when arise.** — When a demand alleged in a complaint is not denied in the answer, but a counterclaim is set up, to which there is no reply, it is held that there is no issue to be tried: *Pardee v. Schenck*, 11 How. Pr. 500; and see *People v. Northern R. R. Co.*, 42 N. Y. 217. So in an action to recover money, where the precise amount claimed to be due is alleged, a denial of having received the

particular amount is worthless, and tenders no issue: *Dillon v. Spokane Co.*, 3 Wash. 498. And where affirmative matter is in an answer which, in effect, amounts to nothing more than a denial of the allegations of the complaint, a reply thereto adds nothing to the issue already formed: *Puget Sound Iron Co. v. Worthington*, 2 Wash. 472.

#### *Issues of law.*

§ 334. [201.] An issue of law arises upon a demurrer to the complaint, answer, or reply, or to some part thereof.



*Issues of fact.*

§ 335. [202.] An issue of fact arises, —

1. Upon a material allegation in the complaint controverted by the answer; or
2. Upon new matter or a set-off, controverted by the reply; or
3. Upon new matter in the reply.

*Issues of law and fact in same action.*

§ 336. [203.] Issues both of law and fact may arise upon different parts of the pleading in the same action. In such cases, the issues of law shall be first tried, unless the court otherwise direct.

**Order of trial of issues.** — Where issues of fact have been tried before issues of law, court directed them so to be tried: *Fry v. Bennett*, 9 Abb. Pr. 45; *Warner v. Wigers*, 2 Sand. 635.

## CHAPTER II.

## OF THE TRIAL OF CIVIL ACTIONS BY JURY.

- § 337. Trial by the court, a jury, or a referee.
- § 338. Motion for postponement, when allowed.
- § 339. Impaneling of jury.
- § 340. Challenges — Two kinds — Number of peremptory challenges.
- § 341. Peremptory challenge defined.
- § 342. Challenge for cause — General and particular cause.
- § 343. What are general causes of challenge.
- § 344. Particular causes of challenge.
- § 345. Implied bias defined.
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- § 348. Order of taking peremptory challenges.
- § 349. Challenges must be taken separately.
- § 350. Exceptions to and denials of challenges.
- § 351. Rules governing trials of challenge.
- § 352. Challenge, exception and denial may be oral.
- § 353. Oath of jurors.
- § 354. Manner of conducting trials — Charge of the court.
- § 355. Requests for instruction.
- § 356. Judges to decide questions of law during the trial.
- § 357. Questions of fact must be decided by the jury.
- § 358. View of property or place by jury.
- § 359. Court may direct whether jurors be allowed to separate.
- § 360. Proceeding in case juror become ill.
- § 361. Juror may be examined as witness.
- § 362. Manner of keeping jury while deliberating.
- § 363. Jury allowed food and lodging at the expense of county.
- § 364. What papers jury may take into their room.
- § 365. Jury may have further instruction upon their request.
- § 366. Discharge of jury without verdict.
- § 367. If jury be discharged without verdict, the action is again for trial.
- § 368. Court may adjourn temporarily while jury are absent.
- § 369. Proceedings when jury have agreed.
- § 370. Manner of giving verdict.
- § 371. Jury may be polled.
- § 372. Receiving the verdict and discharging the jury.

*Trial by the court, a jury, or a referee.*

§ 337. [204.] An issue of law shall be tried by the court, unless referred as provided in this chapter; an issue of fact shall be tried by a jury, unless a jury trial be waived, or a reference be ordered, as provided in this chapter; the waiver of a jury, or agreement to refer, shall be by stipulation of the parties filed, or the oral consent of parties given in open court and entered in the records; *provided*, that nothing herein contained shall be so construed as to restrict the chancery powers of the judges, or to authorize the trial of any issue by a jury, when the complaint alleges an equitable claim, and seeks relief solely upon the ground of the equities of the demand made by the pleadings in the action.

**Trial of cause by court**, where issue of fact is made, there being no waiver of a jury, is the exercise of a power not authorized by law: *Johnson v. Goodtime*, 1 Wash. 484.

**Trial, what constitutes.** — When the merits of a case are brought up, and the cause is placed on the calendar, and the issues, whether of law or of fact, and whether arising on the pleadings or out of subsequent proceedings, are presented to the court, and by the court judicially examined, there is a trial: *Place v. Butternuts Wool. Co.*, 28 How. Pr. 184. It is a trial when plaintiff fails to appear when the cause is called, and defendant takes an order dismissing the complaint: *Dodd v. Curry*, 4 How. Pr. 123; *Mora v. Great Western Ins. Co.*, 10 Bosw. 622. So when a nonsuit is voluntarily submitted to after evidence has been put in on both sides: *Allaire v. Lee*, 1 Abb. Pr. 125. So where plaintiff was nonsuited before any testimony had been taken: *Shannon v. Brower*, 2 Abb. Pr. 377.

In *Mygatt v. Willcox*, 35 How. Pr. 410, it is held that a trial is not completed until the cause is finally submitted to the court, referee, or jury; that the opening of the cause, introduction of evidence, and summing up or submitting on written points are parts of the trial. In Oregon the courts have gone further, and hold that a trial includes the rendition and receiving of the verdict: *State v. Spores*, 4 Or. 199.

**Trial, before what tribunal.** — A complaint may, under the code, embrace both legal and equitable causes of action; the legal causes to be tried by a jury, and the equitable causes by the court: *Davis v. Morris*, 36 N. Y. 569. In a cause of action for equitable relief, the defendant is not, as a matter of right, entitled to a jury trial: *Farwell v. Importers' etc. Nat. Bank*, 90 N. Y. 483; *Fish v. Benson*, 71 Cal. 428; *Colman v. Dixon*, 50 N. Y. 572. The mode of trial in such cases is matter of discretion with the court, not reviewable: See case last cited; *Graham v. Stewart*, 68 Cal. 374. So where plaintiff elects to bring an action for both legal and equitable relief in respect to the same cause of action, he cannot, as of right, claim a trial by jury. By such election he submits to have the issues tried by the court alone, or

with the aid of a jury, in its discretion, according to equity practice: *Cogswell v. New York etc. R. R. Co.*, 105 N. Y. 319. The practice in equity cases, so far as a jury is connected with it, is well stated in *Acker v. Leland*, 109 N. Y. 5; *Randall v. Randall*, 114 N. Y. 499. Where a party goes into court seeking equitable relief alone, in an action for fraud, and the court finds that he is not entitled to it, he cannot, upon certain facts appearing upon the trial warranting an action by plaintiff for damages, but which he has neither alleged nor claimed, have a trial of the issues in the action for fraud and an assessment of damages therefor without a jury. On that branch of the case defendant may demand a jury trial: *Bradley v. Aldrich*, 40 N. Y. 504; compare *Fish v. Benson*, 71 Cal. 428. But where the complaint sets up both legal and equitable causes of action, and plaintiff fails as to the latter, he may recover upon the former, if established: *Davis v. Morris*, 36 N. Y. 569. And defendant has no absolute right to a preliminary order settling issues in an action for equitable relief to be tried by a jury: *Colman v. Dixon*, 50 N. Y. 572. The joinder of an equitable cause of action with others purely legal does not deprive the defendant of the right of trial by jury: *Wheelock v. Lee*, 74 N. Y. 495.

**Conclusiveness of verdict of jury.** — The verdict of the jury in equity cases is merely advisory to the court, and is not conclusive, and may be disregarded: *Sweegle v. Wells*, 7 Or. 222; *De Lashmutt v. Tillotson*, 7 Or. 212; *Learned v. Tillotson*, 97 N. Y. 1.

**Jury may be waived.** — The constitutional rights to a jury trial in civil cases may be waived: *Baird v. Mayor etc.*, 74 N. Y. 382; *Wheelock v. Lee*, 74 N. Y. 495; in the manner prescribed by the code: *Bradley v. Aldrich*, 40 N. Y. 504, 512.

**Libel and construction of writing:** See note to *State v. Syphrett*, 13 Am. St. Rep. 625-628, showing the respective province of the judge and jury in prosecutions for libel; and note to *Fagin v. Connolly*, 69 Am. Dec. 454-460, showing when the construction of a writing is a question for the court, and when for the jury.

*Motion for postponement, when allowed.*

§ 338. [205.] A motion to continue a trial on the ground of the



absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, and also the name and residence of the witness or witnesses. The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be continued. The court, upon its allowance of the motion, may impose terms or conditions upon the moving party.

**Continuances, generally:** See the extended note to *Stevenson v. Sherwood*, 74 Am. Dec. 141-151, discussing this topic very fully.

The power to grant or refuse a continuance is regarded as discretionary, and the judgment of the court upon a motion to postpone will not be reviewed except for clear abuse of discretion: *Thompson v. Washington Ty.*, 1 Wash. 547; *Musgrove v. Perkins*, 9 Cal. 212; *Kern Valley Bank v. Chester*, 55 Cal. 49; *Leggett v. Boyd*, 3 Wend. 346; *Howard v. Freeman*, 3 Abb. Pr., N. S., 292.

If the party does not move for a continuance, he waives his want of preparation, and cannot move for a new trial on that ground: *Turner v. Morrison*, 11 Cal. 21. Unless, indeed, he has used due diligence, but did not know the facts till afterwards: *Spencer v. Vigneaux*, 20 Cal. 450.

A party wishing to introduce a witness who is too drunk to testify should apply for a continuance: *Fox v. Territory*, 2 Wash. 297. A bill of exceptions is the only mode of reviewing refusal to grant a continuance: *Jacks v. Buell*, 47 Cal. 162.

**Adjournments.** — This section does not apply to adjournments during a trial. To secure an adjournment, it is not necessary to move therefor upon the affidavit required by this section: See *Young v. Patton*, 9 Or. 197.

**Continuance for absence of material evidence.** — The party making the application must show that he has used due diligence to procure the attendance of the witness or his testimony without success: *Roeder v. Brown*, 1 Wash. 112; *Burris v. Wise*, 2 Ark. 33; *Pierce v. Holbrook*, 2 Cal. 598; *Ross v. Austill*, 2 Cal. 183; *Kuhland v. Sedgwick*, 17 Cal. 123; *Lightner v. Menzel*, 35 Cal. 452; *Leszinsky v. White*, 45 Cal. 278; *Jacks v. Buell*, 47 Cal. 162; *Kern Valley Bank v. Chester*, 55 Cal. 59; *Boucher v. Le Guen*, 2 Johns. 196; *Powers v. Lockwood*, 7 Johns. 133; *Hooker v. Rogers*, 6 Cow. 577; *Smith v. New York Ins. Co.*, 1 Hall, 225; *Daridson v. Brown*, 4 Binn. 243; *Campbell v. Sproat*, 1 Yeates, 20; *Farr v. McDowell*, 1 Bay, 31; *Potter v. Coward*, Meigs, 22; *Brewster v. Cummings*, 3 Cold. 232; *Parker v. Leano*, 10 Tex. 116; *Johnson v. Evans*, 15 Tex. 59; *Williams v. Edwards*, 15 Cal. 41; and it is not enough for the party to state that he has used due diligence, but the facts constituting such diligence must be specially set out in the affidavit: *Pence v. Christman*, 15 Ind. 257.

If a party fails to subpoena a witness or to take his deposition, where one or the other is

proper, relying upon the promise of the witness to attend the trial, or otherwise expecting that he will be present, the party has not used due diligence, and a continuance will not, in general, be granted him if the witness is not present: *Hensley's Adm'rs v. Lyttle*, 5 Tex. 497; 55 Am. Dec. 741; *Bone v. Hillen*, 1 Mill Const. 197; *Day v. Gelston*, 22 Ill. 103; *Jeter v. Heard*, 12 La. Ann. 3; *Sorenson v. Aultman*, 14 Kan. 273; *Campbell v. Blanke*, 13 Kan. 62; *Muckubin v. Clarkson*, 5 Minn. 247; *Parrish v. Gardner*, 3 Harr. (Del.) 495; and this although the witness had been subpoenaed by the opposite party: *Moore v. Goelitz*, 27 Ill. 18.

There must be no neglect, but promptness, in subpoenaing witnesses or taking their depositions: *Frank v. Brady*, 8 Cal. 48; *People v. Quincy*, 8 Cal. 89; *Jacks v. Buell*, 47 Cal. 162. Causing a subpoena to be placed in the hands of the sheriff is not due diligence, although the witness resides in the county: *Robinson v. Martel*, 11 Tex. 149; and failure of the sheriff to summon witnesses is not a good ground for a continuance, where it is shown that the party failed to give the proper directions: *Golding v. Steamer C. Castro*, 20 La. Ann. 458. The party must have resorted to the legal means to procure the evidence: *Kuhland v. Sedgwick*, 17 Cal. 128; *People v. Jocelyn*, 29 Cal. 563. Where a witness is not obliged to attend without payment or tender of his fees, such payment or tender must be shown, unless payment is waived, to entitle a party to a continuance: *Thurman v. Virgin*, 18 B. Mon. 785.

Undoubtedly, on a proper showing made, a continuance may be granted because of the absence of a witness on account of sickness: See *Thomas v. McCormick*, 1 N. M. 369; and also for sickness in his family: *Allen v. Downing*, 2 Seam. 454; but sickness of a witness residing in another state is no ground for a continuance, where no efforts have been made to take his deposition: *Hamiltons v. Moxly*, 21 Mo. 79. So sickness does not excuse lack of diligence in procuring testimony under ordinary circumstances: *Deming v. Ferry*, 8 Ind. 418.

There should be some satisfactory assurance that the evidence will be forthcoming at a certain subsequent time: *Harper v. Lamping*, 33 Cal. 646; *People v. Ashmauer*, 47 Cal. 98; *People v. Ah Fat*, 48 Cal. 63. A continuance of course is unnecessary, unless the evidence can be obtained, and that it can be obtained must appear affirmatively: *Thompson v. Lord*, 14 Iowa, 591; and an affidavit has been held insufficient if it does not state within what time



the party expects to obtain the testimony: *Borron v. Mertens*, 14 La. Ann. 305.

Affidavits should state that there are no other witnesses by whom the party can prove the facts relied upon: *Thompson v. Abbott*, 11 Iowa, 193; *Eames v. Hennessy*, 22 Ill. 629; *Jarvis v. Shacklock*, 60 Ill. 378; *Pierce v. Payne*, 14 Cal. 419; *Pope v. Dalton*, 31 Cal. 218; compare *Owens v. Starr*, 2 Litt. 230.

Evidence must be material, relevant, and otherwise admissible, in order that a continuance will be granted: *Ware v. Kelly*, 22 Ark. 441; *Hawley v. Stirling*, 2 Cal. 470; *Thackaray v. Hanson*, 1 Col. 365; *Mann v. Waters*, 30 Ga. 220; *McCreary v. Newberry*, 25 Ill. 496; *Bird v. McElvaine*, 10 Ind. 40; *Swenson v. Aultman*, 14 Kan. 273; *St. Louis etc. R. R. v. Ransom*, 29 Kan. 298; *Chambers v. Handley's Heirs*, 3 J. J. Marsh. 98; *Sellers v. Kelly*, 45 Miss. 323; *Cartwright v. Culver*, 74 Mo. 179; *Dold v. Dold*, 1 N. M. 397; *Titus v. Crittenden*, 8 Tex. 139; *Wilson v. Kochnein*, 1 W. Va. 145; *Nash v. Upper Appomattox Co.*, 5 Gratt. 332; *Ward v. Moorey*, 1 Wash. T., O. S., 122; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120. There must therefore be an affidavit of materiality, and the affidavit should likewise show that the expected testimony is relevant and competent. And the court may compare the facts expected to be proved with the plea, and decide whether or not the testimony is material: *McDougal v. Central Bank*, 3 Ga. 185.

Affidavit should set forth facts proposed to be proved with such certainty and particularity that the court may judge of their materiality, and the adverse party may, if he sees fit, admit them, or admit that the absent witness would, if present, swear to them: *Cody v. Butterfield*, 1 Col. 377; *Carey v. Philadelphia etc. Petroleum Co.*, 33 Cal. 694; *Sanford v. Cloud*, 17 Fla. 532; *McBain v. Entoe*, 13 Ill. 76; *French v. Blanchard*, 16 Ind. 143; *Olds v. Glaze*, 7 Iowa, 86; *Brown v. Johnson*, 14 Kan. 377; *Dean v. Turner*, 31 Md. 52; *Mackubin v. Clarkson*, 5 Minn. 247; *Dold v. Dold*, 1 N. M.

397; *Rosset v. Greer*, 3 W. Va. 1; *Winslow v. Bradley*, 15 Wis. 394. The evidence must not be merely cumulative: *People v. Thompson*, 4 Cal. 241. A continuance will not be granted to obtain evidence to support an answer which, if true, is no defense to the action: *Clidborne v. Yoeman*, 15 Tex. 44. Compare *Lyon v. Sterens*, 35 Tex. 439. The affidavit should show that the witness is a competent witness: *French v. Blanchard*, 16 Ind. 143.

*Admissions by adverse party defeating motions for continuance.* — If the adverse party admits or offers to admit the facts proposed to be proved by the absent witness, or according to the practice and statutes in some states, admits or offers to admit that if the witness were present he would swear to the facts set forth, the application for a continuance must be denied: *Green v. King*, 17 Fla. 452; *Vickers v. Hill*, 1 Seam. 307; *Whitchall v. Lane*, 61 Ind. 93; *O'Neil v. New York etc. Mining Co.*, 3 Nev. 141; *Fisk v. Miller*, 13 Tex. 224; and this rule applies equally where a party himself, who is a witness, is absent: *Kitchens v. Hutchins*, 44 Ga. 620; *Pate v. Tait*, 72 Ind. 450; *Prugn v. Gibbons*, 24 La. Ann. 231. So it may be agreed that a deposition which has been taken may be read in evidence: *Bond's Lessee*, 1 Yeates, 284; and the absent party may admit all that could be proved by absent papers: *Baldwin v. Wallen*, 30 Ga. 829. But the agreement that the facts are to be taken as true should be without reserve: *Nave v. Horton*, 9 Ind. 563; and a continuance should be granted if the admission is not broad enough to cover all the facts to which it is expected the absent witness would, if present, testify: *Peck v. Lovett*, 41 Cal. 521. In case of admissions to prevent a continuance, the testimony expected to be obtained is to be regarded as actually before the court: *Boeggs v. Merced Mining Co.*, 14 Cal. 358. The affidavit used to obtain a continuance, when the evidence therein recited is admitted as given, is evidence of its contents, but not conclusive proof: *Blankman v. Vallejo*, 15 Cal. 645.

### *Impaneling of jury.*

§ 339. [206.] When the action is called for trial, the clerk shall prepare separate ballots containing the names of the jurors summoned who have appeared and not been excused, and deposit them in a box. He shall then draw from the box twelve names, and the persons whose names are drawn shall constitute the jury. If the ballots become exhausted before the jury is complete, or if from any cause a juror or jurors be excused or discharged, the sheriff, under the direction of the court, shall summon from the by-standers, citizens of the county, as many qualified persons as may be necessary to complete the jury. Whenever it shall be requisite for the sheriff to summon more than one person at a time from the by-standers or body of the county, the names of the talesmen shall be returned to the clerk, who shall thereupon write the names upon separate ballots and deposit the same in the trial-jury box, and draw such ballots separately therefrom, as in the case of the regular panel. The jury shall consist of twelve persons,

unless the parties consent to a less number. The parties may consent to any number not less than three, and such consent shall be entered by the clerk on the minutes of the trial.

**Summoning talesmen.** — An order of court to fill panel of jury from by-standers is good, if those summoned have the necessary qualifications: *Yelm Jim v. Territory*, 1 Wash. 63; *Clarke v. Same*, 1 Wash. 68; *Blanton v. State*, 24 Pac. Rep. 439. But women are not qualified to sit as jurors: *Harland v. Territory*, 3 Wash. 131; *White v. Territory*, 3 Wash. 332.

*Challenges — Two kinds — Number of peremptory challenges.*

§ 340. [207.] Either party may challenge the jurors, but when there are several parties on either side, they shall join in a challenge before it can be made. The challenge shall be to individual jurors, and be peremptory or for cause. Each party shall be entitled to three peremptory challenges.

*Peremptory challenge defined.*

§ 341. [208.] A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude him.

**Peremptory challenge.** — Each party may ask pertinent questions to show or elicit facts to enable him to decide whether to challenge peremptorily, or at least so it is held in *Watson v. Whitney*, 23 Cal. 379; *People v. Car Soy*, 57 Cal. 102. But see these cases explained in *People v. Hamilton*, 62 Cal. 377, where it is declared that while a defendant may, when the opportunity to interpose a peremptory challenge arises, have the benefit of any information acquired during the trial of a challenge for implied or actual bias, he cannot embark in a general exploration for the sole purpose of satisfying himself whether it will be safe to be tried by a juror against whom no legal objections can be urged.

*Challenge for cause — General and particular cause.*

§ 342. [209.] A challenge for cause is an objection to a juror, and may be either, —

1. General; that the juror is disqualified from serving in any action; or
2. Particular; that he is disqualified from serving in the action on trial.

**Challenge for cause.** — A challenge for cause should specifically state the cause: *Paige v. O'Neal*, 12 Cal. 492; *People v. Dick*, 37 Cal. 279; *People v. Renfrow*, 41 Cal. 38; *Mann v. Glover*, 14 N. J. L. 195.

*What are general causes of challenge.*

§ 343. [210.] General causes of challenge are: —

1. A conviction for a felony;
2. A want of any of the qualifications prescribed by law for a juror;
3. Unsoundness of mind, or such defect in the faculties of the mind or organs of the body as renders him incapable of performing the duties of a juror.

**Want of statutory qualifications.** — As to what are the qualifications of a trial juror, see § 55, *ante*.

A juror is presumed competent: *People v. Brotherton*, 47 Cal. 396. His qualifications must exist at the time of service as a juror; and a challenge for this cause should not be

denied because he was qualified at the time the jury-list was prepared: *Kelley v. People*, 55 N. Y. 565. Objection to a juror on the ground of incompetency under the statute is waived by failure to challenge at the proper time: *State v. McDonald*, 8 Or. 113. And want of necessary qualifications under the

statute, if not discovered until after the trial (even in a capital case), will not be ground for a new trial: *State v. Powers*, 10 Or. 145, a case in which after the trial it was discov-

ered that the juror had been convicted of a felony.

**Exemption from service as juror:** See § 56, *ante*.

*Particular causes of challenge.*

§ 344. [211.] Particular causes of challenge are of two kinds:—

1. For such a bias as, when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias;

2. For the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the trier, in the exercise of a sound discretion, that he cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias

**Challenge for implied bias:** See the next section.

**Challenge for actual bias:** See § 346, *infra*.

*Implied bias defined.*

§ 345. [212.] A challenge for implied bias may be taken for any or all of the following causes, and not otherwise:—

1. Consanguinity or affinity within the fourth degree to either party;

2. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, to the adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages of the adverse party; or being surety or bail in the action called for trial, or otherwise, for the adverse party;

3. Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the state against either party upon substantially the same facts or transaction;

4. Interest on the part of the juror in the event of the action, or the principal question involved therein, excepting always the interest of the juror as a member or citizen of the county or municipal corporation.

**Affinity and consanguinity.**—In *Padlock v. Wells*, 2 Barb. Ch. 333, Chancellor Walworth says affinity “properly means the tie which arises from marriage betwixt the husband and the blood relatives of the wife, and between the wife and the blood relatives of the husband. Consequently, while the marriage tie remains unbroken, the blood relatives of the wife stand in the same degree of affinity to the husband as they do in consanguinity to her. Thus the father of the wife stands in the first degree of affinity to his son-in-law, as he does in the first degree of consanguinity to his daughter. Relationship by affinity may also exist between the husband and one who is connected by marriage with a blood relative of the

wife. Thus where two men marry sisters, they become related to each other in the second degree of affinity, as their wives are related in the second degree of consanguinity.”

The party causing the relation must be living, for on the death the relation ceases: See *Cain v. Ingheim*, 7 Cow. 478; *Padlock v. Wells*, 2 Barb. Ch. 331; *Carman v. Newell*, 1 Denio, 25. The relationship must be to a party to the record within the fourth degree; and relationship of the juror by affinity to relatives of the party is not cause of challenge: *Funk v. Ely*, 45 Pa. St. 444; *Johnson v. Richardson*, 52 Tex. 481; *Rank v. Shewen*, 4 Watts, 218; *Chase v. Jennings*, 38 Me. 44.

Degrees of kindred are computed according



to the civil law in this state: See the Miscellaneous Laws. And the rule of the civil law is, that persons are considered related to each other only in that number of degrees which exists between them, to be counted by reckoning from one up to their common ancestor and then down to the other: See 4 Kent's Com. 412, 413.

**Employer and employee.** — The clerk of a party is disqualified to sit as a juror if challenged: *Hubbard v. Rutledge*, 57 Miss. 7; so of the employee of a railroad company in an action against the company: *Central R. R. Co. v. Mitchell*, 63 Ga. 173; but because one is employed by a stockholder of a corporation which is sued, he is not therefore disqualified from acting as a juror in such action: *Frederickton Bean Co. v. McPherson*, 2 Hann. 8.

**Interest in the result of the action.** — This section leaves the question as to what is a disqualifying interest to the common-law rule,

and it must therefore be interpreted in the light of adjudicated cases: *Garrison v. Portland*, 2 Or. 124.

The interest of the juror, as executor of a decedent, in the judgment, if it be recovered, for payment of debts due by the party to his decedent, is within the meaning of this section: *Smull v. Jones*, 6 Watts & S. 122; *Meeker v. Potter*, 5 N. J. L. 586. Contingent interest as a surety for costs is likewise within the meaning of the section: *Glover v. Wootsey*, Dud. (Ga.) 85; and so of a surety for appearance of one party: *Brazelton v. State*, 11 Pac. Rep. 291. In an action for damages for taking property in the city of Portland under an act authorizing it to be taken, a tax-payer in that city is not competent as a juror: *Portland v. Kamm*, 5 Or. 362.

**Juror, rejection of, for bias:** See extended note to *Commonwealth v. Brown*, 9 Am. St. Rep. 744-760.

### Challenge.

§ 346. [213.] A challenge for actual bias may be taken for the cause mentioned in the second subdivision of section three hundred and forty-four. But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

**Challenge for actual bias.** — A prejudice against a crime charged is not ground of challenge for actual bias: *Parker v. State*, 34 Ga. 362; *United States v. Hanway*, 2 Wall. Jr. 139; nor will it be in a civil action arising out of such criminal act: *Davis v. Hunter*, 7 Ala. 135. And so of prejudice against a party's occupation, if the result is not a prejudice against him personally: *Meretzek v. Cauldwell*, 2 Abb. Pr., N. S., 407; and the same was held of prejudice against the nationality or race of one of the parties: *Palto v. People*, 19 Hun, 424; affirmed 80 N. Y. 484. Compare *People v. Gar Soy*, 57 Cal. 102. Prejudice against the character of a party, where it is of any consequence, as it always is in criminal cases, is ground for challenge, unless the juror can lay aside his prejudice, and give a fair trial and verdict: *People v. Lohman*, 2 Barb. 450; *People v. Allen*, 43 N. Y. 28; *People v. Mahony*, 18 Cal. 180; *State v. Davis*, 14 Nev. 439. The expression of a wish that a party may prevail is held to be more plainly a cause of challenge than a deliberate expression of an opinion that a party ought to prevail: *Ashbury Ins. Co. v. Warren*, 66 Me. 523. It was held that a juror who had a preference in case the evidence was evenly balanced should not be rejected upon a challenge therefor: *McFadden v. Wallace*, 38 Cal. 51; *Trenor v. Central Pac. R. R. Co.*, 50 Cal. 222. But this conclusion is doubtful; for if a juror unaffected by the evidence would lean one way or another, it is held ground for challenge: *Chicago etc. R. R.*

*Co. v. Adler*, 56 Ill. 345; *Mima Queen Co. v. Hepburn*, 7 Cranch, 290.

**Capital punishment, conscientious scruples against:** See *post*, Criminal Code, sec. 1083; and *Williams v. State*, 66 Am. Dec. 615, and note 622. This is cause for challenge under this section, even where the juror states that he is unwilling to be sworn in the case because of such scruples: *Walter v. People*, 32 N. Y. 147; *O'Brien v. People*, 36 N. Y. 276.

**Opinion formed or expressed.** — It is said in *Rothschild v. State*, 7 Tex. App. 542, by Clark, J., that the authorities in the various states on this point are in a hopeless state of conflict. The general rules and weight of authority may, however, be stated, and in any event, much of the conflict in the common-law rules is cured by our statute. Thus as to the conflict as to whether one must have expressed as well as formed an opinion, to be a ground of challenge, our statute is certainly clear.

Under this statute, having formed an opinion must be sufficient cause of challenge; for the words of the statute are, "formed or expressed." And again, the conflict as to whether merely having expressed an opinion is sufficient cause of challenge, is cleared up by the provision of the statute, that no opinion formed or expressed shall be sufficient, unless the juror cannot fairly and impartially try the cause.

It is now generally held that the opinion which will disqualify must be a fixed, unqualified opinion, which evidence will not remove:

*People v. Symonds*, 22 Cal. 348; *People v. King*, 27 Cal. 512; *People v. Johnston*, 46 Cal. 78; *Scranton v. Stewart*, 52 Ind. 68; *People v. Stout*, 4 Park. Cr. 71; *Monroe v. State*, 76 Am. Dec. 58. Light, transient, and merely hypothetical opinions do not disqualify: *Smith v. Eames*, 3 Scam. 76; 36 Am. Dec. 515; *McGregg v. State*, 4 Blackf. 101; *People v. Mather*, 4 Wend. 229; 21 Am. Dec. 122; *Osiander v. Commonwealth*, 3 Leigh, 780; 24 Am. Dec. 693; *Thomas v. People*, 67 N. Y. 218; *People v. Murphy*, 45 Cal. 141; *Monroe v. State*, 76 Am. Dec. 58.

A full discussion of the question as to what opinions will be ground for challenge to a juror will be found in the note to *Smith v. Eames*, 36 Am. Dec. 521-534.

Where both parties accept a juror, though he has expressed a decided opinion, he is competent to act: *Williams v. Poppleton*, 3 Or. 140. An exception to a juror known before trial, and not seasonably taken, is waived: See note to *Daris v. Allen*, 22 Am. Dec. 388; *State v. Jackson*, 41 Am. Rep. 424.

*Appeal from ruling upon challenge.* — Where the decision upon the challenge of a juror for actual bias is assigned as error, the supreme court will not review such decision, unless the evidence adduced on the trial of the challenge appears in the bill of exceptions: *State v. Tom*, 8 Or. 177.

**Juror, rejection of, for bias:** See extended note to *Commonwealth v. Brown*, 9 Am. St. Rep. 744-760.

### *Exemption is not cause of challenge.*

§ 347. [214.] An exemption from service on a jury shall not be cause of challenge, but the privilege of the person exempted.

### *Order of taking peremptory challenges.*

§ 348. [215.] The jurors having been examined as to their qualifications, first by the plaintiff and then by the defendant, and passed for cause, the peremptory challenges shall be conducted as follows, to wit:—

The plaintiff may challenge one, and then the defendant may challenge one, and so alternately until the peremptory challenges shall be exhausted. The panel being filled and passed for cause, after said challenge shall have been made by either party, a refusal to challenge by either party in the said order of alternation shall not defeat the adverse party of his full number of challenges, but such refusal on the part of the plaintiff to exercise his challenge in proper turn shall conclude him as to the jurors once accepted by him, and if his right be not exhausted, his further challenges shall be confined, in his proper turn, to talesmen only.

**Challenges, when to be taken.** — Objections to a juror are waived by failure to take the challenge at the proper time: *State v. McDonald*, 8 Or. 113. In the formation of a jury, a juror having been called and challenged per-

emptorily, it was not error for the court to allow the challenge to be withdrawn before another juror had been called: *Garrison v. Portland*, 2 Or. 123.

### *Challenges must be taken separately.*

349. [216.] The challenges of either party shall be taken separately, in the following order, including in each challenge all the causes of challenge belonging to the same class:—

1. For general disqualification;
2. For implied bias;
3. For actual bias;
4. Peremptory.

**Order of challenges.** — This section provides the order in which challenges are to be taken; but if the statute were silent

upon the subject, they would naturally fall into this order: *Garrison v. Portland*, 2 Or. 123.

*Exceptions to and denials of challenges.*

§ 350. [217.] The challenge may be excepted to by the adverse party for insufficiency, and if so, the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge may be denied by the adverse party, and if so, the court shall try the issue, and determine the law and the facts.

**Appeal from ruling on challenge.** — An objection to the ruling of the court upon a challenge is properly taken by exception, and it can only be taken in this manner: *People v. Cochran*, 61 Cal. 548. Where the ruling of the court is assigned as error, the appellate court will not consider it, unless the evidence ad-

duced on the trial of the challenge appears in the bill of exceptions: *State v. Tom*, 8 Or. 177; *Hayden v. Long*, 8 Or. 244; *State v. Rigg*, 10 Nev. 284; though as to the finding upon the facts it has been held that the action of the trial court is conclusive: *State v. Mims*, 26 Minn. 183.

*Trial of challenge—Rules governing.*

§ 351. [218.] Upon the trial of a challenge, the rules of evidence applicable to testimony offered upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other person otherwise competent, may be examined as a witness by either party. If a challenge be determined to be sufficient, or found to be true, as the case may be, it shall be allowed, and the juror to whom it was taken excluded; but if determined or found otherwise, it shall be disallowed.

**Trial of challenges of jurors** is, to a great extent, discretionary; and unless abuse of discretion is shown, the ruling of the lower court

will not be disturbed: *White v. Territory*, 3 Wash. 397; *Blanton v. State*, 24 Pac. Rep. 439.

*Challenge, exception, and denial may be oral.*

§ 352. [219.] The challenge, the exception, and the denial may be made orally. The judge of the court shall note the same upon his minutes, and the substance of the testimony on either side.

*Oath of jurors.*

§ 353. [220.] As soon as the number of the jury has been completed, an oath or affirmation shall be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the plaintiff and defendant, and a true verdict give, according to the law and evidence as given them on the trial.

**Oath to jurors.** — It is sufficient if the substance of the oath administered to jurors is in consonance with the statute; yet it is better

to follow the prescribed formula: *Leonard v. Territory*, 2 Wash. 381.

*Manner of conducting trials—Charge of the court.*

§ 354. [221.] When the jury has been sworn, the trial shall proceed in the following order:—

1. The plaintiff must briefly state the cause of action, and the evidence by which he expects to sustain it. The defendant may in like manner state the defense, and the evidence he expects to offer in support thereof; but nothing in the nature of comments or argument shall be allowed in opening the case. It shall be optional with the defend-



ant whether he states his case before or after the close of the plaintiff's testimony.

2. The plaintiff, or the party upon whom rests the burden of proof in the whole action, must first produce his evidence; the adverse party will then produce his evidence.

3. The parties will then be confined to rebutting evidence, unless the court, for good reasons, in furtherance of justice, permits them to offer evidence in their original case.

4. When the evidence is concluded, either party may request the judge to charge the jury in writing, in which event no other charge or instruction shall be given, except the same be contained in the said written charge; or either party may request instructions to the jury on points of law, and if the court refuse to give the same, the party requesting may except. Either party shall also be entitled to require of the judge that all interlocutory orders, instructions, or rulings upon the evidence during the progress of the trial of a cause shall be reduced to writing, together with any exceptions that may be made thereto, and the same shall be made a part of the record of the case; and any refusal on the part of the judge trying the cause or making the order to comply with all or any of the provisions of this section shall be regarded error, and entitle the party whose request shall have been refused to a reversal of the judgment on a writ of error; *provided always*, that the instruction or ruling so requested is pertinent and consistent with the law and evidence of the case, and that such refusal has worked an injury to the party requesting the same.

5. After the conclusion of the evidence and the filing of request for charge in writing or instructions, the plaintiff or party having the burden of proof may, by himself or one counsel, address the court and jury upon the law and facts of the case, after which the adverse party may address the court and jury in like manner by himself and one counsel, or by two counsel, and be followed by the party or counsel of the party first addressing the court. No more than two speeches on behalf of plaintiff or defendant shall be allowed.

6. The court shall then charge the jury upon the law in the case. If no request has been made for said charge to be in writing, or if no instructions have been requested, said charge may be oral; but either party, at any time before the jury return their verdict, may except to the same or any part thereof; but no exception shall be regarded by the supreme court, unless the same shall embody the specific parts of said charge to which exception is taken. In charging the jury, the court shall state to them all matters of law necessary for the information of the jury in finding a verdict; and if it become necessary to allude to the evidence, it shall also inform the jury that they are the exclusive judges of all questions of fact.

**Charging as to the facts.** — “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law”: Const., art. 4, sec. 16.

**Right to open and close.** — The right to open and close is a legal right, a denial of which constitutes ground of exception and review: *Millard v. Thonn*, 56 N. Y. 402; *Howard v. Hayes*, 47 N. Y. Sup. Ct. 89. See this topic treated in Best on the Right to Begin and Reply.

**Opening statement.** — A party may, in the opening statement of his case, designate briefly the particular facts he expects to prove, and the evidence he intends to offer for that purpose, but the court may prevent any abuse of this privilege: See *Long v. Lander*, 10 Or. 175, a case where the court, against the objection of the opposing party, allowed a party to state what evidence he would offer, and what he expected to prove thereby. The court held that a party is not confined in his statement to the general allegations and issues in the pleadings. And to the same effect, see *Ayrault v. Chamberlain*, 33 Barb. 229; and see *Riggs v. Sterling*, 1 Am. St. Rep. 554.

**Order of proof** is subject to the regulating discretion of the court: *Lick v. Diaz*, 37 Cal. 445; *Neil v. Thorn*, 88 N. Y. 270; *Walsh v. People*, 88 N. Y. 458; but the court cannot dictate the order in which a party shall put in his evidence as to a question of fact: *Lewis v. Schuenn*, 3 Am. St. Rep. 511; and the court may at a particular stage of the trial receive or refuse particular evidence at that time: *Bennett v. Stephens*, 8 Or. 444. But in absence of direction of the court, a party may introduce his proof in his own order: *Gordon v. Seuring*, 8 Cal. 50; *Palmer v. McCafferty*, 15 Cal. 334; so long as the proof is relevant, and not incompetent: *Crosett v. Whelan*, 44 Cal. 202.

**Introduction of evidence — Rebuttal.** — A party is bound to introduce all his evidence before he closes, and if he fails to do so, it is entirely discretionary with the court whether it will allow the introduction of new evidence which is not in rebuttal: *Marshall v. Davies*, 78 N. Y. 414.

Rebutting evidence under this section means, not merely that which contradicts the witnesses on the other side and corroborates those of the party who began, but includes evidence in denial of some affirmative fact which the answering party has endeavored to prove: *Marshall v. Davies*, 78 N. Y. 414.

The party upon whom is the burden of proof on each issue is, it seems, entitled to offer rebutting proof on such issue: *Lisman v. Early*, 15 Cal. 199; *Abbey etc. Association v. Willard*, 48 Cal. 617; and see Cowen's Treatise, 992; Cowen and Hill's notes to Phill. Ev. 711, 718; and the cases cited in *Shepard v. Potter*, 4 Hill, 204. A party the credibility of whose witnesses is sought to be impeached by evidence against their character may rebut: *Wade v. Thayer*, 40 Cal. 583. But it is not error to refuse to allow plaintiff to recall a witness in rebuttal solely to contradict a witness for defendant on a point upon which plaintiff's witness has already testified: *Phelps v. McGloan*, 42 Cal. 299. Error in admitting in rebuttal testimony which is not technically so admissible is not sufficient to warrant a reversal, as

such testimony might have been received in the discretion of the court: *Harrington v. Chambers*, 3 Utah, 94. But refusal to allow the defendant to disprove new matter given in rebuttal is a fatal error: *Chamberlain v. Raymond*, 3 Utah, 117.

**Argument to jury:** See a valuable note in 18 Cent. L. J. 363, in regard to the duties of counsel in argument, and of the control of the court over the same. See also extended note to *McDonald v. People*, 9 Am. St. Rep. 559-570, showing when misconduct of counsel in argument is so seriously improper as to call for a reversal of the judgment; and note to *Bullard v. Boston etc. R. R.*, 10 Am. St. Rep. 376, concerning the same subject.

The court will restrain the observations of counsel to the points in issue: *Mitchell v. Borden*, 8 Wend. 570. An erroneous statement of the testimony to a jury by counsel at the trial has been held in California to be no ground for a new trial: *People v. Barnhart*, 59 Cal. 402. But in New York it was said that referring to matters not proved or which have been excluded is reprehensible and ground for reversal: *Meyer v. Cullen*, 54 N. Y. 392; *Gould v. Moore*, 40 N. Y. Super. Ct. 357. And see *People v. Lee Ah Yute*, 60 Cal. 95, where the court would not say that there might not be such an abuse in this regard as would require a reversal. The general question came before the supreme court of California again in *People v. Mitchell*, 62 Cal. 411, where the district attorney had been allowed, against the objection of the prisoner's attorney, to argue from facts no evidence in regard to which had been offered. A new trial was granted for this error. In *Koeljes v. Guardian L. I. Co.*, 57 N. Y. 638, it was held error warranting a reversal for the court to permit counsel to read to the jury a pamphlet issued by defendant, but not in evidence.

Reading law to the jury is, as a general rule, objectionable, but it may be read by way of illustration, subject to the sound discretion of the court: *People v. Anderson*, 44 Cal. 70. Reading from scientific books not shown to be of recognized authority is erroneous: *People v. Wheeler*, 60 Cal. 581. See also the recent consideration of this subject in *Gallagher v. Market St. R'y Co.*, 67 Cal. 13; *People v. Forsythe*, 65 Cal. 101; *Sullivan v. Royer*, 72 Cal. 248; 1 Am. St. Rep. 51, note 54.

**Charge to the jury.** — Merely general statements are here made. For a full discussion of the law on this subject, see Sackett's Instructions to Juries, or Thompson's Charging the Jury; also extended note to *State v. Whit*, 72 Am. Dec. 538-549, as to proper subjects of instructions to juries, and to what extent judge may comment upon the evidence; and extended note to *Strohn v. Detroit etc. R. R. Co.*, 99 Am. Dec. 118-138, showing how to obtain the giving of instructions to the jury, and to obtain review of errors in giving or refusing to give instructions on certain points.

**Confined to matters of law.** — The instructions should be strictly confined to matters of law. The court should not instruct the jury upon controverted matters of fact, nor upon the weight of evidence: *McNiel v. Barney*, 51 Cal. 603; *Mitchell v. Fond du Lac*, 16 Ill. 174; *Hudson v. St. Louis*, 53 Mo. 525; nor state to the jury what facts are proved and



what are not proved by the evidence: *Russ v. Steamboat*, 9 Iowa, 374. The jury are the judges of the facts, and it is error for the court to assume, in its instructions to the jury, that a certain fact exists, and then submit to them the question whether or not it does exist: *Cahoon v. Marshall*, 25 Cal. 198; *Caldwell v. Center*, 30 Cal. 539.

The provision that the charge should be confined to matters of law is violated whenever a judge so instructs as to take away the jury's exclusive right to determine the facts: *People v. Ybarra*, 17 Cal. 171. But the court may charge that evidence has been introduced of a certain fact: *People v. Perry*, 65 Cal. 568; and that it is desirable that the jury should agree: *Stepy v. Stark*, 7 Col. 614. The court must not assume that facts not admitted have been proved: *Russell v. Minter*, 83 Ill. 150; *Preston v. Keys*, 23 Cal. 195; *Miller v. Stewart*, 24 Cal. 504; *Levitzky v. Canning*, 33 Cal. 305; *Crawford v. Roberts*, 50 Cal. 236. The jury are the proper judges of what a witness has testified to: *Weil v. Paul*, 22 Cal. 494. If the court, in an instruction, assumes the existence of a fact, and the assumption in the condition of the case could not be productive of injury, the judgment for this reason will not be reversed: *Bradley v. Lee*, 38 Cal. 366. So it is not error to assume a fact as true in regard to which there is no conflict in the evidence: *Watson v. Damon*, 54 Cal. 278; *Page v. Tucker*, 54 Cal. 121. But it is error for a court to instruct the jury not to regard "mere slight variances" between the testimony of witnesses: *State v. Swayne*, 11 Or. 357.

When a question of law is referred to the jury for decision, if it appears that the question has been correctly decided by the jury, exceptions for that cause will not avail: *Johnson v. Shively*, 9 Or. 333.

**Form and requisites of.** — The instructions given should be accurate and concise: *Adams v. Smith*, 58 Ill. 417; *Trish v. Newell*, 62 Ill. 196; *State v. Mix*, 15 Mo. 153; they should not be argumentative: *Ludwig v. Sager*, 84 Ill. 99; *Moshier v. Kitchell*, 87 Ill. 19; nor vague: *People v. Best*, 39 Cal. 692; *People v. Monahan*, 59 Cal. 389; but the fact that a portion of a charge was meaningless was not deemed sufficient to warrant a reversal of a judgment of conviction: *People v. Ah Loy*, 57 Cal. 566; nor although the instruction may not be satisfactory: *People v. Beck*, 58 Cal. 212; nor because of mere inaccuracies from which no injury could have resulted: *Wilson v. S. P. R. R. Co.*, 62 Cal. 164; *People v. Salorse*, 62 Cal. 139. An instruction to "take into consideration all the case and do equal justice" is too general: *Kelly v. Cunningham*, 1 Cal. 367. The evidence must not be submitted to the jury with instructions to consider it "if they are of the opinion it is applicable": *People v. Beaver*, 49 Cal. 57.

Instructions must be pertinent and relevant to the question before the jury: *Rosendorf v. Hirschberg*, 8 Or. 240; *Branger v. Chevalier*, 9 Cal. 360; *People v. Juarez*, 28 Cal. 382; *Conlin v. S. F. etc. R. R. Co.*, 36 Cal. 404; *Bowers v. Cherokee Bob*, 45 Cal. 496; *Capuro v. Builders' Ins. Co.*, 39 Cal. 123; *People v. Turley*, 50 Cal. 469; *People v. De Silvera*, 59 Cal. 592; *People v. Cochran*, 61 Cal. 548. If inapplicable to the evidence and misleading, it will be held error:

*Estate of Colbert*, 57 Cal. 257. It is not an error to refuse to give an instruction which assumes a fact to exist of which no proof was introduced: *Crawford v. Roberts*, 50 Cal. 236; nor if there is no evidence to support the hypothesis on which it is based: *Perkins v. Eckert*, 55 Cal. 400; *Hanks v. Naglee*, 54 Cal. 51; *Russell v. Minter*, 83 Ill. 150; *Liebert v. Leonard*, 21 Minn. 442. If facts are admitted in the pleadings, the jury should be so instructed: *Teris v. Hicks*, 41 Cal. 123.

Instructions must not be contradictory or inconsistent: *McCreery v. Everding*, 44 Cal. 246; *People v. Campbell*, 30 Cal. 312; *Brown v. McAllister*, 39 Cal. 577; *People v. Valencia*, 43 Cal. 552; *People v. Anderson*, 44 Cal. 69; *Wetherby v. Thomas*, 55 Cal. 9; *Aguirre v. Alexander*, 58 Cal. 21. And where contradictory instructions are submitted to a jury, error in one will not be deemed cured by the other, as the court cannot tell on which one the jury acted: *Chidester v. C. P. D. Co.*, 53 Cal. 56; *Bank of Stockton v. Bliven*, 53 Cal. 708; *Black v. Sprague*, 54 Cal. 206; *Illinois L. Co. v. Hough*, 91 Ill. 63; especially where the court says that if either proposition is sustained, a certain verdict must be found: *Downing v. Bartels*, 2 West Coast Rep. 506 (Col.).

In construing a charge it must be all taken together: *Carrington v. P. M. S. S. Co.*, 1 Cal. 478; *People v. McDowell*, 64 Cal. 467. A party cannot complain of instructions given at his own request: *People v. Biggins*, 2 Cal. 887. Instructions offered at the proper time cannot be refused simply on account of their length or number: *Andrews v. Runyon*, 65 Cal. 629; but instructions asked for which are partly correct and partly incorrect may be refused: *Garlick v. Bowers*, 66 Cal. 122.

**Abstract questions of law or fact.** — The court should refuse to instruct the jury on abstract questions of law: *Fowler v. Smith*, 2 Cal. 39; *Benham v. Rowe*, 2 Cal. 387; *Branger v. Chevalier*, 9 Cal. 353; *People v. Best*, 39 Cal. 690; *Bowers v. Cherokee Bob*, 45 Cal. 495. Instructions should state the law of the case as made by the testimony if it is not contradicted: *Sperry v. Spaulding*, 45 Cal. 544.

If the court refuse to instruct the jury upon a point in relation to which there is no evidence, it is not error: *Latshaw v. Territory*, 1 Or. 140; *Morris v. Perkins*, 6 Or. 350; and an instruction is erroneous if of such a nature as to mislead the jury to infer facts not shown in evidence: *Willes v. Oregon R. & N. Co.*, 11 Or. 57; *Breon v. Henckle*, 14 Or. 494; *Glenn v. Savage*, 14 Or. 566.

No instruction should be given unless there is some evidence to which it is applicable upon some rational theory of the case logically deducible from the evidence: *People v. Best*, 39 Cal. 691; *Fairchild v. Cal. Stage Co.*, 13 Cal. 599; *Thompson v. Paige*, 16 Cal. 77.

**Court need not repeat instructions.** *Russell v. Dennison*, 45 Cal. 338; *People v. Cochran*, 61 Cal. 548; *People v. Hong Ah Duck*, 61 Cal. 387; *Anderson v. Walter*, 34 Mich. 113. When the instructions asked have been given in substance, they need not be repeated: *State v. Stanley*, 33 Iowa, 526; *Scott v. Delaney*, 87 Ill. 146; *Seattle v. Busby*, 2 Wash. 25; *People v. Rightetti*, 66 Cal. 184. Nor need instructions asked be given if the jury have been properly



instructed on all matters submitted to them: *Brewster v. Baxter*, 2 Wash. 135.

*Directing verdict.* — A court has no right to direct the jury to find a designated verdict. Its authority is limited to stating to them all the matters of law which it thinks necessary for their information in giving their verdict: *Smith v. Shattuck*, 12 Or. 362.

*Exceptions to instructions.* — The appellate court will not reverse for alleged erroneous instructions, unless the evidence appears in the record and shows that an error had been made: *Brown v. Kentfield*, 50 Cal. 129; *People v. McFadden*, 65 Cal. 445. And on appeal an instruction will not be held erroneous, unless it is so under every conceivable state of facts appearing on the record: *People v. Smith*, 57 Cal. 139. If the objecting party desires to have his objection considered by the reviewing court, he must specifically point out his objections to the oral charge: *Sill v. Reese*, 47 Cal.

294; *Robinson v. W. P. R. R. Co.*, 48 Cal. 409; *Rider v. Edgar*, 54 Cal. 127. And a general exception taken to the charge as a whole will not be noticed by the supreme court: *Brown v. Kentfield*, 50 Cal. 129. Not even if such form of objection is acquiesced in by the opposing counsel: *Coleman v. Gilmore*, 49 Cal. 340. The exception must be taken at the time: *Robinson v. W. P. R. R. Co.*, 48 Cal. 409; *Territory v. Young*, 5 Mont. 242. And it will be too late to wait until the jury has retired: *Mallett v. Swain*, 56 Cal. 171. Party cannot object to instructions as erroneous where they are favorable to himself: *Moorhouse v. Donaca*, 14 Or. 430.

*Permitting jury to take written charge to the jury-room* is bad practice: *Smith v. Lounsdale*, 6 Or. 78; but the jury have been allowed to take to their room written instructions asked by one of the parties and refused: *Langworthy v. Connelly*, 45 Am. Rep. 117.

### *Requests for instruction.*

§ 355. [222.] Any party may, when the evidence is closed, submit in distinct and concise propositions the conclusions of fact which he claims to be established, or the conclusions of law which he desires to be adjudged, or both. They may be written, and handed to the court, or, at the option of the court, oral, and entered in the judge's minutes.

### *Judges to decide question during the trial.*

§ 356. [223.] All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it.

### *Question of fact must be decided by the jury.*

§ 357. [224.] All questions of fact, other than those mentioned in the section preceding, shall be decided by the jury, and all evidence thereon addressed to them.

### *View of property or place by jury.*

§ 358. [225.] Whenever in the opinion of the court it is proper that the jury should have a view of real property which is the subject of litigation, or of the place in which any material fact occurred, it may order the jury to be conducted in a body, in the custody of a proper officer, to the place, which shall be shown to them by the judge, or by a person appointed by the court for that purpose. While the jury are thus absent, no person other than the judge, or person so appointed, shall speak to them on any subject connected with the trial.

**View by jury.** — This section does not convert the jury into silent witnesses; they must decide on the evidence, not upon their view. The only object of the view is to enable them

to understand the evidence: *Wright v. Carpenter*, 49 Cal. 609. This section does not authorize a view of property other than that in litigation. An instruction that "the jury will go with

the sheriff, examine the land, examine the quality of the soil and the growth upon it, but you are not to have any conversation with each other or anybody else in relation to the quality of the lands, avoid forming an opinion as to its quality until you have finally heard all the evidence and retired to your jury-room to consider a verdict," does not authorize the jury to take into consideration, when they should retire to the jury-room, the result of their own examinations of the land as independent evidence in the cause: *Wright v. Carpenter*, 50 Cal. 556.

A view of the premises in the absence of the defendant or his counsel is not erroneous if no application for their presence was made: *State v. Ah Lee*, 8 Or. 214. On a view of the premises being granted, no person can be allowed, even by the court, to speak to the jury on any subject connected with the trial: *People v. Green*, 53 Cal. 60. That it is permissible for the court, with the consent of the parties, to visit premises for the purpose of a better understanding of the question in dispute, see *Preston v. Culbertson*, 58 Cal. 198.

*Court may direct whether jurors shall be allowed to separate.*

§ 359. [226.] The jurors may be kept together in charge of a proper officer, or may, in the discretion of the court, at any time before the submission of the cause to them, be permitted to separate; in either case they may be admonished by the court that it is their duty not to converse with any other person, or among themselves, on any subject connected with the trial, or to express any opinion thereon, until the case is finally submitted to them.

**Keeping jurors together after submission:** See § 362, *post*.

**Misconduct of jury in separating, conversing, expressing opinion, etc.:** See on this topic the valuable note to *Hilton v. Southwick*, 35 Am. Dec. 254. For rule as to separation of jury in civil cases, see extended note to *McKinney v. People*, 43 Am. Dec. 76-80.

**Separation.**—Though the earlier cases held that a separation of the jury during the trial, contrary to the instructions of the court, would of itself be good cause for a new trial, and though this rule still prevails in some of the states (*State v. Sherbourne*, Dud. (S. C.) 28; *Daniel v. State*, 56 Ga. 653; *Williams v. State*, 45 Ala. 51; *State v. Frank*, 23 La. Ann. 213; *McLain v. State*, 10 Yerg. 241; *Minnesota v. Parrant*, 16 Minn. 178; *Wesley v. State*, 11 Humph. 502; *Hines v. State*, 8 Humph. 597; *Commonwealth v. McCaul*, Va. Cas. 271; *Wormley's Case*, 8 Gratt. 712; *Mill's Case*, 7 Leigh, 751), a different doctrine has been established by an overwhelming weight of authority in other of the states, to the effect that a separation of the jury, in criminal as well as in civil cases, if irregular and against the instructions of the court, although it may raise a presumption against the purity of the verdict, is not such misconduct as will warrant a new trial, in the absence of proof of any improper influence on the jury, or of actual damage to the defeated party: *Stephens v. People*, 19 N. Y. 549; *People v. Lee*, 17 Cal. 76; *Coker v. State*, 20 Ark. 53; *Cornelius v. State*, 13 Ark. 782; *Stanton v. State*, 13 Ark. 317; *State v. Madoil*, 12 Fla. 151; *Stone v. State*, 4 Humph. 27; *State v. Cucuel*, 31 N. J. L. 249; *Porter v. State*, 2 Ind. 435; *Sanders v. State*, 2 Iowa, 230; *Downer v. Baxter*, 30 Vt. 467; *State v. Hester*, 2 Jones, 83; *Parsons v. Huff*, 38 Me. 137; *Edrington v. Kiger*, 4 Tex. 89; *Mills v. Gardiner*, 41 Mo. 549; *State v. Tucker*, 10 La. Ann. 501; *Riggins v. Brown*, 12 Ga. 271; *Perkins v. Ermel*, 2 Kan. 325; *Graves v. Uonet*, 15 Miss. 45; *Nininger v. Knox*, 8 Minn. 140; *Nims v. Bige-*

*low*, 44 N. H. 376; *Wright v. Burchfield*, 3 Ohio, 56; *Winslow v. Draper*, 8 Pick. 170; *Howle v. Dunn*, 1 Leigh, 455; *State v. O'Brien*, 7 R. I. 336.

**Conversation or expression of opinion.**—Simply conversing with outsiders, even about the subject of litigation, is not enough to warrant a new trial: *March v. State*, 44 Tex. 64; *Foster v. Brooks*, 6 Ga. 287; *Thrift v. Redmen*, 13 Iowa, 25; *Barbour v. Archer*, 3 Bibb, 8; *White v. Wood*, 8 Cush. 413; *Hager v. Hager*, 38 Barb. 92; *People v. Boggs*, 20 Cal. 432. Although a different doctrine, especially in the earlier cases, has sometimes been adhered to: *Dana v. Roberts*, 1 Root, 134; 1 Am. Dec. 36; *Farrar v. Ohio*, 2 Ohio St. 54; *Knight v. Freeport*, 13 Mass. 218; *Riley v. State*, 9 Humph. 646; *State v. Andrews*, 29 Conn. 100. But the rule is different where the conversation is had with the prevailing party, in reference to the litigation: *Perkins v. Knight*, 2 N. H. 474; *Ritchie v. Holbrooke*, 7 Serg. & R. 458; or with his attorney, either about the facts or the law applicable thereto: *Martin v. Morelock*, 32 Ill. 485; *Oleson v. Meader*, 40 Iowa, 662.

The expression of an opinion before the rendition of the verdict has been held a good reason for a new trial: *Wiggin v. Plummer*, 31 N. H. 251; especially when accompanied by remarks showing a prejudice for or against either party, as that the verdict would be for the plaintiff, without regard to defendant's argument or the court's instructions: *Jenksburg v. Sperry*, 85 Ill. 56. But on the other hand, the mere expression of a hypothetical opinion is not sufficient: *Loeffner v. State*, 10 Ohio, 598; or general statements, such as that the plaintiff would recover: *Harrison v. Price*, 22 Ind. 165; or that he had made up his mind: *McAlister v. Sibley*, 25 Me. 474; *Darby v. Culhoun*, 1 Mill Const. 398; or one in favor of the defeated party: *Evans v. McKinsey*, Litt. Sel. Cas. 262.

**To receive evidence out of court is improper conduct on the part of the jury:** *Rodgers v. Central Pacific R. R. Co.*, 67 Cal. 607.



*Proceeding in case juror become ill.*

§ 360. [227.] If after the formation of the jury, and before verdict, a juror become sick so as to be unable to perform his duty, the court may order him to be discharged. In that case, unless the parties agree to proceed with the other jurors, a new juror may be sworn and the trial begin anew; or the jury may be discharged and a new jury then or afterwards formed.

**Plea of slight illness** will not justify use of spirituous liquors by a jurymen, as such use in the jury-room is cause for setting verdict aside: *Leighton v. Sargent*, 64 Am. Dec. 323. But compare note to *Jones v. State*, 62 Am. Dec. 562.

*Juror may be examined as witness.*

§ 361. [228.] A juror may be examined by either party as a witness, if he be otherwise competent. If he be not so examined, he shall not communicate any private knowledge or information that he may have of the matter in controversy to his fellow-jurors, nor be governed by the same in giving his verdict.

*Manner of keeping jury while deliberating.*

§ 362. [229.] After hearing the charge, the jury may either decide in the jury-box or retire for deliberation. If they retire, they must be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict, or are discharged by the court. The officer shall, to the best of his ability, keep the jury thus separate from other persons, without drink, except water, and without food, except ordered by the court. He must not suffer any communication to be made to them, nor make any himself, unless by order of the court, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on.

**Custody of jury.**—The jury may be put in charge of a sworn officer of the court who has testified for the state: *Edwards v. Washington Territory*, 1 Wash. 195.

**Separation of jury.**—Allowing one or more jurors to retire from the jury-room for a necessary purpose, and under the direct supervision of the officer, is not a separation: *Edwards v. Washington Territory*, 1 Wash. 195. A new trial will not be granted on account of a short temporary separation, if it appear that injustice has not been done by any juror being improperly influenced, etc.: *People v. Backus*, 5 Cal. 275; *People v. Bonney*, 19 Cal. 445; *People v. Brannigan*, 21 Cal. 339; *People v. Symonds*, 22 Cal. 348; *Smith v. Thompson*, 1 Cow. 221; *Downer v. Baxter*, 30 Vt. 467; *Eich v. Taylor*, 20 Minn. 378. See the note to § 359, ante. As to instances of separation which are ground for a new trial, see *Thompson and Merriam on Juries*, secs. 340 et seq.

**Communications to jury.**—It is the duty of the officer having charge of the jury, after they have retired for deliberation, to refrain

from communicating with them, except for the purpose of inquiring if they have agreed, and a breach of such duty has been held sufficient to justify the granting of a new trial: *Nelms v. State*, 21 Miss. 500; *Cole v. Swan*, 4 G. Greene, 32; and actual influence in such case need not be shown, if the means of approach exist, and the remarks were likely to produce influence: *Thomas v. Chapman*, 45 Barb. 98; *Nesmith v. Clinton Fire Ins. Co.*, 8 Abb. Pr. 141; *Sam v. State*, 1 Swan, 61. Thus where the sheriff stated to the jury that if they did not soon agree the judge would carry them with him into another county, a new trial was granted: *Gholston v. Gholston*, 31 Ga. 625. But the application of this rule has been sometimes relaxed, when it appeared that the jury were not in fact influenced: *State v. Summers*, 4 La. Ann. 27; *Baker v. Simmons*, 29 Barb. 198; *Pope v. State*, 26 Miss. 211.

The judge, however, has clearly a right to make proper communications through the bailiff. Thus it was held that a new trial will not be granted because the judge, through the



sheriff, informs the jury that if they do not agree in five minutes they must remain in the jury-room all night: *People v. Hughes*, 29 Cal. 258. And so it was held not improper for the judge and jury to communicate back and forth

concerning the possibility of arriving at a verdict in a short time, and as to the advisability of the judge waiting and keeping court open to receive the verdict: *State v. Garrand*, 5 Or. 228.

*Jury allowed food and lodging at expense of county.*

§ 363. [230.] If, while the jury are kept together, either during the progress of the trial or after their retirement for deliberation, the court order them to be provided with suitable and sufficient food and lodging, they shall be so provided by the sheriff, at the expense of the county.

*What papers may take into their room.*

§ 364. [231.] Upon retiring for deliberation, the jury may take with them the pleadings in the cause, and all papers which have been received as evidence on the trial (except depositions), or copies of such parts of public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession.

**Taking evidence to jury-room.** — A hat and blood-stained garments, that have been admitted in evidence, may be taken by jurors to the jury-room: *Doctor Jack v. Territory*, 2 Wash. 101. And they may take a copy of the statutes of the state: *Edwards v. Territory*, 1 Wash. 195. In *People v. Cochran*, 61 Cal. 548, the supreme court of California, in construing a provision similar to this one, say that the section is not mandatory, and the court may refuse to allow a diagram to go into the jury-room. While it is not erroneous to allow jury to take written charge to the jury-room (*Hurley v. State*, 29 Ark. 17; *State v. Tompkins*, 71 Mo. 613), it is said to be bad practice to allow it to be done: *Smith v. Lonsdale*, 6 Or. 79.

Where a paper has been improperly taken by the jury, the presumption is that it was read: *Bronson v. Metcalf*, 1 Disn. 21; but the contrary may be shown by the affidavits of the jurors: *Hackley v. Hastie*, 3 Johns. 252; *Morris v. Howe*, 36 Iowa, 490. If read by the jury, or if not shown otherwise, this will be ground for setting aside the verdict: *Sheaff v. Gray*, 2 Yeates, 273; *Foster v. McO'Brien*, 18 Mo. 88; but this applies only if the papers were taken by or sent to the jury at the instance of the successful party, for the losing party is not prejudiced by the taking of improper papers at his own suggestion: *Alcott v. Boston S. F. M. Co.*, 11 Cush. 91.

*Jury may have further instruction upon their request.*

§ 365. After the jury have retired for deliberation, if they desire to be informed of any point of law arising in the case, they may require the officer having them in charge to conduct them into court. Upon their being brought into court the information required shall be given in the presence of or after notice to the parties or their attorneys. [February 26, 1891, § 1.]

This is section 232 of the code of 1881, but without the provision for instructing the jury as to the testimony, that provision being omitted as in conflict with section 16 of article 4 of the constitution.

**Absence of attorney** or party when further instructions are given, if it does not appear that they were notified, is a fatal error:

*People v. Trim*, 37 Cal. 274; *Redman v. Gulnac*, 5 Cal. 148; *Davis v. Fish*, 2 G. Greene, 447; *Campbell v. Beckett*, 8 Ohio St. 210.

**Recalling jury.** — The supreme court of California, in construing a similar section, hold that the court has inherent power to recall the jury of its own motion, and give further instructions: *People v. Perry*, 65 Cal. 563.

*Discharge of jury without verdict.*

§ 366. [233.] The jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity requiring their discharge, or by consent of both parties, or after they have been

kept together until it satisfactorily appears that there is no probability of their agreeing.

**Inability of jury to agree warrants discharge:** See note to *State v. Moor*, 12 Am. Dec. 547.

*If jury be discharged, the action is again for trial.*

§ 367. In all cases where a jury are discharged or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action shall thereafter be for trial anew. [February 26, 1891, § 2.]

*Court may adjourn temporarily while jury are out.*

§ 368. [235.] While the jury are absent the court may adjourn from time to time, in respect to other business, but it is nevertheless to be deemed open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged.

In the code of 1881, this section has a provision added that "a final adjournment of the court discharges the jury." This is omitted in view of the constitutional abolishment of terms of court.

*Proceedings when jury have agreed.*

§ 369. [236.] When the jury have agreed upon their verdict they shall be conducted into court by the officer having them in charge. Their names shall then be called, and if all do not appear, the rest shall be discharged without giving a verdict.

*Manner of giving verdict.*

§ 370. [237.] If the jury appear, they shall be asked by the court or the clerk whether they have agreed upon their verdict, and if the foreman answer in the affirmative, he shall, on being required, declare the same.

See notes to the next two sections.

*Jury may be polled.*

§ 371. [238.] When a verdict is given, and before it is filed, the jury may be polled at the request of either party, for which purpose each shall be asked whether it is his verdict; if any juror answer in the negative, the jury shall be sent out for further deliberation. If the verdict be informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may again be sent out.

**Polling jury.** — The jury speak through their foreman unless the jury is polled; and each juror's assent is conclusive unless a disagreement is expressed at the time: *Blum v. Pate*, 20 Cal. 71. On polling the jury, although a juror may dissent, he must base his dissent on the question of fact presented by the verdict, not on the legal effect of the verdict as found: *Fitzpatrick v. Himmelmann*, 48 Cal. 588. In polling the jury the inquiry is, "Is this your verdict?" *Labar v. Koplin*, 4 N. Y. 547.

**Informal verdict.** — Until the verdict is received and recorded the jury have full power over it: *Root v. Sherwood*, 6 Johns. 68; *Thomas v. Zushlag*, 25 Tex. Supp. 225. If the verdict is informal, the court ought to explain the defects to the jury, and direct them to put it in proper form: *People v. Dick*, 34 Cal. 666; *Brigg v. Hilton*, 99 N. Y. 517. The jury have a right, until they are dismissed, to correct or amend an informal or insufficient verdict, though sealed, and after a verbal one has been

announced and entered by the clerk in his minute-book, so as to make it conform to their real and unanimous intention: *Warner v. New York Cent. R. R. Co.*, 52 N. Y. 437. The court may instruct the jury to amend their verdict as to matters of form not affecting the substance, and in such manner as to be unexceptionable in law: *Truebody v. Jacobson*, 2 Cal. 284. So if the verdict is incomplete, it is proper for the court to call the attention of the jury to that fact and remand them to put it in proper form; but omitting so to do, the court may afterwards set it aside in a motion for a new trial: *Garlick v. Bower*, 62 Cal. 65. Or the court may amend the verdict when it is defective in something merely formal, and which has no connection with the merits of the cause, if the amendment in no respect

changes the rights of the parties: *Perkins v. Wilson*, 3 Cal. 139. But if the court, instead of having the verdict corrected by the jury, attempt to correct it by the judgment, and go beyond the verdict, it is error: *Ross v. Austill*, 2 Cal. 192. A general objection to the form of a verdict, without any specification of the particulars, will not be considered: *Mahony v. Van Winkle*, 21 Cal. 552. If a verdict returned by a jury is not sufficiently definite and certain to serve as a basis for a judgment, and the party against whom it is rendered consents that a certain construction thereof should be taken as the verdict, this proceeding is quite as irregular, uncertain, and ineffectual as the verdict itself: *Campbell v. Jones*, 38 Cal. 509.

### *Receiving the verdict and discharging the jury.*

§ 372. [239.] When the verdict is given, and is such as the court may receive, and if no juror disagree or the jury be not again sent out, the clerk shall file the verdict. The verdict is then complete, and the jury shall be discharged from the case. The verdict shall be in writing, and under the direction of the court shall be substantially entered in the journal as of the day's proceedings on which it was given.

**Affidavit of jurors to impeach verdict.**—It is generally decided that the testimony of jurors will not be received to impeach their verdict: *Cline v. Bray*, 1 Or. 89; *Castro v. Gill*, 5 Cal. 40; *Gale v. N. Y. etc. R. R. Co.*, 53 How. Pr. 385; nor to explain it: *People v. Hosmer*, 1 Wend. 297; to show why it was rendered: *Sheldon v. Perkins*, 37 Vt. 550; *Clark v. Carter*, 12 Ga. 500; or explain a mistake in it: *Duhon v. Landry*, 15 La. Ann. 591; *Oregonian R'y Co. v. Oregon S. N. Co.*, 3 Or. 178; *contra*, *Dalrymple v. Williams*, 20 Am. Rep. 544; that they mistook or misunderstood the charge: *State v. Millican*, 15 La. Ann. 557; extended note to *Packard v. United States*, 48 Am. Dec.

376, 379; or that they fraudulently arranged for a verdict as by chance: *Pleasants v. Heard*, 15 Ark. 403. But such affidavits will be received to sustain a verdict: *Dana v. Tucker*, 4 Johns. 487; *Hiz v. Drury*, 5 Pick. 296. This subject will be found discussed in the extended note to *Crawford v. State*, 24 Am. Dec. 475–479; see also *Knowlton v. McMahon*, 97 Am. Dec. 236. As to affidavits to support the verdict of jurors, see note to *Forester v. Guard*, 12 Am. Dec. 143; *Woodward v. Learitt*, 9 Am. Rep. 49.

**Jury is no longer body**, after their verdict or finding is signed and they have separated: *People v. Commissioners etc.*, 36 N. Y. 72.

## CHAPTER III.

### OF VERDICT.

- § 373. General and special verdict defined.
- § 374. Requisites of verdict in action for recovery of personal property.
- § 375. Court may direct, in what cases.
- § 376. Special verdict controls.
- § 377. Jury to assess amount of recovery.

### *General and special verdict defined.*

§ 373. [240.] The verdict of a jury is either general or special. A general verdict is that by which the jury pronounces generally upon all or any of the issues either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court.



**Form of verdict.** — Where the form of the verdict is agreed upon in open court, the plaintiff cannot, after the rendition of the verdict, insist upon a verdict in a different form: *Sezey v. Addison*, 40 Cal. 408.

**Uncertainty.** — A verdict reading, "We, the jury in the above-entitled cause, find for

the plaintiffs, and assess the damages at three thousand and fifty dollars and legal interest," is bad for uncertainty, and would not sustain a judgment for any sum except by treating the words "and legal interest" as surplusage: *Meeker v. Gardella et al.*, 23 Pac. Rep. 837.

*Requisites in action for recovery of personal property.*

§ 374. [241.] In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claim a return thereof, the jury shall assess the value of the property if their verdict be in favor of the plaintiff; or if they find in favor of the defendant, and that he is entitled to a return thereof, they may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property.

**Verdict in action for specific personal property.** — This section does not apply to cases of nonsuit. Therefore, where there has been a nonsuit in the original action, these questions are open to the jury on the trial of an action on the replevin bond: *Ginaca v. Atwood*, 8 Cal. 446.

The verdict should find the value of the property and damages, and also find for a return

of the property to the plaintiff in order to give him an election: *Norcross v. Nunan*, 61 Cal. 640. A verdict not finding the value of the property was declared insufficient in *Garlick v. Bower*, 10 Pac. C. L. J. 427; followed in *Vandeford v. Foster*, 10 Pac. C. L. J. 563. So a finding for damages alone, without deciding the issues of ownership and value, is insufficient: *Jones v. Snider*, 8 Or. 127.

*Special verdict, in what cases court may direct.*

§ 375. [242.] In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk and entered in the minutes.

**Special verdict, generally.** — Court may direct special verdict (*Learned v. Castle*, 67 Cal. 41), in its discretion, and its ruling is not reviewable: *Swift v. Mulkey*, 14 Or. 59; *Columbia etc. R. R. Co. v. Hawthorne*, 3 Wash. 353. Where the question was whether a person had notice, an answer of the jury, "Yes; if possession is notice," was held neither to find the fact of possession, nor the time of it, nor the kind of possession, and was too equivocal: *Watson v. McCune*, 17 Cal. 304; see also *Garfield v. Knight's Ferry*, 17 Cal. 510.

The facts must be found expressly and specially, and not generally or impliedly: *Breeze v. Doyle*, 19 Cal. 101. Where special issues are submitted, they should include all questions of fact raised by the pleadings and necessary to determine the case, and should be separately and distinctly stated: *Phoenix Water Co. v. Fletcher*, 23 Cal. 482. In an action for a quartz ledge, when the defendants deny plaintiff's title and ouster, and set up

title in themselves to a part only of the ledge, a special verdict awarding defendants that portion of the ledge they claim without a general verdict, if accepted by plaintiffs, is a finding in favor of defendants, and entitles them to costs: *Gonzales v. Leon*, 31 Cal. 98. A special verdict settles the facts, and the court, by its judgment, pronounces the conclusion of law upon those facts. If the court errs in this respect, the error may be reviewed without a motion for new trial; but the right to correct the verdict does not depend upon the judgment, and the steps necessary for that purpose must be taken within the statutory time: *Allen v. Hill*, 16 Cal. 117.

Neither party can dictate the terms of any particular question to the jury: *American Co. v. Bradford*, 27 Cal. 365. To get a special verdict, special issues, stating each point separately, must be framed and submitted to the jury: *Brewster v. Bours*, 8 Cal. 501. But, it seems, a general verdict may be responsive to

a particular question, such as negligence: *Aljier v. "Maria,"* 14 Cal. 170. Special issues must include all the issues: *Phoenix W. Co. v. Fletcher*, 23 Cal. 488. If the jury cannot agree upon the special issues, and by consent they are withdrawn and a general verdict received, it is not error: *Mitchell v. Hockett*, 25 Cal. 539. But the jury cannot withdraw a special verdict and render a general one because the legal effect of the former was not what they expected: *Fitzpatrick v. Himmelmann*, 48 Cal. 589. The party in whose favor a judgment is rendered on a special verdict must move for a new trial if he is not satisfied with the verdict, as the verdict would otherwise be conclusive as to the facts in the appellate court: *Garwood v. Simpson*, 8 Cal. 108; *Duff v. Fisher*, 15 Cal. 380.

The verdict of a jury is said to be "general" when it responds affirmatively or negatively to the issues submitted, and "special" when it finds the facts and leaves the court to apply the law to them: *Porter v. Western etc. R. R.*

*Co.*, 2 Am. St. Rep. 272. See also *Willey v. Morrow*, 1 Wash. 474. The purpose of the provision concerning a direction to the jury to find a special verdict, and to find upon particular questions of fact, etc., is to settle some important leading question of fact arising in the case that is not made an issuable fact in the pleadings, but is one which the court deems material to a just determination of the case. In such cases the fact is found, and the court will determine its legal bearing and effect: *Willey v. Morrow*, 1 Wash. 474. See note to next section. A general verdict is sufficient in ejectment: *Joy v. McKay*, 70 Cal. 445; and in an action for the recovery of money, covers all the issues raised by the pleadings, including those raised by a cross-complaint for damages for breach of contract, and the answer thereto, and there is no necessity for special findings thereon: *Hunt v. Elliott*, 77 Cal. 588. The form of a special verdict is a matter resting largely in the discretion of the court: *Louisville etc. R'y Co. v. Flanagan*, 3 Am. St. Rep. 674.

### *Special verdict controls.*

§ 376. [243.] When a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

Special findings control if inconsistent with the general verdict: *Willey v. Morrow*, 1 Wash. 475; *Rofes v. Russel*, 5 Or. 400. If the special findings are not inconsistent with the general verdict, the latter will be acted upon: *Blood v. Light*, 31 Cal. 115. So also if the finding on the special issue would not sustain a general verdict for the party against whom the general verdict is rendered: *McDermott v. Higby*, 23 Cal. 489. If, in an action on a promissory note, the defendant denies that the plaintiff is the owner and holder of the same, and special issues are submitted to the jury, which do not constitute a defense if the plaintiff is the owner and holder of the note, and the jury find on the special issues alone, it is error for the court to render

judgment. There has been a mistrial, and until the issues of fact are decided, no final judgment can be entered: *Kiel v. Reay*, 50 Cal. 62. Where the findings are all upon facts made issuable by the pleadings, and not upon other facts, this section does not apply, because there is no finding upon such questions of fact as are contemplated by it: *Porter v. Western etc. R. R. Co.*, 2 Am. St. Rep. 272; see note to preceding section. The findings should be so construed as to avoid a contradiction if it can reasonably be done; and unless an objection to the form of a special verdict is taken before the verdict is received and recorded, it will not be considered on appeal: *Alhambra etc. Water Co. v. Richardson*, 72 Cal. 598.

### *Jury to assess amount of recovery.*

§ 377. When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a set-off for the recovery of money is established beyond the amount of the plaintiff's claim as established, the jury shall also assess the amount of the recovery; they may also, under the direction of the court, assess the amount of the recovery when the court gives judgment for the plaintiff on the pleadings. [February 26, 1891, § 3.]

**Verdict where counterclaim pleaded.** — Under a section similar to the foregoing, the following verdict was pronounced bad, and judgment was reversed: "We, the jury, find for plaintiff for the amount of contract, two thousand two hundred and fifty dollars, with interest at ten per cent per annum from August 1, 1876, to November 15, 1877, less the amount of notes of the value of nine hundred

and fifty dollars, with interest on said notes": *Watson v. Damon*, 54 Cal. 278. See *Hutchinson v. Superior Court*, 61 Cal. 119, where the jury, in an action on a promissory note, having found, "We, the jury, find verdict for the plaintiff," and the court rendered judgment for a certain amount, the court refused to interfere by *certiorari*, the matter being within the jurisdiction of the lower court.



## CHAPTER IV.

## OF TRIAL BY THE COURT.

§ 378. Trial by court without a jury, in what cases.

§ 379. Findings and conclusions must be filed.

§ 380. Manner of conducting trial by a court — Findings deemed verdict.

*Trial by court without jury, in what cases.*

§ 378. [245.] Trial by jury may, with the assent of the court, be waived by the several parties in the manner following:—

1. By failing to appear at the trial;
2. By written consent, in person or by attorney, filed with the clerk;
3. By oral consent, in open court, entered in the minutes.

**Power of judge at chambers.** — In actions at law, powers given to the court cannot be exercised by a judge at chambers, and a judge at chambers can exercise no powers unless conferred by statute: *Suffern v. Chisholm*, 1 Wash. 486.

**Failure to appear at trial.** — Filing an answer, though an appearance, is not an appearance at the trial: *Zane v. Crowe*, 4 Cal. 112. The failure to appear operates as a consent: *Gillespie v. Benson*, 18 Cal. 410; *Doll v. Feller*, 16 Cal. 433; *Waltham v. Carson*, 10 Cal. 180; *Gilbertson v. Fleischel*, 5 Duer, 652. But notwithstanding the waiver, the court may direct issues to be tried by a jury: *Doll v. Anderson*, 27 Duer, 251.

**Trial by court.** — Where the court was requested by counsel to charge itself as a jury, and counsel handed in instructions, whereupon the court charged that part of itself which was supposed to be a jury, the supreme court held

that the mode adopted, though original, was not of sufficient merit to be exalted into a precedent; and that the proper course is to present the points as a series of propositions, and ask the court to rule upon them: *Touchard v. Crow*, 20 Cal. 163.

**Jury trial is waived** where the parties to an action appear on the day set for trial, and go to trial before the court without objection: *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485; *Pfister v. Dasey*, 65 Cal. 403; *Polack v. Gurnee*, 66 Cal. 266. But the right to a jury trial is not waived by neglecting to demand a jury at the time the case is called to be set for trial, notwithstanding a rule of court that a jury shall then be demanded: *Biggs v. Lloyd*, 70 Cal. 447. This right, however, is waived unless the party demanding a trial by jury pays the jury fees in advance, in accordance with a rule of court to that effect: *Conneau v. Geis*, 73 Cal. 176.

*Findings and conclusions must be filed.*

§ 379. [246.] Upon the trial of an issue of fact by the court, its decisions shall be given in writing and filed with the clerk. In giving the decision, the facts found and the conclusions of law shall be separately stated. Judgment upon the decisions shall be entered accordingly.

**Decision in writing.** — This must be filed, or the judgment cannot stand; but it need not be done till after the court announces its judgment: *Vermule v. Shaw*, 4 Cal. 215; *Broad v. Murray*, 44 Cal. 229. It is not the mere signing of the findings, but the filing, that is essential to a decision: *Comstock Q. M. Co. v. Sup. Court Santa Cruz Co.*, 57 Cal. 625; and until filed it may be changed, though it be signed and has been delivered: *Adams v. Nellis*, 59 How. Pr. 385. If judgment be ordered and entered before findings of facts are filed or waived, it will be set aside: *Van Court v. Winterson*, 61 Cal. 615. And the trial court may set aside a judgment so entered, and order the cause restored to the calendar: *Van Court v. Winterson*, 61 Cal. 615. After announcing his decision

orally, the judge may continue the case until the next term; until the decision is filed, the case has not been tried: *Hastings v. Hastings*, 31 Cal. 95. The provision as to the time for filing the decision has been held to be merely directory: *Broad v. Murray*, 44 Cal. 229; *McQuillan v. Donahue*, 49 Cal. 157; *Burger v. Baker*, 4 Abb. Pr. 11; *People v. Dodge*, 5 How. Pr. 11.

**Findings and conclusions of law, generally.** — In a trial before the court, where the parties have stipulated the facts, no formal findings are necessary: *Frush v. East Portland*, 6 Or. 281. Otherwise the provision requiring findings is mandatory: *Brown v. Brown*, 3 Cal. 111.

A party to an action may now present, as distinct matters, first, the point that the judge



ment is not the legal conclusion from the facts found; and second, the point that the evidence does not sustain the findings or some of them: *Dowd v. Clarke*, 51 Cal. 363. Under this code no findings of fact are implied to support the judgment; so it must appear affirmatively that the facts support the judgment: *N. P. R. R. v. Reynolds*, 50 Cal. 93; *Pink v. Canyon R. R. Co.*, 5 Or. 301. To that end a finding is required upon every material issue: *Campbell v. Buckman*, 49 Cal. 367; *N. P. R. R. v. Reynolds*, 50 Cal. 93; *Dowd v. Clarke*, 51 Cal. 263; *Watson v. Cornell*, 52 Cal. 91; *O'Connor v. Frasher*, 53 Cal. 435; *Freeman v. Campbell*, 55 Cal. 197; *Marsters v. Lash*, 61 Cal. 622; *Dunn v. Dunn*, 62 Cal. 176; *Roeding v. Perasso*, 62 Cal. 515; *Paulson v. Nunan*, 64 Cal. 290; but immaterial issues need not be found upon: *Fontaine v. S. P. R. R. Co.*, 54 Cal. 654; *McCourtney v. Fortune*, 57 Cal. 619; *Knowles v. Seale*, 64 Cal. 377. And an erroneous finding on an immaterial issue will not warrant a reversal: *Sweetzer v. Dobbins*, 2 West Coast Rep. 145. Facts admitted on the pleadings need not be found: *Swift v. Maygridge*, 8 Cal. 445; and if facts are found contrary to admissions on the pleadings, the findings must be disregarded: *Bradbury v. Cronise*, 46 Cal. 288. A finding in an action of partition, which is contrary to an admission made by the pleadings as to the plaintiff's interest in the lands in question, is outside the issue, and erroneous, and a judgment based thereon will be reversed: *Reinhart v. Lugo*, 75 Cal. 639. Facts admitted by the pleadings should be treated as found; and if the court finds adversely to the admissions, such findings should be disregarded in determining the question whether the proper conclusion of law was drawn from the facts as found and admitted by the pleadings: *In re Doyle*, 73 Cal. 564. See *Walker v. Brown*, 67 Cal. 599; *Fish v. Benson*, 71 Cal. 428.

*Facts found must be within issue:* *Morenhout v. Barron*, 42 Cal. 605. It is the duty of the court to supply omissions as to material facts when its attention is called to the subject by proper exception to the findings: *Luse v. Isthmus T. R. Co.*, 6 Or. 124; *Simmonds v. Richardson*, 5 Hun. 177; *Logan v. Hale*, 42 Cal. 646; *Ogburn v. Connor*, 46 Cal. 353; *Hayes v. Wetherbee*, 60 Cal. 399. The court cannot, however, re-examine the evidence on the motion of one of the parties after it has once filed its findings and rendered judgment, and on such re-examination substitute different findings of fact and reverse its former decision: *Prince v. Lynch*, 38 Cal. 530; *Smith v. Acker*, 52 Cal. 219. An objection that certain findings were not within the issues will not be considered on appeal, if no objection to the admission of the evidence supporting the findings was made at the trial: *Horton v. Dominguez*, 71 Cal. 642. Nor can an appellant object that certain findings are unauthorized, as being outside of the issues, when the facts found are alleged in his own pleading: *Riverside L. & I. Co. v. Jensen*, 73 Cal. 550. And a new trial will not be granted on the ground that certain findings are not within the issues raised by the pleadings, when the action was tried without objection to the sufficiency of the pleadings to raise such issues, and the findings are justified by the evidence: *Moore v. Campbell*, 72 Cal. 251.

*Reference to pleadings.* — A finding "that the facts stated in the plaintiff's complaint are true, and that the facts stated in defendant's answer are not true," is good: *McEadden v. Friendly*, 9 Or. 222; *McEwen v. Johnson*, 7 Cal. 260. But a finding "that all the material facts set forth in the complaint are true," is insufficient: *Ladd v. Tully*, 51 Cal. 277; *Cassidy v. Cassidy*, 63 Cal. 352. While it is permissible in the findings to refer to a pleading, — as, for example, that a note or mortgage set forth in the complaint was executed by the party at the time therein alleged, — yet in such cases the reference should be distinct and pointed, so as to leave no doubt as to what particular facts are intended: *McEwen v. Johnson*, 7 Cal. 260.

*Test of sufficiency.* — A finding is not good which states only general conclusions, leaving it doubtful what particular facts were established: *Ladd v. Tully*, 51 Cal. 277. The test is, Would they be sufficient if presented by a jury as a special verdict? *Breeze v. Doyle*, 19 Cal. 101. A finding that an action was commenced, and that a judgment therein was duly given and made, includes a finding of all the facts necessary to give the court jurisdiction: *Whetmore v. Rupe*, 65 Cal. 273. Findings of fact need not follow the language of the pleadings. If the truth or falsity of each material allegation not admitted can be deduced from the findings, the requirements of the code are complied with: *Clary v. Hazlitt*, 67 Cal. 236. But if the complaint be sufficient, a finding by reference to it is sufficient: *Gwinn v. Hamilton*, 75 Cal. 256. And a finding that all the averments of a complaint are true is a sufficient finding of facts, if the answer contains nothing but denials, and an admission of matters alleged in the complaint: *Johnson v. Klein*, 70 Cal. 186; *Moore v. Clear Lake W. W.*, 68 Cal. 146. But after the court had specifically found upon a portion of the issues, a general finding that "the several allegations of the complaint not in conflict with the foregoing findings are true," is insufficient: *Goodnow v. Griswold*, 71 Cal. 599.

*The court should find the ultimate facts, not state the evidence:* *Jones v. Clark*, 42 Cal. 180; *Coveny v. Hale*, 49 Cal. 556; *Mattheus v. Kinsell*, 41 Cal. 514; *Ornbaum v. Creditors*, 61 Cal. 455; *De Celis v. Porter*, 65 Cal. 3; *Coglan v. Beard*, 65 Cal. 58. The appellate court reversed a judgment and remanded the cause where this rule was not complied with: *Heredink v. Holton*, 16 Cal. 104; *Soto v. Irvine*, 60 Cal. 436. But, that findings are sufficient which recite probative facts from which the ultimate facts necessarily result, see *Coveny v. Hale*, 49 Cal. 555; *People v. Hagar*, 52 Cal. 189; *Osborn v. Clark*, 60 Cal. 623; *Biddele v. Brizzolara*, 56 Cal. 381; Where an ultimate fact is found, and probative facts not consistent with the ultimate fact are also found, the finding of the ultimate fact is conclusive: *Barrant v. Garratt*, 50 Cal. 112. A finding that L. conveyed the premises includes a finding of every fact essential to such conveyance; therefore a finding that the deed was acknowledged as required by statute is not necessary: *Lewis v. Kelton*, 58 Cal. 303. A finding that an action was commenced, and that judgment therein was "duly given and made," includes a finding of facts necessary to

give the court jurisdiction: *Whetmore v. Rupe*, 65 Cal. 237. A conclusion of law cannot be regarded as a finding of fact: *Paulson v. Nunan*, 64 Cal. 290.

*Findings contrary to evidence.* — A finding of fact cannot be impeached on the ground of being contrary to evidence except by motion for a new trial: *Pico v. Cuyas*, 47 Cal. 178; *Rice v. Inskip*, 34 Cal. 224; unless, it seems, it appears affirmatively that no such judgment could properly have been rendered: *Semple v. Cook*, 50 Cal. 26. As to insufficiency of evidence to sustain findings, see *Hibernia S. & L. Soc. v. Moore*, 68 Cal. 156; *Shepherd v. Jones*, 71 Cal. 223. The findings are presumed to be supported by the evidence, in the absence of a showing to the contrary in the record on appeal: *Horton v. Dominguez*, 71 Cal. 642; *Kendall v. Waters*, 71 Cal. 26. Where there is evidence tending to support a particular finding, the judgment will not be reversed on the ground that the finding is unsupported by the evidence: *Metropolitan Loan Ass'n v. Esche*, 75 Cal. 513. An objection that a certain finding is not supported by the evidence will not be considered on appeal, unless the statement contains a specification of the particulars in which the evidence is claimed to be insufficient. A specification that the court erred in ordering judgment for the respondent on the findings is not sufficient: *Shepherd v. Jones*, 71 Cal. 223.

*Duty of court.* — It is immaterial whether the findings are draughted by the judge or counsel; but it is the duty of the court to see that they are proper before signing them: *Hathaway v. Ryan*, 35 Cal. 190; *Porter v. Woodward*, 57 Cal. 538; *Barnhart v. Fulkerth*, 73 Cal. 526; *Edgar v. Stevenson*, 70 Cal. 286. The judge is not obliged to adopt those prepared by counsel: *Barnhart v. Fulkerth*, 73 Cal. 526.

*Amendment of findings.* — Findings cannot be amended after the entry of judgment and the denial of a motion for a new trial: *Bate v. Miller*, 63 Cal. 233. Conclusions of law may be amended before entry of judgment: *Condee v. Barton*, 62 Cal. 1. And when case is tried by court alone, its findings may be amended at any time before judgment: *Cathoun v. Gilliland*, 2 Wash. 174.

*Necessity of findings — Effect of omission of.* — It is not necessary to order a new trial for the purpose of having the language of the finding made more exact when it is sufficiently distinct as to the subject-matter of the action: *People v. Beck*, 21 Cal. 385. Where title is found in one party, the court need not find the facts as to the other: *Merrill v. Chapman*, 34 Cal. 252. A finding that after due compliance with the statute, the defendant was authorized, in her own name as a sole trader, to carry on a business, etc., is equivalent to finding that she was authorized to carry on the business in her own name and on her own account: *Porter v. Gamba*, 43 Cal. 108. Where there are no findings, and the case is brought to the appellate court upon the evidence, and the judgment is erroneous, the court will reverse the judgment and remand the case for a new trial: *Dowd v. Clarke*, 51 Cal. 263; *Poorman v. Mills*, 43 Cal. 323. If the court detail facts in its decision, from which the conclusion is drawn, the particular facts found and claimed not to be supported by the evidence should be speci-

fied: *Coveny v. Hale*, 49 Cal. 555. Findings of fact and conclusions of law are not applicable to the case of a nonsuit: *Gilson Co. v. Gilson*, 47 Cal. 601. After the case is submitted, the court may hear arguments at chambers, and thereupon decide the case: *San José v. Shaw*, 45 Cal. 178.

In an action tried by the court without a jury, findings, unless waived, are necessary, and a judgment entered in the absence of findings will be set aside: *Savings and Loan Society v. Thorne*, 67 Cal. 53. The trial court must make findings on every material issue. It is not sufficient to say that it is impossible to make the finding. If no sufficient evidence be introduced, the finding should be against the party upon whom was the burden of proof: *Leriston v. Ryan*, 75 Cal. 293. But where the plaintiff is nonsuited, written findings are not required: *Harney v. McLeran*, 66 Cal. 34. No findings are necessary as to facts admitted by the pleadings: *Taylor v. Central Pacific R. R. Co.*, 67 Cal. 615; nor where the allegations of a complaint are not denied: *Pomeroy v. Gregory*, 66 Cal. 572; nor on the allegations of a cross-complaint, to which a demurrer has been sustained, and no amendment made: *Kendall v. Waters*, 71 Cal. 26; nor on an averment in a complaint of intervention which is not denied by the answer: *Grossini v. Perazzo*, 66 Cal. 544; nor in an action to recover the possession of real property, and for an injunction, where a verdict is rendered in favor of the plaintiffs, upon which judgment is entered, upon the equitable averments of the complaint, if they are not denied by the answer: *Anderson v. Black*, 70 Cal. 226. If, however, findings are made upon the admitted facts, they must be in harmony with such facts: *Walker v. Brem*, 67 Cal. 599.

Where a finding made is conclusive against the right of the plaintiff to recover, findings upon other issues are unnecessary to support the judgment against him: *Dyer v. Brogan*, 70 Cal. 136; see *Malone v. Del Norte Co.*, 77 Cal. 217. The findings should cover all the material issues in a case, but a judgment will not be reversed for want of a finding upon a particular issue, where it is apparent that the omission in no way prejudiced the appellant: *Murphy v. Bennett*, 71 Cal. 528; *Gates v. McLean*, 70 Cal. 72; *Robinson v. Placerville and Sacramento Valley R. R. Co.*, 65 Cal. 263; nor where the omitted findings must have been adverse to the appellant: *People ex rel. Love v. Center*, 66 Cal. 551. An issue raised by a defense upon which no evidence is offered at the trial, and no finding made, is deemed immaterial, and the judgment will not be reversed for want of a finding: *Senter v. Senter*, 70 Cal. 619. A party signing a written stipulation waiving findings is estopped from objecting to the want thereof, although the stipulation was not filed until after the entry of judgment: *Dougherty v. Friermuth*, 71 Cal. 240. If no agreed findings are filed or waived, a judgment entered in conformity with the order after the expiration of the term of office of the trial judge may be set aside for want of findings, on the motion of the party in whose favor the judgment is entered, without notice to the opposite party, notwithstanding the latter offers to waive findings, or to have them



made by the successor of the judge who tried the case, and tenders to the prevailing party the amount of the judgment. Such a motion may be made after the expiration of six months from the date of the order for judgment, and after the termination of the session of the court at which it was made: *Mace v. O'Reilly*, 70 Cal. 231. In such a case, the court has jurisdiction, and it is within its discretion to allow a motion to vacate the judgment to be renewed, although it had previously been denied: *Mace v. O'Reilly*, 70 Cal. 231. In a proceeding to set aside the probate of a will, where only part of the material issues made by the pleadings are submitted to a jury, the court should, if requested, hear testimony, and make findings as to the remaining issues: *Sanders v. Simcich*, 65 Cal. 50.

*Contradictory findings will not support a judgment:* *Reese v. Corcoran*, 52 Cal. 495; *Munly v. Howlett*, 55 Cal. 96; *Smith v. Acker*, 52 Cal. 219; *Sloss v. Allman*, 64 Cal. 47; *Carman v. Ross*, 64 Cal. 249; *Kerns v. McKean*, 65 Cal. 411. But findings must be construed together, and reconciled if possible: *Kimball v. Lohmas*, 31 Cal. 156; *Marks v. Sayward*, 50 Cal. 57. "Where some of the conclusions of law in a decision are not properly drawn from the facts found, this is no ground for reversing the judgment if the ultimate conclusion upon which the judgment rests is not erroneous in view of the facts found": *Davis v. Baugh*, 59 Cal. 576. Where the ultimate facts in issue are found by the court, a contradictory finding as to a probative fact involved therein has no effect: *Lucas v. Richardson*, 71 Cal. 618. Where there is a discrepancy between specific findings of particular facts and findings that are general in their nature, the former must control: *Warder v. Enslin*, 73 Cal. 291. Findings are not contradictory when made according to the allegations of the complaint, which states that the services were rendered at the request of defendant, and in one count that he promised to pay a certain sum therefor, and in another that he promised to pay what they were reasonably worth, and that they were reasonably worth a certain sum, the same amount claimed in the first count: *Allen v. Haley*, 77 Cal. 575. Where the findings of fact do not sustain the conclusions of law, the remedy is by motion in the lower court for further findings, and not appeal: *Eakin v. McCraith*, 2 Wash. 112.

*Separate statement of findings of fact and conclusions of law is necessary:* *Willey v. Morrow*, 1 Wash. 474; *Emeric v. Alvarado*, 64 Cal. 529, 603; *Figg v. Mayo*, 39 Cal. 265; *Breeze v. Doyle*, 19 Cal. 101; *Lucas v. San Francisco*, 28 Cal. 576; *Pralus v. Pacific G. & S. M. Co.*, 35 Cal. 35. A finding of fact and conclusion of law are "separately stated" when the effect of each upon the final judgment is distinct and severable from that of the other: *Weissman v. Russell*, 10 Or. 73. But when the facts are so obscurely found or are so blended with legal conclusions as to render it doubtful whether the facts are only hypothetically stated, the supreme court will disregard it as a finding of fact: *Figg v. Mayo*, 39 Cal. 265. A direction, added by the court to its findings of fact, that judgment be entered in accordance with the findings in favor of the plaintiff for restitution of the premises, and for

his costs and disbursements, states a conclusion of law: *Murphy v. Snyder*, 67 Cal. 451. Placing findings of facts among the conclusions of law does not make them conclusions of law: *Foot v. Murphy*, 72 Cal. 104.

*Conflicting evidence.* — Where the evidence on a particular issue is conflicting, the findings will not be disturbed on the ground that they are not supported by the evidence: *Williams v. Gallick*, 11 Or. 337; *Emeric v. Alvarado*, 64 Cal. 529; *Sweetzer v. Dobbins*, 65 Cal. 529; *Kelly v. Fitzell*, 65 Cal. 87; *Rankin v. Thompson*, 7 Col. 381; *Baker v. McAllister*, 2 Wash. 48; *Coffman v. Brown*, 7 Col. 147; *Raynor v. Drew*, 72 Cal. 307; *Edgar v. Sterens*, 70 Cal. 286; *Alhambra Add. W. Co. v. Richardson*, 72 Cal. 598; *English v. Korn*, 73 Cal. 617; *People ex rel. Clough v. Lecy*, 71 Cal. 618; *Hildreth v. White*, 66 Cal. 549.

*Opinion of court.* — The supreme court are always glad to have the opinion of the court below, but it should be entirely separate from the findings of facts and conclusions of law: *Hidden v. Jordan*, 28 Cal. 305; *Brynn v. Maume*, 28 Cal. 244; *Jones v. Block*, 30 Cal. 229; *McClory v. McClory*, 38 Cal. 575.

*Objection to — Amendment of — Collateral attack on.* — An objection that a certain finding is not within the issues raised by the pleadings, if not made in the court below, will not be considered on appeal: *Moore v. Campbell*, 72 Cal. 251. Where all the material issues made by the pleadings are determined by the findings, and the findings are not attacked as unsustained by the evidence, a party cannot demand a new trial upon the ground that the court erroneously applied the law to the facts, or drew the wrong conclusion of law from the facts found. The remedy in such case is by appeal from the judgment: *Estate of Doyle*, 73 Cal. 564. Where the findings are erroneous in any respect, the appropriate proceeding to have them set aside is a motion for a new trial. A motion to amend the findings after a decree has been entered in the case is irregular: *Pico v. Sepulveda*, 66 Cal. 336. Even if the trial court has power to substitute other findings of fact for those which have been signed and filed (which is doubted), it cannot be done without notice to the parties interested: *Wunderlin v. Cadogan*, 75 Cal. 617. And the fact that the defendant was not represented at the trial does not excuse the want of such notice: *Wunderlin v. Cadogan*, 75 Cal. 617. The question of the sufficiency of the findings to support the judgment cannot be made on a collateral attack: *Johnston v. San Francisco Savings Union*, 75 Cal. 134.

*Statute of limitations.* — A finding that all the allegations of the complaint are true is a sufficient finding on a plea of the statute, if the complaint contains averments showing that the statute had not run: *Lewis v. Adams*, 70 Cal. 403. Where the statute was pleaded by specifying certain sections of the Code of Civil Procedure as a bar to the action, and the court found that the action was not barred by the statute or by the sections of the code so specified, the finding is sufficient: *Oakland Gas Light Co. v. Dameron*, 67 Cal. 663. The court should expressly find whether or not the action is barred by the statute, and not merely the facts from which it may be inferred: *Duff*



*v. Duff*, 71 Cal. 513. But the facts found need not necessarily be stated in the language of the pleadings. If probative facts are found from which the court can declare that the ultimate facts necessarily result, the finding is sufficient: *Alhambra Addition Water Co. v. Richardson*, 72 Cal. 598. Where the statute is pleaded by the defendant, a finding as to matter which takes the case out of the statute is within the issues: *Hendy v. March*, 75 Cal. 566. The defendants pleaded section 337 of the Code of Civil Procedure in bar of the action. It was held that the section did not apply, and that no finding on the subject was required: *Lourell v. Gridley*, 70 Cal. 507.

**Waiver.** — Findings are not waived by giving a notice of motion for a new trial: *Sacings & L. Soc. v. Thorne*, 67 Cal. 53. Where there is a substantial conflict in the evidence in an action tried by the court without a jury, in which findings are waived, it will be presumed on appeal that the lower court found all the facts in favor of the prevailing party, and its decision will not be disturbed on the ground that it is not justified by the evidence: *Myers v. Tibbals*, 72 Cal. 278. So, also, in support of the presumption that the trial court has performed its duty, this court will presume that findings were waived when none appear in the tran-

script. But this presumption has no force when a writing clearly intended to be a finding upon a material issue appears to have been filed by the judge of the court below: *Kimball v. Storer*, 65 Cal. 116.

*Opinion of trial court is not the "findings": Johnston v. San Francisco Savings Union*, 75 Cal. 134.

**Expiration of term of judge.** — Where the term of office of the judge who tried the case expires after an order for judgment has been entered, but before the findings have been filed, no valid judgment can be entered in the action without a new trial being had, unless agreed findings are filed or waived by both sides: *Mace v. O'Reilly*, 70 Cal. 231.

**Equitable actions.** — In equity actions, the findings of the jury are advisory only, and until the court has made findings, there is no decision upon which to base a motion for a new trial: *Spottiswood v. Weir*, 66 Cal. 525. In an action to foreclose a mortgage of personal property, the findings of the jury may be treated by the court as advisory only. The court may set aside the verdict and find the facts: *Johnson v. Powers*, 65 Cal. 179. In equity, as in other cases, findings of fact will not be disturbed, where the evidence is conflicting: *Donohoe v. Mariposa Land and Mining Co.*, 66 Cal. 317.

### *Manner of conducting trial by the court—Findings deemed verdict.*

§ 380. [247.] The order of proceedings on a trial by the court shall be the same as provided in trials by jury. The finding of the court upon the facts shall be deemed a verdict, and may be set aside in the same manner and for the same reason, as far as applicable, and a new trial granted.

**Verdict.** — The findings of the court upon the facts are regarded as a verdict: *Wiley v. Morrow*, 1 Wash. 474; *Hallock v. Portland*, 8 Or. 29; and may be set aside as such and a

new trial granted: *Hallock v. Portland*, 8 Or. 29.

*Setting aside findings for insufficiency of evidence: See New Trial.*

## CHAPTER V.

### TRIAL BY REFEREE.

- § 381. Issues may be referred by consent.
- § 382. Reference without consent of parties.
- § 383. To whom reference may be ordered.
- § 384. Qualifications of referee.
- § 385. Challenges to referees.
- § 386. Manner of conducting trial by referee.
- § 387. Referee's report; what it must contain.
- § 388. Motion for judgment on or to set aside referee's report.
- § 389. Court may affirm, modify, or set aside report and give judgment accordingly.

### *Issues may be referred by consent of parties.*

§ 381. [248.] All or any of the issues in the action, whether of fact or law, or both, may be referred upon the written consent of the parties; but either party shall have the right in an action at law, upon an issue of fact, to demand a trial by jury.

**Actions at law:** See notes next section as to reference without consent in actions of an equitable nature, and in actions involving long accounts.

**Referee defined:** See *Carson v. Smith*, 77 Am. Dec. 539.

**When both parties consent,** a pending action may be sent to referees, and their report, when regularly made, is a proper foundation for a judgment: See note to *Grim v. Norris*, 79 Am. Dec. 206.

The parties to the action entered into a stip-

ulation for its reference, which authorized the referee to determine all the issues of law and fact, and provided that, upon the filing of the report of the referee, judgment should be entered by the court in accordance therewith. The court thereupon made an order of reference directing judgment to be entered upon the filing of the report of the referee; and it was held that upon the filing of the report, the clerk was authorized to enter judgment without any further order of the court: *Bowie v. Borland*, 68 Cal. 233.

### *Reference without consent of parties.*

§ 382. [249.] Where the parties do not consent, the court or judge may, upon the application of either, direct a reference in all cases formerly cognizable in chancery in which reference might be made:—

1. When the trial of an issue of fact shall require the examination of a long account on either side, in which case the referees may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein; or

2. When the taking of an account shall be necessary for the information of the court, before judgment upon an issue of law, or for carrying a judgment or order into effect; or

3. When a question of fact, other than upon the pleadings, shall arise, upon motion or otherwise, in any stage of the action; or

4. When it is necessary for the information of the court in a special proceeding.

**Compulsory reference.** — See extended note to *Grim v. Norris*, 79 Am. Dec. 207–211, on power to send actions to referees, showing in what actions compulsory reference may be ordered, and what actions cannot be referred. To justify a compulsory order of reference, there must be evidence showing the existence of the statutory conditions. Thus it is not sufficient that the case may, by possibility, involve the examination of a long account; enough must be alleged or shown to justify an inference that it will. And this rule applies to equitable actions as well as to legal actions: *Thayer v. McNaughton*, 117 N. Y. 111; *Untermeyer v. Beinhauer*, 105 N. Y. 521. So where there is no account between the parties as to matters set forth in the complaint, the cause cannot be referred, although there may be many items of damage; nor does the fact that the answer sets up a counterclaim which requires the examination of a long account make the action referable. This must be determined by the complaint. The answer cannot change it: See case last cited. A compulsory reference is not a matter of right: *Wheeler v. Falconer*, 7 Robt. 45. It is said that when the right to refer depends on the examination of an account the court has no power to refer a whole issue unless the account arises directly and not collaterally or incidentally: *Kain v. Delano*, 11 Abb. Pr., N. S., 29; *Williams v. Benton*, 24 Cal. 425; and see *Tribou v. Strowbridge*, 7 Or. 156. The judge may state the account himself, but the better practice is to refer: *Hidden v. Jordan*,

28 Cal. 308. The referee must take the account on principles previously laid down by the court: *Smith v. Walker*, 38 Cal. 388. A referee appointed to ascertain and state an account between partners should ascertain what the real and actual profits were, and not what they ought or might have been: *Boire v. McGinn*, 8 Or. 466.

The order of reference cannot go beyond the pleadings: *Branger v. Chevalier*, 9 Cal. 361. The court can order a reference to ascertain the damages sustained by reason of an injunction. The undertaking is a consent by the plaintiff: *Russell v. Elliott*, 2 Cal. 247. It was held that an action for work done — plea, payment by promissory note; replication, fraud in the execution of the note — could not be compulsorily referred: *Seaman v. Mariani*, 1 Cal. 336. Neither can an ordinary action at law for the recovery of a debt, even though it involve the examination of a long account: *Grim v. Norris*, 19 Cal. 141; 79 Am. Dec. 206.

The application should not be made until the cause is ready for trial: *Hawkins v. Avery*, 32 Barb. 551; and should be by motion on affidavit: *Goodyear v. Brooks*, 4 Robt. 682; unless the court refers of its own motion: *Barron v. Sandford*, 14 How. Pr. 443. A referee's finding on a question of fact may be reviewed in the supreme court of New York: *Stockwell v. Phelps*, 90 Am. Dec. 710. But where the court below has decided to refer because of the examination of a long account, it is only where the examination of a long account cannot be



possibly involved that an appeal will lie to the court of appeals of that state: *Welsh v. Darragh*, 52 N. Y. 590. See note to § 387.

**Reference in equity cases** may be made

even without the consent of the parties: Note to *Grim v. Norris*, 79 Am. Dec. 207. On reference without consent generally, see *McMartin v. Bingham*, 1 Am. Rep. 265.

*To whom reference may be ordered.*

§ 383. [250.] A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge may appoint one or more, not exceeding three.

*Qualifications of referee.*

§ 384. [251.] When the appointment of referees is made by the court or judge, each referee shall be,—

1. Qualified as a juror as provided by statute;
2. Competent as juror between the parties;
3. A duly admitted and practicing attorney.

**Qualifications and competency of jurors:** See §§ 55, 56, *ante*.

*Challenges to referees.*

§ 385. [252.] When the referees are chosen by the court, each party shall have the same right of challenge as to such referees, which shall be made and determined in the same manner and with like effect as in the formation of juries, except that neither party shall be entitled to a peremptory challenge.

**Challenge to jurors:** See §§ 342-346, *ante*.

*Manner of conducting trial by referee.*

§ 386. [253.] Subject to the limitations and directions prescribed in the order of reference, the trial by referees shall be conducted in the same manner as a trial by the court. They shall have the same power to grant adjournments, administer oaths, preserve order, punish all violations thereof upon such trial, compel the attendance of witnesses, and to punish them for non-attendance or refusal to be sworn or testify, as is possessed by the court.

**Trial by referee.** — It is the intention of the statute that trials before a referee proceed in the same manner as trials before a court, and that referees be clothed with the same authority in directing the manner of a trial, and in deciding motions which may arise during its progress: *Stinson v. Estes*, 3 Or. 521; *Goodrich v. Mayor*, 5 Cal. 431; *Phelps v. Peabody*, 7 Cal. 53.

A referee is an officer of the court. He is clothed with important powers, and some weight must be given to his certificate, and some discretion allowed him in the manner of taking testimony and returning exhibits: *Bohlman v. Coffin*, 4 Or. 313. He must adhere to the rules of evidence: *De la Riva v. Berryesa*, 2 Cal. 197. He can exercise all the powers of

a judge in relation to the trial, and may therefore grant a nonsuit, and report a judgment to that effect: *Plant v. Fleming*, 20 Cal. 93. After the case is submitted, the referee cannot allow plaintiff to introduce an amended complaint and compel defendant to file an amended answer: *De la Riva v. Berryesa*, 2 Cal. 197. Exercising a sound discretion, he may open the case after it has been closed, and receive further testimony: *Marizion v. Pioche*, 10 Cal. 545. When an original instrument is offered in evidence before a referee, and he makes a certified copy thereof, and files and returns the certified copy as an exhibit, such exhibit will not be disregarded, except in peculiar cases: *Bohlman v. Coffin*, 4 Or. 313.

*Referee's report, what it must contain.*

§ 387. [254.] The report of the referees shall state the facts found,



and when the order of reference includes an issue of law, it shall state the conclusions of law separately from the facts. The referees shall file with their report the evidence received upon the trial. If evidence offered by either party shall not be admitted on the trial, and the party offering the same except to the decision rejecting such evidence at the time, the exceptions shall be noted by the referees, and they shall take and receive such testimony and file it with the report. Whatever judgment the court may give upon the report, it shall, when it appears that such evidence was frivolous and inadmissible, require the party at whose instance it was taken and reported to pay all costs and disbursements thereby incurred.

**Referee's report.** — The referee cannot file an additional or amended report: *Headley v. Reed*, 2 Cal. 325. The report should state the facts found and conclusions of law: *Lambert v. Smith*, 3 Cal. 409; it should be like the decision of the court: *Hihn v. Peck*, 30 Cal. 285. It seems that when a jury may return a general verdict, a referee may find generally; at all events, it is his duty to report exactly what he is required to report: *Connor v. Morris*, 23 Cal. 451; *Hihn v. Peck*, 30 Cal. 285. A report that the referee is unable from want of evidence to find the value referred to him to determine is equivalent to finding no value whatever: *Montifiori v. Engels*, 3 Cal. 434. It seems that where the referee commits any errors of law or fact, the remedy is by appeal from the judgment entered upon his report: *Maicus v. Leony*, 113 N. Y. 619. See note to § 382.

*Motion for judgment on or to set aside referee's report.*

§ 388. [255.] The report shall be filed with the clerk. Either party may, within such time as may be prescribed by the rules of the court, or by special order, move to set the same aside, or for judgment thereon, or such order or proceeding as the nature of the case may require.

So much of this section of the code of 1881 as refers to proceedings in *term time* and in *vacation* is omitted, in view of the abolition of terms of court by the constitution.

*Court may affirm, modify, or set aside report, and give judgment accordingly.*

§ 389. [256.] The court may affirm or set aside the report, either in whole or in part. If it affirms the report, it shall give judgment accordingly. If the report be set aside, either in whole or in part, the court may make another order of reference, as to all or so much of the report as is set aside, to the original referees or others, or it may find the facts and determine the law itself and give judgment accordingly. Upon a motion to set aside a report, the conclusions thereof shall be deemed and considered as the verdict of the jury.

**Judgment on referee's report.** — *Mandamus* lies to compel the court to enter judgment on the report of a referee: *Russell v. Elliott*, 2 Cal. 246. If a report of a referee contain sufficient on which to base a judgment, it is the duty of the court below to enter judgment in accordance with the report, so far as it concerns the matter referred, and it has no right to entertain any objection whatever: *Headley v. Reed*, 2 Cal. 322. Exceptions to the ruling of the court on the referee's findings must be reserved, if the ruling is expected to be reviewed: *Poire v. Rocky Mt. T. Co.*, 7 Col. 588. Judgment on an award made by a referee after the time for making such award has expired is erroneous: *Hanner v. Coffin*, 1 Or. 99. In a suit in equity, where the court appoints a referee to take testimony and report the facts and law to the court, this court will not reverse the findings of facts by the referee unless the same are clearly against the weight of the testimony: *Fahie v. Lindsay*, 8 Or. 474. The report of a referee should be set aside if uncertain: *Doyle v. Reilly*, 85 Am. Dec. 582.

## CHAPTER VI

## OF EXCEPTIONS.

- § 390. Exception defined
- § 391. Requisites of — No particular form necessary.
- § 392. May be settled when taken, or embodied in bill.
- § 393. Time of settling bill.
- § 394. Exceptions after judgment.
- § 395. How settled if judge refuse.
- § 396. How settled when judge has ceased to hold office.
- § 397. When exceptions need not be noted.
- § 398. Exception unnecessary when.

*Exception defined.*

§ 390. An exception is an objection upon a matter of law to a decision or ruling made, either before or after judgment, by a court, tribunal, judge, or other judicial officer, in an action or proceeding. The exception must be taken at the time the decision is made, except as provided in sections three hundred and fifty-four and three hundred and ninety-seven. [*February 25, 1891, § 1.*]

This is the definition found in nearly all the codes.

*Requisites of — No particular form necessary.*

§ 391. [257.] No particular form of exception is required. The objection must be stated with so much of the evidence or other matter as is necessary to explain it, and no more. But when the exception is to the verdict or decision, upon the grounds of the insufficiency of the evidence to sustain it, the objection must specify the particulars in which such evidence is alleged to be insufficient.

**Bills of exceptions.** — The object of a bill of exceptions is to bring into the record what would not otherwise appear, so as to lay the ground for proceedings in error, and for the information of the appellate court: *State v. Drake*, 11 Or. 396. Without the bill of exceptions, the supreme court will not notice errors other than those which are disclosed by the face of the record: *Scott v. Cook*, 1 Or. 24.

Papers attached to the exception, and referred to therein as "hereunto annexed, marked exhibit A," etc., are sufficiently identified as parts of the bill; and this though the papers are not actually so marked: *Oregonian R'y Co. v. Wright*, 10 Or. 162.

The bill of exception is the proper means to bring in for consideration the acts and conduct of the court, but not of its officers. Where the objectionable act is that of an officer, the party should call upon the court for relief, and if not afforded, then except: *People v. Torres*, 38 Cal. 142. It is the proper mode of placing on record instructions given or refused: *Thompson v. Backenstoss*, 1 Or. 17; or irrelevant language addressed to the jury: *State v. Drake*, 11 Or. 396. A denial of a motion for a continuance can only be reviewed upon a bill of exceptions: *Jacks v. Buell*, 47 Cal. 162. It can-

not be used to raise questions respecting the weight of evidence: *Roberts v. Chan Tin Pen*, 23 Cal. 264. Where the judge tries the facts, the proper mode of reserving questions of law is to ask the court to decide as counsel may desire, and upon a refusal, to have it noted in the bill of exceptions: *Griswold v. Sharpe*, 2 Cal. 23.

**Exceptions lie, when and when not.** — Exception lies to acts and conduct of the court, not of its officers. Where the objectionable act is that of an officer, the party should call upon the court for relief, and if not afforded, then except: *People v. Torres*, 38 Cal. 142. It does not lie as to questions respecting the weight of evidence: *Roberts v. Chan Tin Pen*, 23 Cal. 264. Where the judge tries the facts, the proper mode of reserving questions of law is to ask the court to decide as counsel may desire, and, upon a refusal, to have it noted in the bill of exceptions: *Griswold v. Sharpe*, 2 Cal. 23. A denial of a motion for a continuance can only be reviewed upon a bill of exceptions: *Jacks v. Buell*, 47 Cal. 162. There is no distinction between legal and equitable actions respecting exceptions to evidence: *Norton v. Mallory*, 63 N. Y. 434. An objection that the complaint does not state a



cause of action may be available, even though the evidence is sufficient, if the point is properly made when the evidence is offered: *Rector v. Clark*, 78 N. Y. 21, 28. The direction of the court, given during the trial to commit a witness for perjury, is not the subject of an exception; if it is improper, and prejudices the party, he should move for a new trial: *Lindsay v. People*, 63 N. Y. 43. An exception will not lie to an expression of opinion by the court upon a matter of fact, if no binding instructions thereupon were given to the jury: *Massoth v. Delaware etc. Canal Co.*, 64 N. Y. 524; nor to the judge's finding of facts, where, upon a trial by the court, without a jury, the parties call upon the court to decide the whole question as matter of law: *McCall v. Sun Mutual Ins. Co.*, 66 N. Y. 505. The extent of cross-examination as to a collateral issue, affecting the credibility of a witness, is in the discretion of the court, and the limitation thereof is not a ground of exception, unless the discretion has been abused: *King v. New York etc. R. R. Co.*, 72 N. Y. 607. So where there is any evidence as to the loss of and search for a paper, in order to let in secondary evidence of its contents, the sufficiency of the evidence is addressed to the discretion of the trial court, and no exception lies to its decision: *McCulloch v. Hoffman*, 73 N. Y. 615. The correctness of a ruling by a referee at the trial, allowing an amendment of a pleading, must be tested by an exception: *Quimby v. Clafin*, 77 N. Y. 270. There is no distinction between legal and equitable actions in respect to the availability of exceptions to the admission of incompetent evidence: *Foote v. Beecher*, 78 N. Y. 155. An exception will not lie to the denial of a motion for a nonsuit, upon a jury trial, where the defendant's testimony supplied the defects in the plaintiff's testimony: *Painton v. Northern etc. R. R. Co.*, 83 N. Y. 7; nor to the ruling of the court, where, in the exercise of its discretion, it interposes and excludes the further examination of a witness with reference to a particular transaction, where, upon a jury trial, a party has already examined him at length upon the same subject: *Cowing v. Altman*, 79 N. Y. 167.

**Time and manner of taking exceptions.**—The exception must be taken at the time the error occurs, or it will be presumed to have been waived: *Brown & Co. v. Forest*, 1 Wash. 201; *Smith v. United States*, 1 Wash. 262; *Booth v. Cleveland Rolling Mill Co.*, 11 Hun, 278; *Adams v. Greenwich Ins. Co.*, 70 N. Y. 166; *Rogue River Mfg. Co. v. Walker*, 1 Or. 341; *Howell v. Adams*, 68 N. Y. 314. And unless an exception be reserved, even though an objection be made, the objection is waived, and cannot afterwards be raised: *Castro v. Gill*, 5 Cal. 42. The reason is, that the court may have an opportunity of correcting its ruling: *Letter v. Putney*, 7 Cal. 423; or the adversary may amend: *Goodale v. West*, 5 Cal. 341; *Posten v. Rasselte*, 5 Cal. 469.

The point of objection must be particularly stated. For instance, as to admission or rejection of evidence, the party must lay his finger on the point: *Frier v. Jackson*, 8 Johns. 496; *Jackson v. Cadwell*, 1 Cow. 622; *Whiteside v. Jackson*, 1 Wend. 418; *Waters v. Gilbert*, 2 Cush. 27; *Covillaud v. Tanner*, 7 Cal. 38; *Kiler*

*v. Kimball*, 10 Cal. 268; *People v. Glenn*, 10 Cal. 37; *Voorman v. Voight*, 46 Cal. 392; and must specify the ground of his objection: *People v. Chee Kee*, 61 Cal. 404. Exceptions to a charge ought to point out the specific portions excepted to: *Hicks v. Coleman*, 25 Cal. 146; *St. John v. Kidd*, 26 Cal. 263; *Sill v. Reese*, 47 Cal. 348; *Robinson v. W. P. R. R. Co.*, 48 Cal. 425; *Rider v. Edgar*, 54 Cal. 127; though perhaps this is otherwise where the different portions are manifestly inconsistent: *McCreery v. Everding*, 44 Cal. 246; in which case it was held that an exception "to each of the instructions requested by defendant" was sufficient.

It is sufficient for the opposite party to except generally to instructions given at the request of the opposite party; but an exception to the charge, given by the court of its own motion, must specify the proposition which is deemed objectionable: *Shea v. P. & B. V. R. R. Co.*, 44 Cal. 415. It is sufficient, however, to except "to that part of the charge about probable cause," reciting the first sentence employed by the court in treating of that subject: *Rogers v. Mahoney*, 62 Cal. 611.

Where a portion of the charge which is excepted to is erroneous, the failure to except to the other portions, presenting similar erroneous propositions, which were disputed upon the trial, does not cure the error in the part excepted to: *Tyler v. Brock*, 68 N. Y. 418. An exception to "the latter part of the charge" in reference to a subject named, without specifying what particular part, is sufficient, where there is substantially only one proposition in that portion of the charge: *Wilkinson v. Gill*, 74 N. Y. 63. Where a portion of the charge is correct, a general exception to the entire charge will not be sustained: *Doyle v. New York etc. Infirmary*, 80 N. Y. 631. A general exception to the charge to the jury is unavailing, unless the entire part of the charge covered by it is erroneous: *Scheive v. Mulray*, 14 Week. Dig. 384; *Mosher v. City of Auburn*, 14 Week. Dig. 477. Errors in a refusal to charge must be shown affirmatively, and can only be founded upon a refusal to charge some specific proposition: *Distin v. Rose*, 69 N. Y. 122.

**Repetition of exception.**—When the same evidence has been several times objected to, and ruled out by the court, there is no need to repeat the objection on every repetition of the question. The court may properly treat the objection as continuing on every repetition of the question, unless something transpires to show that it is waived; nor need the party renew it on motion for a new trial, or in arrest of judgment, in order to preserve it: *Tolmie v. Dean*, 1 Wash. 46; *Dilleber v. Home L. Ins. Co.*, 69 N. Y. 256; *People v. Melvane*, 38 Cal. 617.

**Points not saved by exceptions cannot be raised on appeal:** *Holden v. New York etc. Bank*, 72 N. Y. 286; *Smith v. Bodine*, 74 N. Y. 30; *Jordan v. National S. & L. Bank*, 74 N. Y. 467; *Laughran v. Smith*, 75 N. Y. 205; *Thayer v. Marsh*, 75 N. Y. 340. The bill of exceptions alone affords the appellate court information of what evidence was before the jury, and what instructions were given them: *Brown v. Forrest*, 1 Wash. 201; and it must show whether instructions given or refused were pertinent to the case; and it should con-



tain all of the instructions, so that the appellate court may determine whether particular instructions complained of were erroneous; *Brown v. Forest*, 1 Wash. 201; *Yelm Jim v. Washington Territory*, 1 Wash. 63; and it must show the evidence to which the instructions pertain: *Thompson v. Washington Territory*, 1 Wash. 547; *City of Seattle v. Buzby*, 2 Wash. 25. Where the bill did not contain all of the instructions, and failed to show that the instructions complained of upon a particular point were all the instructions given upon that subject, the court would not review the action of the trial court: *Oregon R'y & Nav. Co. v. Galliter*, 2 Wash. 70. And the appellate court will not notice an *ex parte* affidavit filed with the papers in the case, but not embodied in the bill of exceptions: *Fox v. Territory*, 2 Wash. 297.

**Form of exception and statement of evidence.** — The rule generally in regard to the bill of exceptions is thus stated in *Estate of Page*, 57 Cal. 238, 239: "To make it [an exception] effectual in a bill of exceptions, the objection should be stated, and also the ground upon which it was made. If it was not upon grounds of error of law, the proper mode in an action tried by the court without a jury is to

ask the court to decide what counsel may consider an applicable principle of law, and upon refusal, to have it noted in the bill of exceptions: *Griswold v. Sharp*, 2 Cal. 23; *Touchard v. Crow*, 20 Cal. 163. But the mere statement in a bill of exceptions that a party excepted to a decision, unaccompanied by the objection of the court and the grounds — whether of law or of fact — upon which it was made, does not constitute an exception upon which any question involved is examinable by this court; and under such circumstances we can only deal with such questions as may arise upon the judgment roll."

*Deficiencies in the evidence must be specifically stated: Estate of Page*, 57 Cal. 238; *Perham v. Kuper*, 61 Cal. 331; *Ruler v. Edgar*, 54 Cal. 127. The bill of exceptions should show only so much of the evidence as is sufficient to explain the applicability of the instruction objected to, or requested and refused; and the evidence need not necessarily be set forth in detail: *City of Seattle v. Buzby*, 2 Wash. 25; *Richards v. Fanning*, 5 Or. 356; *People v. Getty*, 49 Cal. 584. Where it is proposed to show an abuse of discretion, the bill must contain all evidence upon which such conclusion was founded: *State v. Jackson*, 9 Or. 457.

*May be settled when taken, or embodied in bill.*

§ 392. [258.] A bill containing the exception to any ruling may be presented to the judge at the time the ruling is made, or the exception may be entered on the judge's minutes and afterward settled. The bill must be conformable to the truth, or be at the time corrected until it be so, and signed by the judge and filed with the clerk.

**Signing by judge.** — Although certified by the attorneys on both sides to be correct, a statement does not become a bill of exceptions unless signed by the judge: *Singer Mfg. Co. v. Graham*, 8 Or. 17. Where the judge refuses to sign the bill of exceptions, the proper remedy is by *mandamus*, and no delay of the judge will affect the appellant: *Ah Lep v. Gong Choy*, 13 Or. 205.

The bill of exceptions should be presented immediately after trial, but may be settled and allowed at any reasonable time thereafter, at the convenience of the judge: *Ah Lep v. Gong Choy*, 13 Or. 205.

Unless the bill is presented to and settled by the judge, it will not be noticed on appeal: *Warner v. Holman*, 24 Cal. 229. It may be signed after it is filed: *Marble v. Fay*, 49 Cal. 585.

While the naming of a day for the settlement of a bill of exceptions might not, in case of notice to the opposite party, be sufficient without also designating an hour, yet when a day for such purpose is stipulated for by the parties, neither can complain that the hour of hearing is not known: *City of Seattle v. Buzby*, 2 Wash. 25.

*Time of settling bill.*

§ 393. [259.] If a bill is not presented at the time of ruling, a bill containing the exceptions, or any of them, relating to any ruling had up to the time of the entry of judgment, may, upon three days' notice to the adverse party, at any time after such ruling is made, and within ten days after the entry of judgment, or such other time as may be fixed by the court or judge, be presented to the judge and settled.

*Exceptions after judgment.*

§ 394. Exceptions to any decision made after judgment may be presented to the judge at the time of such decision, and may be settled or noted as provided in section three hundred and ninety-

two, and a bill thereof may be presented and settled afterward, as provided in section three hundred and ninety-three, and within like periods after entry of the decision. [*February 25, 1891, § 2.*]

*How settled if judge refuse.*

§ 395. [261.] If the judge, in any case, refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to approve the same. The application may be made in the mode and manner and under such regulations as that court may prescribe, and the bill, when proven, must be certified by a justice thereof as correct, and filed with the clerk of the court in which the action was tried, and when so filed, it has the same force and effect as if settled by the judge who tried the cause.

**Refusing to settle bill of exceptions.** — "Refuse" means "improperly": *Gallardo v. A. & P. T. Co.*, 49 Cal. 510.

A mistake in entitling a bill of exceptions is not sufficient reason for the judge's refusal to settle it: *People v. Crane*, 60 Cal. 279, where the document sought to be settled was entitled "A Statement on Appeal."

**Petition** must be presented before the final submission of the case. The appellant cannot incorporate in his transcript *ex parte* affidavits, etc., and, after the final submission of the case, bring the question before the su-

preme court for the first time in his brief. The motion on the petition is an original proceeding. The petition must be in writing, setting forth at length the exceptions which were taken at the trial and not allowed by the judge, and so much of the evidence as may be necessary to illustrate them. It should be presented with the record. In the absence of any general rules, the court will, upon the presentation of the petition, take action: *Wormouth v. Gardner*, 35 Cal. 228, 229. See application of section: *Estate of Hill*, 62 Cal. 186.

*How settled when judge has ceased to hold office.*

§ 396. [262.] If the judge who presided at the trial ceases to hold office before the bill is tendered or settled, he may nevertheless settle such bill, or the party may, as provided in the preceding section, apply to the supreme court to prove the same.

*When exceptions need not be noted.*

§ 397. [263.] When a cause has been tried by the court or by referees, and the decision or report is not made immediately after the closing of the testimony, the decision or report shall be deemed excepted to, on a motion for a new trial, or on appeal, without any special notice that an exception is taken thereto.

*Exception unnecessary when.*

§ 398. No exception need be taken or allowed with respect to any decision or ruling upon a matter of law, when the same is entered in the journal or made wholly upon matters in writing and on file in the cause. [*February 25, 1891, § 3.*]

**Exception, when not necessary.** — No exception need be taken as to matters apparent on the face of the record: *Scott v. Cook*, 1 Or. 24. If the record contains internal evidence that a document on which the decision rests is a forgery, the objection may be taken for the first time in the appellate court: *Fuller v. Ferguson*, 26 Cal. 575. Where a complaint shows

on its face that plaintiff is not entitled to relief, the defect may be taken advantage of in the appellate court, even though no demurrer be filed: *White v. Pratt*, 13 Cal. 521. When a party stands by a pleading to which a demurrer is sustained, no exception to the decision is requisite: *Smith v. Lawrence*, 38 Cal. 27.

## CHAPTER VII.

## OF NEW TRIALS.

§ 399. New trial defined.

§ 400. Upon what grounds new trial may be granted.

§ 401. Manner of specifying grounds of motion.

§ 402. Not granted on account of smallness of damages when.

§ 403. In what cases affidavits may be used on a motion.

§ 404. Notice of intention, when filed, and what to contain — Service of affidavits.

§ 405. What affidavits for motion must show.

*New trial defined.*

§ 399. [275.] A new trial is a re-examination of an issue in the same court after a trial and decision by a jury, court, or referees.

Definition quoted in *Knight v. Roche*, 56 Cal. 15, 17; *Benjamin v. Stewart*, 61 Cal. 605; *Whittenbock v. Bellmer*, 62 Cal. 559.

*Upon what grounds new trial may be granted.*

§ 400. [276.] The former verdict or other decision may be vacated and a new trial granted, on the motion of the party aggrieved, for any of the following causes materially affecting the substantial rights of such party:—

1. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

2. Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors.

3. Accident or surprise which ordinary prudence could not have guarded against.

4. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial.

5. Excessive damages, appearing to have been given under the influence of passion or prejudice.

6. Error in the assessment of the amount of recovery, whether too large or too small, when the action is upon a contract, or for the injury or detention of property.

7. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

8. Error in law occurring at the trial and excepted to at the time by the party making the application.



**New trial, generally.** — A new trial should certainly never be granted when it appears that it would avail nothing: *Tolmie v. Dean*, 1 Wash. 46. The party alleging error in granting or refusing a new trial must make the error affirmatively appear; i. e., he must show an abuse of discretion: *Duell v. Bear R. Co.*, 5 Cal. 86; *Jacks v. Cooke*, 6 Cal. 164; *Weddle v. Stark*, 10 Cal. 301; *Hansel v. Barnhisel*, 11 Cal. 340; *Bensley v. Atwill*, 12 Cal. 240; *McGarrity v. Byington*, 12 Cal. 432; *Peters v. Foss*, 16 Cal. 358; *Quinn v. Kenyon*, 22 Cal. 82; *Peterie v. Bugby*, 24 Cal. 422; *Mauge v. Heringli*, 26 Cal. 581; *Hawkins v. Reichert*, 28 Cal. 535; *Hall v. "Emily Banning,"* 33 Cal. 525. The supreme court will not presume error or abuse of discretion of the lower court in granting or refusing a new trial: *Thompson v. Morrow*, 2 Cal. 99. The court may refuse a new trial though the parties assent: *Phekin v. Ruiz*, 15 Cal. 90. When the appeal is from an order granting a new trial, the burden is on the appellant to show that the discretion accorded to the trial court in such matters has been improvidently exercised, and that the rules of law governing such motions have been violated: *Hobler v. Cole*, 49 Cal. 251. A new trial will not be granted on grounds contradictory to the admissions on record of the moving party: *Vandall v. S. F. Dock Co.*, 40 Cal. 92.

A motion for a new trial for matters outside of the record is discretionary, and will not be reviewed: *State v. McDonald*, 8 Or. 113. Where on appeal the record shows that the motion was made upon several grounds, without showing upon which of them the action of the court was based, the order will not be reversed if it was within the discretion of the court to make it upon any of the grounds stated: *Oullahan v. Starbuck*, 21 Cal. 413. An objection good as a ground for a new trial on the part of one party only, if not raised by him, cannot be raised by another party: *Beach v. Holydon*, 66 Cal. 187. In *Lake v. Lake*, 18 Nev. 361, a divorce proceeding, new trial of the issues relating only to the community property was ordered.

**Irregularities.** — Going to trial without first disposing of a demurrer to the answer, where no objection was made at the time of trial, is not ground for a new trial for irregularity: *Calderwood v. Tevis*, 23 Cal. 335. Rendering judgment by default, *ex parte*, at nine, A. M., on a particular day, against defendants summoned to appear in the court of first instance at ten, A. M., on that day, was held an irregularity: *Parker v. Shephard*, 1 Cal. 131. It was held irregular for the judge to grant a new trial, and then immediately proceed to render a contrary judgment without hearing or notice: *Mitchel v. Hackett*, 14 Cal. 667. Where the judge stated in the course of a trial before a jury, with regard to one of the plaintiff's witnesses, who was being cross-examined, that she was one of the most respectable women in his neighborhood, which he afterwards qualified by saying he did not mean to say that, but that she was a woman of respectability, the supreme court considered that the judgment did not depend in any material degree upon the testimony of this witness. If it had, they would have reversed it: *McMinn*

*v. Whelan*, 27 Cal. 320. Where the verdict must have been given under a state of great excitement, preventing a fair and just trial, it was sufficient to ground an order for a new trial: *People v. Acosta*, 10 Cal. 196. The fact that after a verdict of guilty has been rendered the accused ascertains for the first time that before the jury was impaneled a juror had formed and expressed an opinion as to his guilt, is not a ground for a new trial: *People v. Fair*, 43 Cal. 137; *People v. Mortimer*, 46 Cal. 120. An omission to rule upon an objection properly made and not waived is an "irregularity of court": *Estate of Brooks*, 54 Cal. 473; *Dewey v. Frank*, 62 Cal. 343. If plaintiff, instead of going to trial, moves for and obtains a judgment on the pleadings, he cannot afterwards complain of the judgment, though it be for a nominal amount: *Hudlam v. Ott*, 2 Wash. 165.

The admission of immaterial or irrelevant evidence is not ground for a new trial, unless it has prejudiced the party in the mind of the court or jury: See *Winkley v. Foye*, 33 N. H. 171; 66 Am. Dec. 715, and the very elaborate note on this topic in the latter report, pages 717-720.

**Misconduct of jury.** — As to misconduct of the jury in separating during the trial or in communicating with other persons concerning the case, against the admonition of the court, see the notes to §§ 358, 359, 362.

On a trial for felony, if it is shown either that a juror has engaged in conversation with others on the subject of the charge upon which he is to pass, or has voluntarily listened to the remarks of others, addressed to himself or third parties, upon matters connected with the charge, misconduct sufficient to authorize the court to set the verdict aside is *prima facie* established: *People v. Turner*, 39 Cal. 375; *People v. Brannigan*, 21 Cal. 340; *McCann v. State*, 9 Smedes & M. 465; *State v. Prescott*, 7 N. H. 288. Where one of the jury addressed defendant's counsel, and said that there was no use in the lawyers occupying so much time examining witnesses and trying to humbug the jury, and that the one who made the shortest speech would get a verdict, that was considered by the supreme court not to be sufficient misconduct to justify a new trial: *Taylor v. Cal. Stage Co.*, 6 Cal. 229; see *People v. Dennis*, 39 Cal. 625.

Where a newspaper slip was handed by a deputy sheriff to a jury during the trial, containing matters relating to the trial but not in evidence, and was perused by them, and the court instructed the jury that the slip should be wholly disregarded by them, and it appeared that the perusal could not have prejudiced the losing party, it was held not to be such misconduct as to be ground for a new trial: *Thrall v. Smiley*, 9 Cal. 529.

Where the sheriff was asked by one of the jurors if they were to be governed by the instructions of the court, and answered that he would ask the judge, which he did, whereupon the judge said that "the instructions were for them to be governed by, or they would not have been given," which answer the sheriff repeated to the jury, it was held there was no misconduct of the jury: *Nelson v. Mitchell*, 10 Cal. 92. Where, in a criminal case, the jury were taken to a hotel to get their dinner, and

the proprietor of the hotel spoke to some of the jurors, and told them to convict the defendant, it was held that, however improper the passing remark of the hotel proprietor was, it did not constitute misconduct of the jury: *People v. Brannigan*, 21 Cal. 342.

The mere retiring by several jurors for a few moments, with the permission of the sheriff when in his custody, out of his sight, to obey a call of nature, without communicating with any one, is no misconduct: *People v. Moore*, 41 Cal. 238. A verdict arrived at by "chance" is bad; and the word "chance" in the statute is used in its popular sense: *Good v. Cody*, 1 Wash. 329.

In a case where the jury agreed amongst themselves that each member should set down a sum according to his own judgment, that the aggregate should be divided by twelve, and that the quotient should be returned as the verdict, which was done, the supreme court said the rule was, that if such means are adopted merely to arrive at a proper result for the purpose of determining what the verdict should be, without being bound thereby, and the jury afterwards agreed upon such sum as their verdict, it would be good. But if the jury resorted to this or any other similar means, and agreed to be bound by the contingent result, without reserving to themselves the right to dissent, the verdict would be bad: *Wilson v. Berryman*, 5 Cal. 46; 63 Am. Dec. 78; *Good v. Cody*, 1 Wash. 329; see *Dana v. Tucker*, 4 Johns. 487; *Harvey v. Rickett*, 15 Johns. 87; *Smith v. Cheetham*, 3 Caines, 57; *Grinnell v. Phillips*, 1 Mass. 541; *Warner v. Robinson*, 1 Root, 194; *Roberts v. Fails*, 1 Cow. 238; *Turner v. Tuolumne W. & M. Co.*, 25 Cal. 399; *Boyce v. Cal. Stage Co.*, 25 Cal. 473; *Donner v. Palmer*, 23 Cal. 47; *Lery v. Brannan*, 39 Cal. 489.

The drinking of liquors during the trial may or may not be cause for a new trial. It seems that if it consisted of such a course as would affect the ability of the jurors to deliberate clearly, the verdict would be set aside, or the misconduct be ground for a new trial: See *People v. Gray*, 61 Cal. 164, and cases cited.

**Surprise.** — The surprise or accident which is ground for a new trial, it will be seen, is such as ordinary prudence could not have guarded against, and therefore, where one by the exercise of ordinary diligence might have avoided the effects of what he complains as the ground of his surprise, a new trial will not be granted on this ground: *Stewart Mining Co. v. Coulter*, 3 Utah, 174; *Landrum v. Farmer*, 7 Bush, 46; but any unexpected situation in which a party may be placed, without any default on his part, and which will be injurious to his interests, may be termed "surprise" entitling him to a new trial: *Oakley v. Sears*, 7 Rob. (N. Y.) 111; and see *Hatfield v. Macy*, 52 How. Pr. 193; *Fretwell v. Laffoon*, 77 Mo. 26; *Platt v. Munroe*, 34 Barb. 291.

A party cannot move for a new trial on this ground unless the surprise is conclusively shown by the affidavits: *McDonald v. Bear River Co.*, 13 Cal. 220; and it appears that the fact or facts from which the surprise resulted had a material bearing upon the case, and that the verdict may be mainly attributed to their effect: *Hartwright v. Budham*, 11 Price, 383. Upon this ground new trials should be granted

with great caution. A party claiming to have been injured must show that the surprise has not resulted in any degree from his own fault or negligence: *Royers v. Huie*, 1 Cal. 429; 54 Am. Dec. 300; *Brooks v. Lyon*, 3 Cal. 114; *Dewey v. Frank*, 62 Cal. 343; and must claim his relief at the earliest opportunity. If he can relieve himself from his embarrassment in any mode, either by a nonsuit: *Brown v. Smith*, 10 Cal. 510; or an continuance: *Ferrer v. Home Mutual Ins. Co.*, 47 Cal. 416; *Dewey v. Frank*, 62 Cal. 343; or the introduction of other testimony, or otherwise, — he must not take the chance of a verdict: *Live Yankee Co. v. Oregon Co.*, 7 Cal. 42; but he must at once fortify his position by resorting to all available modes of present relief: *Schellhouse v. Ball*, 29 Cal. 607. And he must show not only a surprise, but that he is injured by it, and what case he can establish in the event of a new trial: *Patterson v. Ely*, 19 Cal. 35; *Blake v. Howe*, 1 Aiken, 306; 15 Am. Dec. 681; *Taylor v. Cal. Stage Co.*, 6 Cal. 228; *Cook v. De la Guerra*, 24 Cal. 240; *People v. Jocelyn*, 29 Cal. 564; *Brooks v. Douglas*, 32 Cal. 209. But if at the time the party cannot possibly make a showing sufficient for a continuance, he need not move for one: *Spencer v. Vigneaux*, 20 Cal. 450.

As examples of what will constitute surprise are, the sudden departure of a witness from court, the unexpected adverse testimony of the party's witness, and sometimes any unexpected testimony: *Oakley v. Sears*, 7 Robt. 111; and see *Egan v. Delaney*, 16 Cal. 87; *Sultan v. Sherwood*, 18 Nev. 454; *Russell v. Reed*, 32 Minn. 45. Thus where an original record was lost, and the party defeated was misled by a certified copy used on the trial, which was subsequently discovered not to conform to the original in important points, but the correctness of which he had no reasonable ground for disputing at the time, this was held to be a proper case of legal surprise for which a new trial might be granted, unless it was clear from the record that the errors complained of would not affect the result: *Farnham v. Jones*, 32 Minn. 7; and see *Goldstein v. Lowther*, 81 Ill. 399. But the general rule is, that neither party is entitled to a new trial on the ground that he was surprised by the testimony of the adverse party: *Travis v. Barkhurst*, 4 Ind. 171; *Helm v. First National Bank*, 91 Ind. 44; *Gardner v. State*, 94 Ind. 489; *Delaney v. Brunette*, 62 Wis. 615; *Beal v. Coddington*, 32 Kan. 107; *Dimmey v. Railroad Co.*, 27 W. Va. 32; *Atkinson v. Conner*, 56 Me. 546; *Blake v. Madihan*, 65 Mo. 552; *Beckford v. Chipman*, 44 Ga. 543; *Whiteman v. Leslie*, 54 How. Pr. 494.

Reliance upon the unsworn statement of an adversary's witness as to what will be his testimony is not the exercise of ordinary prudence; and surprise resulting therefrom, whereby a party goes to trial without witnesses to prove the real truth, is not ground for a new trial: *Pittsburgh etc. R. R. Co. v. Sponier*, 85 Ind. 165; and see *Klockenbaum v. Pierson*, 22 Cal. 163; *Armstrong v. Davis*, 41 Cal. 499. But where a party to a suit, in order to influence the action of his adversary, tells him that certain facts will not be controverted on the trial, and the latter relies on such statement and omits to produce witnesses to prove such facts, he may be entitled to a new



trial on the ground of surprise which ordinary prudence could not guard against: *Haynes v. State*, 45 Ind. 424. So where a party in advance of the trial promises not to call a particular witness, and his adversary, in reliance on the promise, neglects to subpoena impeaching witnesses, the calling of such witness in violation of the promise is such a surprise as will justify the court in granting a new trial: *Tyler v. Hoornbeck*, 48 Barb. 198; and see *Continental National Bank v. Adams*, 67 Barb. 318.

The mere fact that a party's own witness gives testimony different from what the party expected him to give does not furnish adequate ground for granting a new trial on the ground of surprise: *Guard v. Risk*, 11 Ind. 156; *Graeter v. Fowler*, 7 Blackf. 554; *Sprout v. Fire Ins. Co.*, 1 Lans. 71; *Estate of Cartery*, 56 Cal. 470; *Schultz v. Third Ave. R. R. Co.*, 15 Jones & S. 285. But the cases agree that a party may be entitled to a new trial on the ground of surprise, caused by his own witness testifying differently from what he had the right reasonably to expect, where no want of diligence in guarding against such surprise is attributable to him, and where it is shown that he is injured thereby: *Todd v. State*, 25 Ind. 212; *Oakley v. Sears*, 7 Robt. 111; *Wilson v. Brandon*, 8 Ga. 136; *Rodriguez v. Comstock*, 24 Cal. 85. The application for a new trial should, however, be denied, where, from the motion or the evidence, it appears that the applicant did not use diligence to procure the evidence or to avoid the surprise: *Ex parte Walls*, 64 Ind. 461; *Rockford etc. R. R. Co. v. Rose*, 72 Ill. 183; there must have been no want of skill, care, or attention: *Hatfield v. Macy*, 52 How. Pr. 193; *Nelson v. Waters*, 18 Ark. 570. It is even held that the applicant for a new trial on the ground of surprise at testimony given by his own witness must show that he has used due diligence or care to direct the attention of the witness to the particular point of difference: *Howell v. Howell*, 37 Mo. 124. And it should appear that the consequences can be remedied on another trial: *Delmas v. Martin*, 39 Cal. 555; *Stellwagen v. Life Ass'n*, 14 Blatchf. 349. So it must be apparent that the party has not been guilty of laches in making his application, and that he has acted in good faith in omitting to apply for relief at an earlier stage in the proceedings: *Id.*; *Ames v. Howard*, 1 Sum. 482; *Schweizer v. Raymond*, 6 Abb. N. C. 378; *Mehan v. Railroad Co.*, 55 Iowa, 305.

A new trial will not be granted because of the fact that a witness made a mistake in his testimony except in peculiar and extraordinary cases: *O'Kelly v. Fulker*, 71 Ga. 775; *Scofield Rolling Mill Co. v. State*, 54 Ga. 635; nor is it ground for a new trial that a witness has testified without being sworn, unless it appears that the evidence was material and not true, and that the party against whom the witness testified was not guilty of laches in permitting him to testify without being sworn: *Sheeks v. Sheeks*, 98 Ind. 288.

A party cannot be surprised by the other making good by proof a fact distinctly put in issue by the pleadings: *Armstrong v. Davis*, 41 Cal. 499. Nor is it a ground of legal surprise for a party to produce oral testimony instead of depositions that have been taken: *Heath v. Scott*, 65 Cal. 548. A mistake of law cannot

operate as a surprise: *Fuller v. Hutchins*, 10 Cal. 526; 70 Am. Dec. 746; *Klockenbaum v. Pierson*, 22 Cal. 163.

If a party omit to pay his attorney after being informed that he will not conduct the case unless his fees are paid, and judgment goes by default in consequence, the party is not "surprised": *Goldstone v. Sperling*, 39 Cal. 448.

*Motions for new trials on grounds of surprise* are addressed to the sound discretion of the trial court, and its action will not be disturbed, unless it is manifest that there was an abuse of such discretion: *Hill v. Denslinger*, 61 Iowa, 240; *Coker v. State*, 20 Ark. 53; *Shepherd v. State*, 34 Ark. 659; and see *Stewart v. Town of Dunlap*, 61 Iowa, 248; *Evans v. Rugee*, 63 Wis. 31; *Williams v. Montgomery*, 60 N. Y. 648; *Railroad Co. v. Hays*, 15 Neb. 224; *Sultan v. Sherwood*, 18 Nev. 454.

**Accident.**—The supreme court will not disturb an order granting a new trial on the ground of accident, unless there was abuse of discretion on the part of the court below: *Moore v. Los Angeles Infirmary*, 49 Cal. 669; *Smith v. Richmond*, 15 Cal. 501; *Nooney v. Mahoney*, 30 Cal. 226.

**Newly discovered evidence.**—To be ground for a new trial, newly discovered evidence must be such as has come to the knowledge of the party since the trial: *First Nat. Bank v. Heaton*, 6 Thomp. & C. 37; *Darbee v. Ellwood*, 2 Hun, 599; and it must be shown that it was not owing to want of due diligence that it was not discovered sooner: *Id.* It is not good ground for a new trial, that the defendant discovered material testimony at too late a period to produce the same at the trial; he should have moved for a continuance: *Berry v. Metzler*, 7 Cal. 418. It is said that motions of this kind are regarded with distrust, and a strict showing of diligence is required: *Lander v. Miles*, 3 Or. 40; and if it appears that with due diligence the evidence could have been discovered, the motion will be denied: *Reere v. Stuller*, 54 How. Pr. 492. Mere want of recollection of a fact has been held insufficient ground for a new trial: *Gautier v. Douglas Mfg. Co.*, 52 How. Pr. 325; *Hatfield v. Macy*, 52 How. Pr. 193; and so evidence overlooked, which was in the applicant's books, is insufficient: *Burkett v. Taylor*, 9 Rep. 623. There must not merely be an allegation, but proof, of diligence, to discover the evidence and produce it at the trial: *Jacks v. Cooke*, 6 Cal. 164; *Weiner v. Lowery*, 11 Cal. 113; *Klockenbaum v. Pierson*, 22 Cal. 164; *People v. Miller*, 33 Cal. 102; *Jones v. Jones*, 38 Cal. 585; *Butler v. Vassault*, 40 Cal. 76; *Jones v. Singleton*, 45 Cal. 92; *People v. Lewis*, 61 Cal. 367; *Moran v. Abbey*, 63 Cal. 56; *People v. Lyle*, 4 West Coast Rep. 349. Though the trial court grant the motion, yet the order will be reversed, if it clearly appear that diligence to obtain the evidence had not been used: *Hendy v. Desnomd*, 62 Cal. 260.

A new trial should not be allowed for newly discovered evidence, unless it is apparent to the court that such evidence would alter the result: *Leschi v. Washington Ty.*, 1 Wash. 14; *McKilber v. Manchester*, 1 Wash. 255; and the showing that the result would be different on another trial should be decisive to a reasonable certainty: *McKilber v. Manchester*, 1 Wash.



255; *Darbee v. Ellwood*, 2 Hun, 599; *Shulz v. Third Ave. R. R. Co.*, 47 N. Y. Sup. Ct. 285. Newly discovered evidence going merely to discredit or impeach a witness is not sufficient to authorize the granting of a new trial: *Territory v. Latshaw*, 1 Or. 146; *Carpenter v. Coe*, 67 Barb. 411.

The evidence which would justify a new trial must be really new, and not merely cumulative: *McKilver v. Manchester*, 1 Wash. 255; *Cutler v. Steamer Columbia*, 1 Or. 101; *Lander v. Miles*, 3 Or. 40; *Gaven v. Hellwig*, 5 Cal. 342; *Taylor v. Cal. S. Co.*, 6 Cal. 230; *Live Yankee Co. v. Oregon Co.*, 7 Cal. 40; *Spencer v. Doane*, 23 Cal. 420; *Aldrich v. Palmer*, 24 Cal. 515; *Meyer v. Mowry*, 34 Cal. 516; *Levitzsky v. Johnson*, 35 Cal. 43; *Doyle v. Sturli*, 38 Cal. 456; *Armstrong v. Davis*, 41 Cal. 499; *People v. McDonnell*, 47 Cal. 138; *Reed v. Clark*, 47 Cal. 204; *Wilson v. S. P. R. R. Co.*, 62 Cal. 164. Though in some degree cumulative, if it tends to show a different state of facts, a new trial may be granted: *Cooper v. Eastern Tr. Co.*, 11 Rep. 234. But if the evidence be cumulative, the opposing party should set forth in his affidavits so much of the evidence given at the trial as will make it so appear: *Hobler v. Cole*, 49 Cal. 251.

To make a showing entitling the applicant to a new trial, the evidence must be set forth in the affidavits, and the affidavits of the witnesses themselves obtained, if possible: *Arnold v. Skiggs*, 35 Cal. 684; *Rogers v. Huie*, 1 Cal. 429; *Perry v. Cochrane*, 1 Cal. 180; *Taylor v. Cal. S. C. Co.*, 6 Cal. 228; *Bate v. Miller*, 63 Cal. 233. If the affidavits of the witnesses cannot be obtained in time, an extension must be asked: *Jennie Lind Co. v. Bower*, 11 Cal. 195; *Case v. Colding*, 38 Cal. 194; see *Daniel v. Daniel*, 2 J. J. Marsh. 52. Affidavits showing newly discovered evidence, but opposed by counter-affidavits which expose them to the suspicion of bad faith, and not showing a reasonable presumption that the evidence, if produced, would change the result, are not sufficient: *Merk v. Gelzhueuser*, 50 Cal. 631. And it is held that if moving and opposing affidavits are conflicting, the motion for a new trial should be denied: *Chapman v. O'Brien*, 39 N. Y. Sup. Ct. 244.

In decisions upon a motion for this cause, much must be left to the discretion of the judge below, and the supreme court will interfere with great reluctance: *Baker v. Joseph*, 16 Cal. 180; *O'Brien v. Brady*, 23 Cal. 244.

**Excessive damages.** — The court will not set aside a verdict on the ground that the damages are excessive unless the amount is so disproportionate to the injury proved as to make it clear that the jury acted under the influence of passion or prejudice: *Payne v. P. M. S. S. Co.*, 1 Cal. 33; *George v. Law*, 1 Cal. 365; *Potter v. Seale*, 5 Cal. 411; *Taylor v. Cal. Stage Co.*, 6 Cal. 230; *McCarty v. Fremont*, 23 Cal. 196; *Kinsey v. Wallace*, 36 Cal. 463; *Wheaton v. N. B. & M. R. R. Co.*, 36 Cal. 591; *Wilson v. Fitch*, 41 Cal. 386; *Myers v. San Francisco*, 42 Cal. 215; *Karr v. Parks*, 44 Cal. 47; *Russell v. Dennison*, 45 Cal. 338. Where the damages awarded are largely in excess of those claimed, the court may grant a new trial, if not asked to have the jury remanded to put their verdict in proper form: *Gurlock v. Bower*, 62 Cal. 65. An objection to excessive damages can only be

made available on motion for new trial, and cannot be raised for the first time in the appellate court: *Douglas v. Kraft*, 9 Cal. 562; *Duff v. Fisher*, 15 Cal. 380; *Van Pelt v. Littler*, 14 Cal. 194; *Campbell v. Jones*, 41 Cal. 518.

The court may put the plaintiff under terms, to reduce the verdict by consent, or that a new trial shall be had: *Benedict v. Cozzens*, 4 Cal. 383; *Battelle v. Connor*, 6 Cal. 140; *Chapin v. Bourne*, 8 Cal. 296; *Kinsey v. Wallace*, 36 Cal. 463.

In *Benjamin v. Stewart*, 61 Cal. 605, under a similar code section of this, it was determined that it could not be urged as an independent ground for a new trial that insufficient damages were given through passion and prejudice of the jury. Insufficient damages may perhaps be a cause for moving for a new trial on the ground of insufficiency of the evidence to justify the verdict: *Benjamin v. Stewart*, 61 Cal. 605.

**Insufficiency of evidence to justify verdict or decision.** — Where a case is tried before a jury, and the judge is satisfied that the verdict is clearly against the weight of the evidence, it is his duty to set it aside upon motion for a new trial, even though there was some conflict in the testimony: *Dickey v. Davis*, 39 Cal. 565; *Sherman v. Mitchell*, 46 Cal. 577. But this rule does not apply to the appellate court, which will not, in cases where the evidence is conflicting, grant a new trial because the verdict is against the weight of evidence: See case last cited. The motion for a new trial for insufficiency of the evidence to justify the verdict or finding of fact is addressed to the sound discretion of the court, and will not be reviewed on appeal, except, of course, for a gross abuse of discretion: *Gerold v. Brunswick etc. Co.*, 67 Cal. 124; *Hallock v. City of Portland*, 8 Or. 29; *State v. Mackey*, 12 Or. 154; and this is on the principle that the supreme court will not disturb the verdict of a jury upon a question of fact, where the evidence is conflicting and no rule of law appears to have been violated: *Johnson v. Pendleton*, 1 Cal. 132; *Dwinelle v. Henriquez*, 1 Cal. 388; *Amsby v. Dickhouse*, 4 Cal. 103; *Crooke v. Forsyth*, 30 Cal. 662; *Wilkinson v. Parrott*, 32 Cal. 102; *McNeil v. Shirley*, 33 Cal. 207; *Wendt v. Ross*, 33 Cal. 656; *Sperry v. Spaulding*, 49 Cal. 253; *Ladd v. Samuels*, 57 Cal. 357; *Bensley v. Whipple*, 57 Cal. 267; *Downey v. Hellman*, 58 Cal. 62; *Sherman v. Mitchell*, 46 Cal. 577; because the jury, having heard the testimony and observed the manner of the various witnesses, have better opportunities of forming a correct judgment than the appellate court have from merely reading a statement of the evidence: *Ritter v. Stock*, 12 Cal. 402; *Antoine Co. v. Ridge*, 23 Cal. 220; *Peterie v. Bugby*, 24 Cal. 422; *Kimball v. Gearhart*, 12 Cal. 48; *Luback v. Bullock*, 24 Cal. 338. The fact of the motion being before a judge who did not hear the evidence makes no difference: *Macy v. Davila*, 48 Cal. 647; and this principle applies equally to findings of fact by a court: *Perry v. Cochrane*, 1 Cal. 180; *Vogan v. Barrier*, 1 Cal. 186; *Wilkins v. McCue*, 46 Cal. 660; also to findings of fact by a referee: *Walton v. Minturn*, 1 Cal. 362; *Muller v. Boggs*, 25 Cal. 181. It has even been said that the appellate court would not interfere with a verdict where there was

any evidence to support it: *Escolle v. Merle*, 9 Cal. 95; *Pfeiffer v. Riehn*, 13 Cal. 643; *Burnett v. Whitesides*, 15 Cal. 36; *Baxter v. McKinley*, 16 Cal. 77; *Noonan v. Hood*, 49 Cal. 294; *Trenor v. C. P. R. R. Co.*, 50 Cal. 222.

Where there were several separate and distinct defenses, each of which was sufficient to defeat the action, the court quoted Washington, J., in *Lonsdale v. Brown*, 4 Wash. C. C. 148: "If there be two issues, or issues on two counts, and the verdict be not contrary to evidence as to one of them, the court will not grant a new trial, though it be contrary to evidence as to the other, for since the verdict is right in part, the court will not set it aside," and adopted his view: *Kidd v. Laird*, 15 Cal. 182; 76 Am. Dec. 472. Where the testimony below consists entirely of depositions, the reason is absent, and if the supreme court thinks the court below came to a wrong conclusion, it will grant a new trial: *Wilson v. Cross*, 33 Cal. 69. But even in this case the judgment must be affirmed, unless it appear clearly against the weight of evidence: *Cunning v. C. P. R. R. Co.*, 50 Cal. 168.

Where the evidence is dubious and conflicting, the supreme court will not, although it may differ in opinion from the lower court, revise the discretion of the court below in granting or refusing a new trial, unless there is abuse: *Taylor v. McKinley*, 4 Cal. 104; *Watson v. McClay*, 4 Cal. 288; *Walton v. Maguire*, 17 Cal. 92; *Winans v. Sierra Lumber Co.*, 66 Cal. 61; *Low v. McCallan*, 64 Cal. 2. But in the entire absence of evidence on some material point to support the verdict or finding, the supreme court will grant a new trial or order a nonsuit: *Cummins v. Scott*, 20 Cal. 85; *Lyle v. Rollins*, 25 Cal. 440; *Carpentier v. Gardiner*, 29 Cal. 164; *Himmelmann v. Spanagel*, 39 Cal. 391; *Smith v. Athern*, 34 Cal. 510; *Moss v. Atkinson*, 44 Cal. 16; although this can seldom happen: *Bensley v. Whipple*, 57 Cal. 267. The competency of the evidence is not to be taken into consideration: *McCloud v. O'Neill*, 16 Cal. 392. Where there has been an abuse of discretion in refusing a new trial on this ground, the court will grant one: *Wetzler v. N. W. Ice Co.*, 9 Cal. 176; *O'Keefe v. Cunningham*, 9 Cal. 591; *Guerrero v. Bullerino*, 48 Cal. 119; *Branson v. Carruthers*, 49 Cal. 375. Where there is such overwhelming evidence against the verdict as to justify the inference that it was rendered under the influence of passion or prejudice, or bias of some kind, the court below should grant a new trial: *Cooper v. Pena*, 21 Cal. 403; *Conroy v. Troy Iron Co.*, 44 N. Y. 577; and this even though there is some conflict: *Dirkey v. Davis*, 39 Cal. 569; *People v. Baker*, 39 Cal. 687; *Hawkins v. Abbott*, 40 Cal. 541; *Mason v. Austin*, 46 Cal. 387.

**Verdict or decision against law.**—It is not enough to aver that the verdict is against law, and then offer to support the averment by showing that the verdict is not supported by the evidence, and is for that reason against law: *Brummagin v. Bradshaw*, 39 Cal. 35. Errors in law under subdivision 8 are not included in the expression "against law": *Martin v. Matfield*, 49 Cal. 46. Erroneous conclusions of law drawn from the findings of fact constitute a decision against law: *Bosquett v. Crane*, 51 Cal. 501; *Martin v. Matfield*, 49 Cal.

46; *Simmons v. Hamilton*, 56 Cal. 493. A verdict in disobedience to the instructions of the court upon a point of law is "against law": *Emerson v. Santa Clara*, 40 Cal. 545; *Buntin v. Orient Ins. Co.*, 4 Bosw. 262; *Fleming v. Marine Ins. Co.*, 4 Whart. 59.

Whatever else may be meant by the expression "decision against law," there is no doubt but that it includes the case where the decision is based upon findings which do not determine all of the material issues of fact raised by the pleadings: *Knight v. Roche*, 56 Cal. 15.

**Errors of law excepted to, etc.**—As to exceptions generally, see the next preceding chapter.

The admission of improper evidence is error; so is rejection of admissible evidence: *Santillan v. Moses*, 1 Cal. 93; *Mateer v. Brown*, 1 Cal. 231; 52 Am. Dec. 302; *Trimble v. Thorne*, 16 Johns. 152; 8 Am. Dec. 302; *Osgood v. Manhattan Co.*, 3 Cow. 612; 15 Am. Dec. 304. But admission of evidence to prove a fact admitted on the pleadings is no cause for granting a new trial: *Wells v. McPike*, 21 Cal. 215; and if the ruling of the court is right when made, no testimony afterwards introduced can render it erroneous: *Depuy v. Williams*, 26 Cal. 310.

In many cases, the better plan, where an objection is made to the admission or rejection of evidence, is to include the objection in a bill of exceptions: *Walls v. Preston*, 25 Cal. 61. It is not essential to a "trial" that evidence should be introduced before the court or jury. If the court erroneously exclude all evidence in support of the averments of the complaint, that is error: *Moore v. Bates*, 46 Cal. 30.

With regard to the improper admission or rejection of evidence, the effect is the same whether the case is tried by a court, referee, or jury: *Spanagel v. Dellinger*, 38 Cal. 282; *Osgood v. Manhattan Co.*, 3 Cow. 612; 15 Am. Dec. 304; *Marquand v. Webb*, 16 Johns. 89. Erroneous instructions to the jury, or refusing to give proper instructions, are errors in law: *Yonge v. P. M. S. S. Co.*, 1 Cal. 354; *Benedict v. Haggin*, 2 Cal. 386; *Pearson v. Snodgrass*, 5 Cal. 479; *People v. Payne*, 8 Cal. 344; *Battersby v. Abbott*, 9 Cal. 568; *Smith v. Arnold*, 56 Cal. 640.

It is not an error of law that the evidence is insufficient to justify a particular finding of fact: *Smith v. Christian*, 47 Cal. 20; nor that the court failed to require the short-hand reporter to file his notes: *Sais v. Sais*, 49 Cal. 263. The fact that instructions given by the court are lost or mislaid before a motion for new trial is heard is no ground to suspend the hearing of the motion for new trial: *Visher v. Webster*, 13 Cal. 58.

Error which is relied on must be shown clearly, affirmatively, and specifically: *Clayton v. West*, 2 Cal. 381; *Kilburn v. Ritchie*, 2 Cal. 145; 56 Am. Dec. 326; *Rabe v. Wells*, 3 Cal. 148; *Morgan v. Hugg*, 5 Cal. 409; *Herriter v. Porter*, 23 Cal. 388; *Cochrane v. O'Keefe*, 34 Cal. 556; *People v. Best*, 39 Cal. 690.

Errors in law which do not prejudice the complaining party cannot be made the ground of a motion for new trial: *Newberg v. Farmer*, 1 Wash. 182; *Seaward v. Malotte*, 15 Cal. 307; *Stark v. Barrett*, 15 Cal. 372; *People v. Doyell*, 48 Cal. 93; *People v. Cleveland*, 49 Cal. 580; *People v. Keith*, 50 Cal. 137; *Byrne v. Jansen*,



50 Cal. 624. When, however, error is shown, it is presumed the party against whom it was made was prejudiced: *Jackson v. Feather R. Co.*, 14 Cal. 22; *Busenius v. Coffee*, 14 Cal. 91; *Walker v. Woods*, 15 Cal. 66; *People v. Stanley*, 47 Cal. 119; *Leonard v. Kingsley*, 50 Cal. 628.

But if the error is corrected in time to prevent injury, it will be no ground for a new trial: *Ward v. Preston*, 23 Cal. 471; *Union W. Co. v. Crary*, 25 Cal. 510; *People v. Anderson*, 26 Cal. 134; *People v. Hoy Yen*, 34 Cal. 176; *Tynan v. Walker*, 35 Cal. 645; *People v. Woody*, 48 Cal. 82.

*Manner of specifying the grounds of motion.*

§ 401. In no case of motion for a new trial hereafter made in the courts of this state shall it be necessary to specify the grounds thereof, otherwise than in the language of section four hundred of this code, specifying the grounds upon which a motion for a new trial may be made. [January 31, 1888, § 1. In effect immediately.]

*Not granted on account of smallness of damages when.*

§ 402. [277.] A new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, nor in any other action where the damages shall equal the actual pecuniary injury sustained.

*In what cases affidavits may be used on the motion.*

§ 403. [278.] The motion for a new trial shall state the grounds or causes for which a new trial is asked, and if made for any of the causes mentioned in the first, second, third, or fourth subdivision of section four hundred, the facts upon which it is based may be shown by affidavit.

*Notice of intention, when to be filed, and what to contain — Service of affidavits.*

§ 404. The party intending to move for a new trial must, within two days after the verdict of the jury if the action was tried by a jury, or after notice of the decision of the court or referee, if the action was tried without a jury, file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made. If the motion is to be made upon affidavits, the moving party must, within two days after serving the notice, or such further time as the court in which the action is pending, or a judge thereof, may allow, file such affidavit with the clerk, and serve a copy upon the adverse party, who shall have two days to file counter-affidavits, a copy of which must be served upon the moving party. [February 26, 1891, § 1.]

**Notice of motion, generally.** — It should be formally given in writing: *Bear R. Co. v. Bolea*, 24 Cal. 355. It is not necessary, under this section, that the notice should contain a notice of motion to vacate the decision: *Bauder v. Tyrrel*, 59 Cal. 99. The notice must state on what the motion will be made: *Hill v. Beatty*, 61 Cal. 292. New notice after the motion has been denied is improper, and should be struck

from the files: *People v. Center*, 61 Cal. 191. If the transcript does not show proper service of notice, the statement on motion for new trial cannot be considered on appeal: *First Nat. Bank of H. v. McAndrews*, 5 Mont. 325.

**Notice of motion must be given in time.** If not, it is of no effect: *Cuney v. Silverthorn*, 9 Cal. 67; *Flateau v. Lubeck*, 24 Cal. 366; *Wright v. Snowball*, 45 Cal. 654; *Clark v.*



*Gridley*, 49 Cal. 106; *Coveny v. Hale*, 49 Cal. 555; *San Fernando H. Ass'n v. Porter*, 58 Cal. 81. If the time to move is extended by the court, the extension is to be computed from the end of the statutory time after receipt of notice of decision: *Emerie v. Alvarado*, 64 Cal. 529; and it must not be given before the verdict, etc.: *Mahony v. Caperton*, 15 Cal. 313. If the notice of motion is given too late, the judge may refuse, for that reason, to settle the statement: *Clark v. Crane*, 57 Cal. 629. Similar provisions in the Wyoming statutes have been regarded as mandatory, placing it beyond the power of the court to extend the time *ex parte* in which to move: *McLaughlin v. Upton*, 2 Wyo. 27.

**Time limited.** — All other steps must be taken within. If not, the proceedings fail: *Adams v. Oakland*, 8 Cal. 510; *Lafferty v. Brownlee*, 11 Cal. 132; *Hegeler v. Henckell*, 27 Cal. 491; *Kavanagh v. Maus*, 28 Cal. 262; *Thompson v. Lynch*, 43 Cal. 482. But the presumption is in favor of the regularity of official acts: Cal. C. C. P., sec. 1963; *Battersby v. Abbott*, 9 Cal. 568. Presumption that time was regularly extended was indulged in *Patrick v. Morse*, 64 Cal. 462. That the court may extend time to file the statement, see *Muir v. Galloway*, 61 Cal. 498. Proposing amendments to a statement is not a waiver of the objection that it was not filed in time: *Cottle v. Leitch*, 43 Cal. 320.

**Imposing terms.** — The court has in some cases a discretion to grant a new trial upon equitable terms: *Rice v. Gashirie*, 13 Cal. 54;

such as payment of costs: *Sherman v. Mitchell*, 46 Cal. 517; *Cordor v. Morse*, 57 Cal. 301; or unless plaintiff will remit some portion of his demand: *Gillespie v. Jones*, 47 Cal. 264; *Dreyfus v. Adams*, 48 Cal. 132; *Gregg v. S. F. & N. P. R. R.*, 59 Cal. 312. If an order granting a new trial is made on payment of costs, accepting the costs is not a waiver of right to appeal: *Tyson v. Wells*, 1 Cal. 379.

**Effect of order for new trial.** — Such order is final, and the court cannot afterwards vacate it, and decide again on the motion: *Coombs v. Hilberd*, 43 Cal. 452. It vacates the judgment, if any, entered on the verdict or findings set aside, and therefore an appeal from such a judgment cannot be entertained: § 435, note; Const., art. 4, sec. 2; *Kozer v. Gluck*, 33 Cal. 407. But this result does not follow as to all the parties to the action unless the motion is granted as to all; as to those to whom the motion is denied, the judgment still exists, and is appealable: *Wittenbock v. Bellmer*, 62 Cal. 558. Having once passed upon the motion, — here denied it, — the court cannot vacate the order, and pass upon the motion again: *Nichols v. Dunphy*, 10 Pac. C. L. J. 193.

**All presumptions are in favor of the order on the motion for a new trial:** *Clark v. Sawyer*, 48 Cal. 133; *Moore v. Massin*, 43 Cal. 389; *People v. Best*, 39 Cal. 690; *Blum v. Sunol*, 63 Cal. 341; *Whiting v. Marshall*, 11 Pac. C. L. J. 287.

**Motion for new trial must be made upon a written statement:** *Jones v. Wiley*, 1 Wash. 603.

*What affidavits for motion must show.*

§ 405. If the motion be supported by affidavits, and the cause be newly discovered evidence, the affidavits of any witness or witnesses, showing what their testimony will be, shall be produced, or good reasons shown for their non-production. [February 26, 1891, § 2.]

## CHAPTER VIII.

### OF JUDGMENT IN GENERAL

§ 406. Judgment defined.

§ 407. Against whom may be given — Extent thereof.

§ 408. Judgments in actions against several parties.

*Judgment defined.*

§ 406. [283.] A judgment is the final determination of the rights of the parties in the action.

**Judgment, finality of.** — Every definite sentence or decision of a court by which the merits of the cause are determined is a judgment: *Belt v. Davis*, 1 Cal. 138; *Loring v. Illsley*, 1 Cal. 24. A judgment dismissing an action upon the merits is in effect a final judgment: *Parrish v. Ferris*, 2 Black. 606; *Durant v. Essex Co.*, 7 Wall. 107; *Case v. New Orleans etc. Co.*, 101 U. S. 688; and is as conclusive upon the rights of the parties as any other judgment that might have been rendered in the

case: *Id.*; see also *Dowling v. Polack*, 18 Cal. 625; note to *Durant v. Essex Co.*, 85 Am. Dec. 689. An order of the county court dismissing an appeal is a judgment within the meaning of this section: *Pearson v. Lovejoy*, 35 How. 193; 53 Barb. 407. A judgment may be a final adjudication in different senses. It may be final as to the court which renders it, without being final as to the subject-matter. Although a judgment may be final with reference to the court which pronounced it, and as such be the

subject of an appeal, yet it is not necessarily final with reference to the property or rights affected, so long as it is subject to appeal and liable to be reversed: *Hills v. Sherwood*, 33 Cal. 478; *United States v. Schooner Peggy*, 1 Cranch, 103; *Smith v. Adams*, 130 U. S. 167. A judgment on demurrer is final, if the merits are involved, and is conclusive between the same parties upon the same matter directly in question in a subsequent action: *Aurora v. West*, 7 Wall. 82. A judgment of reversal is only final when it also enters or directs the entry of a judgment which disposes of the case: *Smith v. Adams*, 130 U. S. 168. But for instances of final and interlocutory judgments and decrees, see extended note to *Williams v. Field*, 60 Am. Dec. 427-439; *King v. Barnes*, 107 N. Y. 645; *Smith v. Adams*, 130 U. S. 168; *Lewis v. Campen*, 90 Am. Dec. 245.

**Judgment or decree must correspond with allegations** and proofs of the parties, and cannot be founded upon a fact not put in issue by the pleadings: *Carneal v. Banks*, 10

Wheat. 181; *Crockett v. Lee*, 7 Wheat. 522; *Day v. Town of New Lots*, 107 N. Y. 148; and is not to be given in favor of a defendant for a cause of action which he has not set up by way of defense or counterclaim: *Wright v. Debiel*, 25 N. Y. 266. Item of special damage not being alleged in the complaint, it is error to include the same in the judgment, although if alleged it would have been recoverable: *Levy v. Sheehan*, 23 Pac. Rep. 802.

**Judgment or decree does not bind non-residents** in a proceeding purely *in personam*, in which they did not appear, and had no notice except by publication: *Pennoyer v. Neff*, 95 U. S. 714; *Brooklyn v. Ethna Life Ins. Co.*, 99 U. S. 362; *Empire v. Darlington*, 101 U. S. 87; note to *Flint River Steamboat Co. v. Foster*, 48 Am. Dec. 273; *Dearing v. Bank of Charlestown*, 48 Am. Dec. 300; *Ever v. Coffin*, 48 Am. Dec. 587. As to service by publication, see *Hahn v. Kelly*, 34 Cal. 391; 94 Am. Dec. 742.

*Against whom may be given — Extent thereof.*

§ 407. [284.] Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.

**Judgment affecting less than all:** See next section. A sued B and C as partners, and misjoinder was not set up in answer. Plaintiff proved his demand against B, but not against C, and it was held that a verdict and judgment in favor of plaintiff against B, and in favor of C against plaintiff, was correct: *Royce v. Chandler*, 1 Cal. 168. In *Stearns v. Aguirre*, 6 Cal. 176, this was doubted; but *Stearns v. Aguirre*, 6 Cal. 176, was overruled by *Lewis v. Clarkin*, 18 Cal. 400, *People v. Frisbie*, 18 Cal. 402, and *Clyfin v. Butterly*, 5 Duer, 327, which distinctly affirmed the principle laid down as above. The same principle was again affirmed in *Tay v. Hawley*, 39 Cal. 95. But see *Curry v. Roundtree*, 5 Cal. 184, where it is held that the clerk cannot enter judgment by default against one of three partners sued jointly, nor can the court render judgment against two alone. Objections to misjoinder or non-joinder must be taken by demurrer or answer, or are waived: *Royce v. Bacigallupi*, 21 Cal. 635; *Whitney v. Stark*, 8 Cal. 514; 68 Am. Dec. 360; *Rutenburg v. Main*, 47 Cal. 221. And if there is

no answer setting up misjoinder, plaintiff can, in an action for trespass against several defendants, introduce evidence of a several trespass, and recover against one defendant only: *McCarron v. O'Connell*, 7 Cal. 152. But there must be some evidence against the defendants, against whom, and for the plaintiffs for whom, judgment passes: *Tormey v. Pierce*, 42 Cal. 337. If there is no objection by demurrer or answer, on the ground of misjoinder, the damages may be apportioned at the trial: *Whitney v. Stark*, 8 Cal. 514; see also *Weeks v. Gibbs*, 9 Mass. 74; *Rich v. Penfield*, 1 Wend. 380. If misjoinder is pleaded, this section does not cure it: *South Fork etc. Co. v. Snow*, 49 Cal. 155. In actions for torts, malicious arrest, and prosecution, where the plaintiff sues two jointly, judgment apportioned between the two defendants in favor of plaintiff is erroneous: See *McCool v. Mahoney*, 54 Cal. 491. But judgment against two defendants in tort may be reversed as to one on his appeal alone: *Nichols v. Dunphy*, 58 Cal. 605.

*Judgments in actions against several parties.*

§ 408. [285.] In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, whenever a several judgment is proper, leaving the action to proceed against the others.

**Only one of two defendants** being served with process, it is error to render personal judgment against both, though alleged in complaint to be partners; but personal judgment may be rendered against the one appearing and against the joint property of both: *McCoy v. Bell*, 20 Pac. Rep. 595 (Wash.).

**Judgment against part of parties:** See preceding section. In an action on a joint and several contract, where some of the defendants refused to plead, it was held that judgment may be had by default against such defendants, without waiting for final trial on the merits against the other defendants as to whom



issue was joined: *Sears v. McGrew*, 10 Or. 48. In ejectment against several defendants occupying different portions of the property, several judgments may be entered, and at different times, whether upon trial on separate verdicts, etc., or after default; the costs may be apportioned: *Lick v. Stockdale*, 18 Cal. 219. In an action against two defendants on a joint contract, plaintiff may have a several judgment against one defendant who has been served, even though the other has not been served: *Kelly v. Bandini*, 50 Cal. 530. As to this point, see notes to *Wood v. Watkinson*, 44 Am. Dec. 571; *St. John v. Holmes*, 32 Am. Dec. 604-607.

And as to the effect of a release to or satisfaction accepted from one of several wrong-doers, see note to *Seither v. Philadelphia Traction Co.*, 11 Am. St. Rep. 906-909. In an action against several upon a joint obligation, where all the defendants have been served, judgment may be had against any or either of them severally, where the plaintiff would be entitled to such judgment if such defendants had been sued alone. But this rule does not authorize a recovery against a part of the defendants in such case, where the others are also liable: *Fisk v. Henarie*, 14 Or. 29.

## CHAPTER IX.

### OF JUDGMENT OF NONSUIT.

§ 409. Cases in which judgment of nonsuit may be entered.

§ 410. Judgment must be on merits in all other cases.

§ 411. Effect of judgment of nonsuit.

#### *Cases in which judgment of nonsuit may be entered.*

§ 409. [286.] An action may be dismissed, or a judgment of nonsuit entered, in the following cases:—

1. By the plaintiff himself, at any time before the jury retire to consider their verdict, unless set-off be interposed as a defense, or unless the defendant sets up a counterclaim to the specific property or thing which is the subject-matter of the action;

2. By either party, upon the written consent of the other;

3. By the court, when the plaintiff fails to appear on trial, and the defendant appears and asks for a dismissal;

4. By the court, when, upon the trial and before the final submission of case, the plaintiff abandons it;

5. By the court, on the refusal or neglect of the plaintiff to make the necessary parties, after having been ordered by the court;

6. By the court, on the application of some of the defendants, where there are others whom the plaintiff fails to prosecute with diligence;

7. By the court, for disobedience of the plaintiff to an order concerning the proceedings in the action;

8. By the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient cause for the jury.

**Nonsuit.** — *Motion for.* — Where an answer admits the facts in the complaint, but denies all legal conclusions only, judgment may be allowed on motion: *Simpson v. Prather*, 3 Or. 26.

On defendant's motion for a nonsuit for defect of proof on some point, the court will permit plaintiff to supply the defect if he can do so: *May v. Hanson*, 5 Cal. 366; *Gardner v. Schmackzle*, 47 Cal. 588; *Abbey Homestead v. Willard*, 48 Cal. 617.

An action was brought on a promissory note by an indorsee. The complaint alleged the execution of the note, its assignment to the plaintiff by the payee, and that he was the owner and holder thereof. The answer admitted the execution of the note, but denied every other allegation of the complaint. On the trial, the plaintiff offered the note in evidence, proved that no part of it had been paid, and rested, without any proof of the indorsement. The defendant then moved for a



nonsuit on the ground that there was no proof of the indorsement. The plaintiff's counsel contended that no such proof was necessary, but upon an intimation of the court to the contrary, asked leave to open the case and introduce evidence of the indorsement. This the court refused to allow, and granted the motion for nonsuit. The nonsuit, if allowed to stand, would have compelled the plaintiff to bring a new action, to which the statute of limitations would be a bar. It was held that, under the circumstances, the rulings of the court were erroneous: *Low v. Warden*, 70 Cal. 19. A motion for a nonsuit which does not state the grounds upon which it is made is properly denied: *Silva v. Holland*, 74 Cal. 530.

Defendant must specify the grounds of his motion for nonsuit: *Gardiner v. Schmaelzle*, 47 Cal. 588. This he must do in analogy to the practice on objecting to the introduction of testimony: *Mateer v. Brown*, 1 Cal. 222; 52 Am. Dec. 303; *Kiler v. Kimball*, 10 Cal. 268; *People v. Bantard*, 27 Cal. 474; *Sanchez v. Neary*, 41 Cal. 485; *Coffey v. Greenfield*, 62 Cal. 603; and defendant will not be allowed to raise a fresh point afterwards in the supreme court: *Raimond v. Eldridge*, 43 Cal. 506; *Johnson v. Moss*, 45 Cal. 518. Unless the grounds are specified, it is not error to overrule the motion; and if the grounds of the motion do not appear of record, the supreme court will not consider it: *Poehlman v. Kennedy*, 48 Cal. 201.

On motion by defendant for nonsuit, it seems the court may offer terms: *May v. Hanson*, 5 Cal. 366; 63 Am. Dec. 135. Defendant may move for a nonsuit on the ground that plaintiff has failed to prove a sufficient case. He is not bound to demur: *Anthony v. Wessel*, 9 Cal. 104; *Snodgrass v. Ricketts*, 13 Cal. 360; *Waugenheim v. Graham*, 39 Cal. 175. But objection of non-joinder of parties defendant, the defect not appearing on the face of the complaint, must be taken by answer, or it is waived. It cannot be taken on motion for nonsuit: *Parisich v. Bean*, 48 Cal. 364.

Misjoinder of parties plaintiff, which does not appear upon the complaint, may be pleaded, and is then a ground of nonsuit against all the plaintiffs: *S. F. & P. Canal Co. v. Snow*, 49 Cal. 155.

*When to take.* — Plaintiff has a right to take a nonsuit at any time before the jury retires, there being no counterclaim: *Hancock Co. v. Bradford*, 13 Cal. 637; *Brown v. Harter*, 18 Cal. 77; but he cannot insist on taking a nonsuit after the action has been tried, submitted, and taken under advisement by the court: *Heinlin v. Castro*, 22 Cal. 102.

*Nonsuit for failure to prove cause* sufficient to be submitted to the jury is allowed only where there is no substantial evidence to prove some material point: *Stoddart v. Vandyke*, 12 Cal. 438; *Copper Hill Mining Co. v. Spencer*, 25 Cal. 26. In *Grant v. Baker*, 12 Or. 329, the rule is laid down that there must be such a total failure of proof of a material issue as would require the court to set aside the verdict for want of evidence if the jury were to find for plaintiff. See, to the same effect, *Moore v. Murdock*, 26 Cal. 525; *Mateer v. Brown*, 1 Cal. 222; 52 Am. Dec. 303; *Rudd v. Dams*, 3 Hill, 287; *Stuart v. Simpson*, 1 Wend. 376; *Demyer*

*v. Souzer*, 6 Wend. 436; *Wilson v. Williams*, 14 Wend. 146; 28 Am. Dec. 518; *Fort v. Collins*, 21 Wend. 109; *Jansen v. Acker*, 23 Wend. 480; *Geary v. Simmons*, 39 Cal. 232; *Vanderford v. Foster*, 65 Cal. 49; note to *Tison v. Yarn*, 60 Am. Dec. 711; note to *French v. Smith*, 24 Am. Dec. 622; *Buchanan v. Beck*, 15 Or. 563. A party is certainly not entitled to a nonsuit where a *prima facie* case is made out against him. *Salmon v. Olds*, 9 Or. 488. And it is held that a nonsuit will not be granted where there is any evidence to sustain plaintiff's allegations: *Ward v. Moorey*, 1 Wash. 104. It is error to render judgment of nonsuit against the plaintiff where the defendant admits a part of the plaintiff's demand to be due, and tenders in court such amount: *Mace v. Gaddis*, 3 Wash. 125; *Southwell v. Berzley*, 5 Or. 458; for then its sufficiency must be left to the jury: *Ringgold v. Haven*, 1 Cal. 117; *Dalrymple v. Hanson*, 1 Cal. 127; *Mateer v. Brown*, 1 Cal. 222; 52 Am. Dec. 303; note to *French v. Smith*, 24 Am. Dec. 623. In the last case the defendant moved for a nonsuit on the ground that the plaintiff had not proved a material fact by competent testimony; the court held the nonsuit properly refused. By the process of compulsory nonsuit, the same end is arrived at as by "the cumbrous and complicated machinery of a demurrer to evidence": *Ringgold v. Haven*, 1 Cal. 113. Plaintiff's examination in chief and cross-examination must all be considered in deciding whether he has proved a sufficient case: *Mustin v. Griffling*, 33 Cal. 116. That possession of defendant must be proved in ejectment or nonsuit will be granted, see also *Shaeffer v. Matzen*, 50 Cal. 652. Nonsuit was granted where plaintiff failed to connect a defendant with the transactions which were alleged to make him a partner: *Clark v. Ritter*, 50 Cal. 669.

The rule that in an action for negligence the burden of proof is on defendant to show that contributory negligence is a matter to be proved by defendant does not preclude the court from directing a nonsuit when the evidence introduced by plaintiff so conclusively establishes the defense that the court would grant a new trial in case of a verdict in his favor upon the like evidence: *McQuilken v. C. P. R. R. Co.*, 50 Cal. 8. A nonsuit should be ordered where it clearly appears from the evidence that the plaintiff has been guilty of such culpable contributory negligence as precludes his recovery: *Northern Pacific R. R. Co. v. Holmes*, 3 Wash. 202. And where the testimony shows that the injury was caused by a fellow-servant, and not the master, the defendant in the case, the defendant may move for a nonsuit without having pleaded such defense in his answer: *Sayward v. Carlson*, 23 Pac. Rep. 830. To avoid a nonsuit there must be more than a mere *scintilla* of evidence. Where there is so little that the court might well hold that it would not sustain a verdict in plaintiff's favor, a nonsuit is proper: *Cogswell v. Oregon & C. R. R. Co.*, 6 Or. 417; *Ensminger v. McIntire*, 23 Cal. 594. In *Wilson v. S. P. R. R.*, 62 Cal. 164, 172, the court said that a nonsuit should not be granted "unless there is no evidence at all, or a mere *scintilla* of evidence wholly insufficient for the consideration of the jury." Where incompetent evidence is admitted without objection, the

court will treat it as competent on a motion for a nonsuit: *Jacobsen v. Siddell*, 12 Or. 280.

*Granting nonsuit on opening statement.* — It has been said that the practice of granting a nonsuit on the opening statement should be discouraged: *Emmerson v. Weeks*, 58 Cal. 383. But judgment of nonsuit on opening statement will be affirmed in the absence of any statement or bill of exceptions showing on what the court acted: *Nicholl v. Littlefield*, 60 Cal. 238. In counsel's argument in this case various decisions are collated, in which it was held not error to nonsuit on the opening statement.

*Nonsuit as to some defendants.* — Plaintiff may be nonsuited as to some defendants, and the evidence go to the jury as to others: *Acquital v. Crowell*, 1 Cal. 193. And in ejectment it is error to refuse a nonsuit to such defendants as were not in possession, that being an essential fact: *Garner v. Marshall*, 9 Cal. 268.

*Intervention.* — If there is an intervenor in an action who claims an interest in the property in dispute, adverse to both the plaintiff and defendant, and the plaintiff answers the intervention, raising material issues, his right to be heard on those issues is not affected by a nonsuit granted on the motion of defendant: *Poehlmann v. Kennedy*, 48 Cal. 201. That an intervenor may abandon the contest by dismissing his petition of intervention, see *Sheldon v. Gunn*, 56 Cal. 582.

*Judgment, entry of.* — A judgment on nonsuit must not be entered as a judgment on the merits. Defendant might proceed with his own case and get judgment on the merits. He waives this by moving for nonsuit: *Wood v. Raymond*, 42 Cal. 645. See next subdivision below.

*Waiver of right to nonsuit.* — If defendant, after having moved for a nonsuit, introduces evidence which enables plaintiff to supply the defects in his evidence, he waives his right to a nonsuit: *Bennett v. Northern Pac. Exp. Co.*, 12 Or. 49; *Ringgold v. Haven*, 1 Cal. 109; *Smith v. Compton*, 6 Cal. 26; *Perkins v. Thornburgh*, 10 Cal. 190; *Winans v. Hardenbergh*, 8 Cal. 293. See next subdivision above.

*Error in granting.* — An error in granting a nonsuit is one of law, and unless so specified and excepted to, it will not be reviewed: *Schroeder v. Schmidt*, 74 Cal. 459.

*Dismissals. — Wrongful.* — If an action is improperly dismissed by plaintiff, defendant's remedy is by appeal from the judgment, and not by motion to set it aside: *Higgins v. Mahoney*, 50 Cal. 444. But no appeal lies in such a case, at the instance of plaintiff, as where the case was erroneously dismissed at his instance after an order refusing an injunction: *Mahricke v. City of Tacoma*, 23 Pac. Rep. 804.

*As to certain defendants.* — In an action upon a joint and several promise by defendants, plaintiff may go to trial before all the defendants are served, and dismiss as to some, taking judgment against the others: *People v. Evans*, 29 Cal. 429. If one of the several defendants in ejectment answers, and the others make default, the plaintiff may, before trial, dismiss the action as to the defendant answering, and take judgment against the others: *Dimick v. Deringer*, 32 Cal. 488.

*For want of prosecution.* See *McDonald v. Swett*, 76 Cal. 257; *Lodtman v. Schluter*, 71 Cal. 94. It must be presumed, in the absence of evidence to the contrary, that the court exercised its power in accordance with the statute: *Pardy v. Montgomery*, 77 Cal. 326. A judgment dismissing an action for want of prosecution is not void, although made after the death of the plaintiff, and without the substitution of his personal representative: *Wallace v. Center*, 67 Cal. 133. Where an express statute of limitations applies to a suit in equity, mere delay to commence the suit for a period less than that of the statute is never a reason for dismissing it; and where the defendant relies on mere delay and his own adverse use, the statutory period having expired, he must plead the statute: *Lux v. Haggin*, 69 Cal. 255. An action was commenced on the 9th of November, 1881. On the 6th of November, 1882, the summons was issued, but was not served or placed in the hands of the sheriff for service until several months thereafter. The issuance of the summons was delayed at the request of some of the defendants, and occasioned by their promises to pay the money to recover which the action was brought. It was held that the action should not have been dismissed for want of prosecution: *Cowell v. Stuart*, 69 Cal. 525. The reference of an action for trial and judgment does not deprive the court of power to order its dismissal for want of diligence in its prosecution before the referee: *Saville v. Frisbie*, 70 Cal. 87. In this case, an action was commenced on the 31st of March, 1860. On the 15th of May, 1861, it was referred to a referee to report a judgment. In the years 1862 and 1863, the plaintiff introduced a portion of his evidence, but no further steps were taken in the matter until June, 1883. In August, 1868, the original plaintiff died, and on the 24th of February, 1881, his administrator was substituted in his place. The administrator knew of the condition of the action for at least ten years before his substitution. On the 5th of November, 1883, the court made an order dismissing the action for want of diligence in its prosecution. It was held that the order was proper: *Saville v. Frisbie*, 70 Cal. 87. A judgment dismissing an action for want of prosecution may be set aside by the trial court upon good cause being shown therefor: *Lodtman v. Schluter*, 71 Cal. 94.

Dismissal for want of prosecution for two years after issue joined may be ordered on motion of defendant upon notice to the adverse party: *Simmons v. Keller*, 50 Cal. 38.

*Where affirmative relief is sought by defendant,* the plaintiff cannot dismiss: *Robinson v. Placerville etc. R. R. Co.*, 65 Cal. 263; *Thompson v. Sprain*, 66 Cal. 350. Where defendants set up a counterclaim and prayed affirmative relief, and afterwards a stipulation was signed and filed, whereby it was provided that upon the trial of the cause an account might be taken of the matters thus set up; that if a balance should be found in favor of the defendant, judgment in his favor for such balance might be entered; that the stipulation should be regarded as a compromise of the counterclaim, and that the counterclaim should be deemed stricken from the answer, — it was held that



the clerk, in the absence of any direction from the court or defendant's counsel, was not authorized to enter an order, upon request of plaintiff, dismissing the action: *People v. Loewy*, 29 Cal. 264. But to prevent plaintiff from dismissing the action, the counterclaim must be one on which defendant could obtain affirmative relief: *Belleau v. Thompson*, 33 Cal. 496.

**Dismissal not discretionary.** — The clause in the above section providing that an action "may be" dismissed on motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient cause for the jury, does not render the dismissal discretionary with the court; the words "may be," in certain cases, may become as imperative as "shall be." Want of jurisdiction, or a failure to state facts sufficient to constitute a cause of action, are never cured except by supplying the defect, and when it is apparent that no cause of action exists the court should dismiss: *Tolmie v. Dean*, 1 Wash. 46.

**Other questions as to dismissals.** — That causes of action are not separately stated, or that a cause of action is against public policy, are neither of them grounds on which defendant can move to dismiss: *Watson v. S. F. etc. Co.*, 50 Cal. 523. But that the complaint does not contain a cause of action, and the plaintiff declines to amend, is a good cause for moving, when the case is called for trial, to dismiss the action: *King v. Montgomery*, 50 Cal. 115.

When a defendant in his answer avers matters growing out of the matters set forth in

the complaint upon which he seeks affirmative relief, the plaintiff cannot dismiss the action upon his own motion, and without the consent of the defendant: *Clark v. Hundley*, 65 Cal. 96; *Shinn v. Cummins*, 65 Cal. 97. Where a cross-complaint has been stricken from an answer, leaving therein matters of defense only, the plaintiff may dismiss the case at any time before the trial on payment of costs: *Thompson v. Spray*, 66 Cal. 350.

An action is properly dismissed if the complaint therein has been stricken out by the consent of both parties: *Smith v. Ling*, 73 Cal. 72.

An action will not be dismissed on the ground that at the time it was commenced there was another action pending between the same parties for the same cause of action, if prior to the trial of the second action the former had been dismissed by stipulation of the parties: *Byer v. Scalmanini*, 69 Cal. 636.

The court has no jurisdiction to render judgment against a party as to whom the action has been dismissed until the order of dismissal is vacated: *Sere v. McGovern*, 65 Cal. 244.

After an action has been regularly tried and submitted for decision, it cannot be dismissed on the motion of the plaintiff: *Casey v. Jordan*, 68 Cal. 246.

If a plaintiff, who has appeared by attorney, afterwards stipulates in writing that the action may be dismissed, the court should not make the order of dismissal unless the attorney of record assents to the same: *Board of Commissioners v. Younger*, 29 Cal. 147.

*Judgment must be on merits in all other cases.*

§ 410. [287.] In every case other than those mentioned in the last section, the judgment shall be rendered on the merits.

**Trial of case on merits.** — A judgment pursuant to a stipulation authorizing its entry upon a final judgment, being obtained in another action, cannot be entered during the pendency of a motion for a new trial in the latter action: *Gillmore v. American Cent. Ins. Co.*, 65 Cal. 63. A motion for a judgment pursuant to a stipulation is not a trial of the case upon the merits. If a party to such stipulation is entitled to judgment, it is upon the stipulation, and not upon a trial of the cause. A motion for a new trial in such case is irregular, and should be dismissed: *Gillmore v. American Cent. Ins. Co.*, 65 Cal. 63.

**Pleadings, judgment on.** — If the complaint is good, and the answer presents nothing by way of denial or new matter to defeat it, plaintiff may move for judgment on the pleadings: *Fitzgibbon v. Culvert*, 39 Cal. 261; *Felch v. Beaudry*, 40 Cal. 443; *Gay v. Winter*, 34 Cal. 160; *Corrin v. Clayton*, 4 Cal. 204; *Prost v. More*, 40 Cal. 347; *Loveland v. Garner*, 74 Cal. 298. But judgment on the pleadings cannot be rendered for the plaintiff where any of the material allegations of the complaint are denied: *Reich v. Rebellion Silver Mining Co.*, 2 Utah, 254; *Miles v. McCullan*, 1 Ariz. 491; although in a special defense, separately stated, the allegations formerly denied are admitted: *Botts v. Vandament*, 67 Cal. 332; or where it sets up new matter constituting a defense: *Miles v. McCullan*, 1 Ariz. 491. It is only

where an answer admits or leaves undenied the material facts stated in the complaint that a judgment can be rendered on the pleadings: *Prost v. More*, 40 Cal. 347; *Hicks v. Lovell*, 64 Cal. 14. Several causes of action in a complaint not being separately stated, or a cause of action being against public policy, are not either of them grounds on which judgment may be given for defendant on the pleadings: *Watson v. S. F. etc. Co.*, 50 Cal. 523.

In an action by an administrator against a former administrator, alleging a final settlement of the latter's accounts by the court, and a balance due from the administrator to the estate on such accounts, a denial of a final settlement of the accounts and of the final decree having been entered, are sufficient to defeat a motion for judgment on the pleadings in favor of plaintiff, even if it appear from the answer that an appeal has been taken from the only decree rendered: *Craig v. Bateman*, 49 Cal. 71. If the plaintiff treats the denials of the answer as sufficient, and goes to trial upon them, he cannot afterwards move for judgment on the pleadings, on the ground of the insufficiency of the denials; for if he had moved before, the defendant might have had leave to amend: *Teris v. Hicks*, 41 Cal. 128. If there is a denial, and also a plea of new matter, which admits the allegations of the complaint, plaintiff cannot have judgment on the pleadings on that account: *Nudd v. Thompson*, 34 Cal. 46.



A defendant usually demurs or proceeds under § 409; but it is said that if plaintiff admits on the pleadings facts showing that he has no cause of action against defendant, the court may order judgment for defendant (on the pleadings?). There was a question on the subject of replication in this case: *Mulford v. Estudillo*, 32 Cal. 136. When the cause is called for trial, defendant may move to have the action dismissed, if the complaint does not state a cause of action and the plaintiff refuses to amend: *King v. Montgomery*, 50 Cal. 115.

Where the plaintiff has a good cause of action, which, by accident or mistake, he has failed to set out in his complaint, the court, on a motion for judgment on the pleadings, should, on his application so to do, permit him to amend; but if he fail to make such an application, the defendant is entitled to judgment on the pleadings: *Kelley v. Kriess*, 68 Cal. 210. On an appeal from the judgment, where there is no bill of exceptions, the ruling of the court on motion for judgment on the pleadings cannot be reviewed: *Hemme v. Hays*, 55 Cal. 337.

### *Effect of judgment of nonsuit.*

§ 411. [288.] When a judgment of nonsuit is given, the action is dismissed; but such judgment shall not have the effect to bar another action for the same cause.

Judgment of nonsuit does not determine the rights of the parties, and neither bars a new action nor is of any weight as evidence therein: *Manhattan L. Ins. Co. v. Broughton*, 109 U. S. 121; *Homer v. Brown*, 16 How. 354; *Haldeman v. United States*, 91 U. S. 584. After the testimony is in on both sides, if the complaint is dismissed because the plaintiff has failed to produce evidence enough to maintain

the issue on his part, it will be no bar to another action for the same cause: *Wheeler v. Ruckman*, 51 N. Y. 391. But a dismissal of the plaintiff's suit upon the merits is as conclusive upon the rights of the parties as any other judgment that might have been rendered in the case: *Parrish v. Ferris*, 2 Black, 606; *Durant v. Essex Co.*, 7 Wall. 107; *Case v. New Orleans etc. Co.*, 101 U. S. 688.

## CHAPTER X.

### OF JUDGMENT ON FAILURE TO APPEAR AND ANSWER.

§ 412. Judgment for want of answer in actions for recovery of money.

§ 413. Court may set aside default.

### *Judgment for want of answer in actions for recovery of money.*

§ 412. [289.] Judgment may be had if the defendant failed to answer to the complaint, as follows:—

1. In any action arising on contract for the recovery of money only, the plaintiff may file with the clerk proof of personal service of the summons and complaint on one or more of the defendants. The court shall thereupon enter judgment for the amount claimed against the defendant or defendants, or against one or more of the several defendants, in the cases provided for in section sixty-eight. Where the defendant, by his answer, in any such action, shall not deny the plaintiff's claim, but shall set up a counterclaim amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of said claim over the said counterclaim.

2. In other actions the plaintiff may, upon the like proof, apply to the court after the expiration of the time for answering, for the relief demanded in the complaint. If the taking of an account or of the proof of any fact be necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose. Where the action is for the recovery of damages, in whole

or in part, the court may order the damages to be assessed by a jury; or if to determine the amount of damages the examination of a long account be necessary, by a reference as above provided. If the defendant give notice of appearance in the action before the expiration of the time for answering, he shall be entitled to five days' notice of the time and place of application to the court for the relief demanded in the complaint.

3. In an action where the service of the summons was by publication, the plaintiff, upon the expiration of the time for answering, may, upon proof of service by publication, apply for judgment; and the court must thereupon require proof of the demand mentioned in the complaint, and must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for his use on account of such demand, and may render judgment for the amount which he is entitled to recover, or for such other relief as he may be entitled to.

"Section sixty-eight" is superseded by § 177 of this code.

**Judgment on failure to answer.** — A defendant, by not answering the complaint, does not admit that plaintiff is entitled to the relief demanded against him, but only that he is entitled to such relief, as the facts, properly alleged, authorize: *Argall v. Pitts*, 78 N. Y. 239. A demurrer is an answer within the meaning of this section: *Oliphant v. Whitney*, 34 Cal. 25. It is not necessary that a default should be actually entered before judgment is taken. The only purpose of a default is to limit the time during which defendant may answer: *Drake v. Durenick*, 45 Cal. 462. It will be presumed in favor of the judgment by default that the court satisfied itself that the time in which to answer had expired: *Catanich v. Hayes*, 52 Cal. 338. However, whether there was an error in entering judgment by default before the expiration of the time for answering may be considered on appeal from the judgment: *Maud v. Wear*, 55 Cal. 25. Judgment by default on a complaint which shows no legal cause of action is erroneous: *Abbe v. Marr*, 14 Cal. 211; and may be appealed. But if one of several causes of action is imperfectly stated, the plaintiff can take judgment by default on the others. The default admits all material facts: *Hunt v. San Francisco*, 11 Cal. 258. A judgment on default for damages where none are prayed for is erroneous although the complaint states facts sufficient to sustain a judgment for damages: *Pitts C. M. Co. v. Greenwood*, 39 Cal. 71. A summons radically defective will not support a judgment by default: *State v. Woodlief*, 2 Cal. 242. That an insufficient affidavit of service of summons will not support judgment by default, see *Maynard v. McCrellish*, 57 Cal. 355; *Howard v. Galloway*, 60 Cal. 10; *Weil v. Bent*, 60 Cal. 603; *Hoy's Back M. Co. v. New Basil Co.*, 63 Cal. 121, affidavit of service by mail. And the defendant's remedy is either by motion in the court entering the default or by appeal without moving to set the default aside: *Howard v. Galloway*, 60 Cal. 10; *Hallock v. Jaudin*, 34 Cal. 172, reversing earlier cases. A judge can-

not refuse the right of judgment by default accorded by law to the plaintiff: *State v. Posey*, 87 Am. Dec. 525.

Plaintiff took judgment by default against *George Mott*; afterwards he obtained an order amending the name to *Gordon*. The supreme court held it error, and reversed the judgment: *McNally v. Mott*, 3 Cal. 235. Judgment against *John Cox*, service being returned upon *James Cox*, there being nothing in the record to identify the party, is error: *Sutter v. Cox*, 6 Cal. 415. But judgment against *D. C. Seaver*, on a published summons to *D. C. Seavers*, was held good: *Seaver v. Fitzgerald*, 23 Cal. 92. If persons are served who are not named in the complaint, by real or fictitious names, it is error to render judgment against them by default: *Lamping & Co. v. Hyatt*, 27 Cal. 99. Where the sheriff returned service on "John Doe alias Westfall," Westfall, by not appearing, was held to have admitted his identity, and the judgment was good: *Curtis v. Herrick*, 14 Cal. 119. The relief granted cannot exceed that claimed in the complaint: *Rann v. Reynolds*, 11 Cal. 19; *Parrott v. Den*, 34 Cal. 81; *Gage v. Rogers*, 20 Cal. 91; *Lamping v. Hyatt*, 27 Cal. 102; *Gautier v. English*, 29 Cal. 165; and if it does, the judgment is erroneous, but is not void: *Chase v. Christianson*, 41 Cal. 256; and may be amended or modified: *Gamble v. Voll*, 15 Cal. 510; *Oakland v. Whipple*, 44 Cal. 305; *Bond v. Pacheco*, 30 Cal. 530. The relief granted must not be outside the issue: *Lothian v. Wood*, 55 Cal. 159. But a plaintiff in ejectment to recover an undivided interest in land may have a recovery of a less undivided interest than that sued for: *Hulsey v. Martin*, 22 Cal. 645.

Where plaintiff, being entitled to a money judgment, took also judgment foreclosing a mechanic's lien which had expired before suit, the court acted correctly in modifying the judgment so as to make it a money judgment only: *Lacore v. Leonard*, 45 Cal. 394. Where on the face of the complaint it appeared that two of the defendants contracted merely as



agents for another, judgment against them was held erroneous: *Shaver v. Ocean M. Co.*, 21 Cal. 46.

In ejectment, where defendant did not appear, but the case was submitted to the court, who found that plaintiff had title in the whole tract sued for, but defendant had possession of part only of it, judgment against defendant for the whole tract was upheld: *Vallejo v. Fay*, 10 Cal. 378; see *Coleman v. Doe*, 2 Scam. 251; *Little v. Bishop*, 9 B. Mon. 240, where the complaint alleged that all the defendants except two had interests in the land, and prayed that the "defendants" convey to plaintiff the interest he claimed, and the action was dismissed as to the two, and the other defendant required to convey to plaintiff the amount claimed, the relief was held not in excess of the prayer: *Brooks v. Carpenter*, 53 Cal. 287.

No writ of inquiry or other assessment of damages is necessary, unless the court so order: *Dimick v. Campbell*, 31 Cal. 239. And the court may refer the question of damages if it please: *Emeric v. Tams*, 6 Cal. 156. A judgment on default for damages where none are prayed for is erroneous, although the complaint states facts sufficient to sustain a judgment for damages: *Pitts C. M. Co. v. Greenwood*, 39 Cal. 71.

Service of process must appear to justify a nonsuit if there is no appearance, and such process must be sufficient: *Willamette F. Co. v. Clark*, 1 Or. 13; *Smith v. Ellendale Mfg. Co.*, 4 Or. 70.

Judgment by default where the record shows a demurrer undisposed of is error: *Willamette F. Co. v. Smith*, 1 Or. 181; *Tregambo v. Comanche M. M. Co.*, 57 Cal. 501. Where a demurrer has been sustained, a judgment for failure to answer an amended pleading is erroneous if no notice of the amendment has been given: *Tolmie v. Otchin*, 1 Or. 95. If after default is entered the plaintiff amend the complaint in matter of substance, such amendment must be served, even on the defaulted defendant, the default on the original pleading being opened by the amendment: *Thompson v. Johnson*, 60 Cal. 292. But the court may substitute in place of the plaintiff one who has acquired his rights without giving notice to the defendant whose default has been entered: *Furrell v. Jones*, 63 Cal. 194. Entry of default after demurrer overruled was held regular, although no notice of the overruling of the demurrer had

been served in writing on the defendant, where his attorney was present in court and asked time in which to answer: *Barron v. Deleva*, 58 Cal. 95.

The judgment containing a recital of personal service of process on defendant is valid, although the certificate of service of the summons in the record does not show a sufficient service: *Quirey v. Baker*, 37 Cal. 465. A default judgment has the same effect as *res adjudicata* as would a judgment on the merits: *Neil v. Tolman*, 12 Or. 289.

**After service of summons by publication.** — A judgment rendered against a non-resident of the state on service by publication only, the defendant having no property in the state, and who does not appear, is void: *Pennoyer v. Neff*, 95 U. S. 714; *Paxton v. Daniell*, 23 Pac. Rep. 441; *Sayward v. Carlson*, 23 Pac. Rep. 830. And the subsequent appearance of an attorney for defendant, moving to set the judgment aside, will not give the court jurisdiction: *Paxton v. Daniell*, 23 Pac. Rep. 441. But where judgment against a non-resident defendant has been taken by default, on service by publication, his motion to set aside the default, and the subsequent filing of an answer, is a waiver of objections to the jurisdiction before the entry of the default: *Sayward v. Carlson*, 23 Pac. Rep. 830. Allowing a default to be taken before the summons has been published for the time required, and where there is no evidence that a copy has been mailed to defendant, is error: *Montgomery v. Manning*, 1 Wash. 434.

**Judgment after appearance.** — To render judgment by default against a defendant after he has appeared by filing a demurrer is grave error: *Walla Walla etc. Co. v. Budd*, 2 Wash. 336. But one's mere corporal presence, or presence by agent, is not sufficient to prevent a default being taken against him, and having a judgment rendered thereon: *McCoy v. Bell*, 20 Pac. Rep. 595 (Wash.). He must demur, answer, or give notice of appearance: *Id.*

**Appeal.** — An appeal lies from a default judgment: *Baker v. Prewitt*, 3 Wash. 474. But where defendant has been personally served with summons, and made default, without any objections, he cannot on appeal first urge that the summons did not state the general nature of the action: *Baker v. Prewitt*, 3 Wash. 595.

### *Court may set aside default.*

§ 413. [290.] The court may, in its discretion, before final judgment, set aside any default, upon affidavit showing good and sufficient cause, and upon such terms as may be deemed reasonable.



## CHAPTER XI.

## OF JUDGMENT BY CONFESSION.

- § 414. When judgment may be given on confession.
- § 415. How corporations and minors may confess judgment.
- § 416. Judgment by confession against persons jointly liable.
- § 417. Confession and assent, how executed.
- § 418. Such judgment may be without action, and for money due or to become due.
- § 419. Requisites of statement for judgment by confession.
- § 420. Statement must first be submitted to court or judge.

*When judgment may be given on confession.*

§ 414. [291.] On the confession of the defendant, with the assent of the plaintiff or his attorney, judgment may be given against the defendant in any action, before or after answer, for any amount or relief not exceeding or different from that demanded in the complaint.

**Judgment by confession.** — If an action is commenced and a summons served, and the defendant, before the time for answering expires, files a verified statement consenting to a judgment, and specifying the amount, and undertaking to state the subject-matter of the indebtedness, a judgment entered on such statement is a judgment by confession: *Pond v. Davenport*, 44 Cal. 481. Statutes allowing judgments by confession are to be strictly pursued: *Chapin v. Thompson*, 20 Cal. 686; *Bank v. St. John*, 5 Hill, 497; *Edgar v. Greer*, 7 Iowa, 136. Judgments of this kind are in no way valid unless entered in a court which would have had jurisdiction to enter the same judgment in a contested case: *Lanning v. Carpenter*, 23 Barb. 402. A judgment by confession is to be tried by the same rules, when attacked collaterally, as would other judgments: *Allen v. Norton*, 6 Or. 344. A judgment by confession, regular upon its face, can be im-

peached only for fraud: *Miller v. Bank of British Columbia*, 2 Or. 291.

The assent of plaintiff is necessary, and without it the judgment by confession is invalid for all purposes. But if ratified and accepted, it is valid: *Wilcoxson v. Burton*, 27 Cal. 228. A judgment by consent, in an action in which the court has jurisdiction of the subject-matter and of the parties, will bind them and their privies as efficaciously as if it had been entered after a trial of the issues: *Partidge v. Shepard*, 71 Cal. 470.

**Judgment against partners**, entered on confession by one only, will be valid only against that one: *Clark v. Bowen*, 22 How. 270; note to *Morgan v. Scott*, 12 Am. Dec. 37; note to *Lee v. Figg*, 99 Am. Dec. 277.

**Judgment by confession, when void and when valid:** See note to *Lee v. Figg*, 99 Am. Dec. 275-278.

*How corporations and minors may confess judgment.*

§ 415. [292.] When the action is against the state, a county or other public corporation therein, or a private corporation or a minor, the confession shall be made by the person who, at the time, sustains the relation to such state, corporation, county, or minor as would authorize the service of a notice upon him; or in the case of a minor, if a guardian for the action has been appointed, then by such guardian; in all other cases, the confession shall be made by the defendant in person.

**Who may confess judgment.** — An agent thereto authorized may confess judgment: *Parker v. Poole*, 12 Tex. 86; *Davenport v. Wright*, 51 Pa. St. 292. It has been held that a public officer may confess judgment for the amount due in an action against him for services rendered to the public at his request: *Gere v. Supervisors*, 7 How. Pr. 257. The officer or agent of a corporation on whom summons might be served (in this case the president) may confess judgment against the corporation: *Miller v. Bank of British Colum-*

*bia*, 2 Or. 291; *Miller v. Oregon City Mfg. Co.*, 3 Or. 24. A trustee cannot bind the trust estate by his confession of judgment: *Mallory v. Clark*, 20 How. Pr. 418; *Hunt v. Townshend*, 31 Mo. 336; so a husband cannot confess judgment for his wife, unless, of course, she authorize him thereto: *Roraback v. Stebbins*, 33 How. Pr. 278; *Palmer v. Davis*, 28 N. Y. 242.

**On whom service of summons may be made in the cases mentioned in the statute:** See *ante*, § 173.

*Judgment by confession against persons jointly liable.*

§ 416. [293.] When the action is upon a contract, and against one or more defendants jointly liable, judgment may be given, on the confession of one or more defendants, against all the defendants thus jointly liable, whether such defendants have been served or not, to be enforced only against their joint property and against the joint and separate property of the defendant making the confession.

**Judgment against persons jointly liable:** See *ante*, § 407, note.

A partner cannot under this section confess judgment which shall be binding upon his co-partner or upon the partnership property unless

made in an action pending: *Richardson v. Fuller*, 2 Or. 179. As to the effect of a judgment against a partnership or joint debtors on service of one, see note to *Wood v. Watkinson*, 44 Am. Dec. 570-574.

*Confession and assent must be in writing and acknowledged.*

§ 417. [294.] The confession and assent thereto shall be in writing and subscribed by the parties making the same, and acknowledged by each before some officer authorized to take acknowledgments of deeds.

**Statement must be signed, how.** — A judgment by confession is void, unless the statement authorizing its entry is signed by the person against whom the judgment is rendered; a statement merely signed by the

attorney of such person will not sustain the judgment: *Reynolds v. Lincoln*, 71 Cal. 183. And it must be signed by all the defendants: *Chapin v. Thompson*, 20 Cal. 687.

See § 419 *post*, as to requisites of statement.

*Such judgment may be without action, and for money due or to become due.*

§ 418. [295.] A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter.

**What may be confessed for.** — It is said that this section does not authorize the confession of a judgment without action for

damages arising out of tort: *Bostelle v. Owens*, 2 Sand. 655; *Burkham v. Van Saun*, 14 Abb. Pr., N. S., 163.

*Requisites of statement for judgment by confession.*

§ 419. [296.] A statement in writing shall be made, signed by the defendant and verified by his oath, to the following effect:—

1. It shall authorize the entry of judgment for a specified sum.
2. If it be for money due or to become due, it shall state concisely the facts out of which the indebtedness arose, and shall show that the sum confessed to be due is justly due or to become due.
3. If it be for the purpose of securing the plaintiff against a contingent liability, it shall state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same.

**Statement, sufficiency of, etc.** — A confession of judgment without action requires a statement; otherwise none is required: *Miller v. Bank of British Columbia*, 2 Or. 291; *Miller v. Oregon City Mfg. Co.*, 3 Or. 24. The requisites as to the statement must be fully complied with and strictly pursued, or the judgment will be *prima facie* evidence of fraud; and this because where a party fails to make all the disclosures required by the act the pre-

sumption is that he has something to conceal. But this presumptive evidence, like all presumptions, can be rebutted. It merely throws upon the plaintiff the burden of proving that his judgment was not fraudulent: *Richards v. McMillan*, 6 Cal. 422; 65 Am. Dec. 521. A statement that the indebtedness is for money lent for certain purposes at certain times: *Frost v. Koon*, 30 N. Y. 428, 441; or that it is for goods sold by plaintiffs to defendants, at a



certain time, place, and for a certain amount: *Read v. French*, 28 N. Y. 285; or that it is upon a certain promissory note, specifying the consideration: *Freligh v. Brink*, 22 N. Y. 418,— sufficiently shows the facts out of which it arose. So if it sets forth that the judgment is confessed to secure the plaintiff for a debt justly to become due upon his indorsement, as the surety of the plaintiff, and for his benefit, of bills and notes which are fully described as to names, dates, amounts, and times of payment: *Doio v. Platner*, 16 N. Y. 562. But a statement to the effect that the indebtedness is upon a promissory note for money, without stating the consideration for which the note was given, is insufficient: *Richardson v. Fuller*, 2 Or. 179. The facts out of which the indebtedness evidenced by the note arose should be stated: *Chappel v. Chappel*, 12 N. Y. 215. And if nothing more appears than the date, amount, time of payment, and that it was "given on a settlement of accounts," on a specified day, between the debtor and the plaintiff in the judgment, the confession will be deemed fraudulent and void as to other judgment creditors of the debtor: *Dunham v. Waterman*, 17 N. Y. 9; 72 Am. Dec. 406. So when the statement is, that the indebtedness is for goods sold and delivered, and money had and received, it is insufficient in this, that it does not show the kind or quantity or price of the goods, or time of sale, or when the money was received, or under what circumstances, nor how much of the indebtedness is for money and how much for goods; and the judgment confessed is *prima facie* fraudulent: *Cordier v. Schloss*, 18 Cal. 576. It was held that it should appear by some form of direct statement that at the very instant when the judgment was confessed the relation of creditor and debtor was on foot, and to the extent stated in the judgment: *St. Clair Denver v. Burton*, 28 Cal. 549. To rebut the presumption of fraud, the facts proved must be consistent with the averment of the statement and in support of them: *Pond v. Davenport*, 44 Cal. 487. A judgment by confession upon a statement which does not sufficiently state the facts out of which the indebtedness arose, nor that the amount confessed was justly due, is not a nullity on its face, and can only be called in question by the creditors of defendant on the ground of fraud and in a direct proceeding for that purpose: *Lee v. Figg*, 37 Cal. 328. See § 417, *ante*, as to signature, etc.

**Confession of judgment** suffered for the purpose of hindering and delaying the plaintiff in collecting his debt will be held void as to him in a direct proceeding taken by him to avoid it: *Ryan v. Daly*, 6 Cal. 239. When a debtor confesses judgment without the request or knowledge of his creditor, and the creditor thereafter ratifies it, the record will become binding, as between the parties to it, by force of the ratification; and the judgment will be considered as good from the date of its entry. But such ratification can neither override nor in any manner affect rights acquired prior to the ratification, and while the judgment was one only in name. If the confession states a "promissory note," implying a consideration, or "services," or "advances," or both, as the source or ground of indebtedness, the creditor, always keeping within the limits of the terms used, may prove all matters explanatory. Beyond this he cannot go. To allow him to go further, and prove a claim which the statement not only does not include, but excludes by necessary intendment, would be to allow him to prove his judgment to be virtuous by proving it to be false: *Wilcorson v. Burton*, 27 Cal. 235. It is not necessary that plaintiff, in a suit by a creditor to set aside a judgment on confession, should be either a judgment or execution creditor. A lien acquired by attachment suffices: *Scales v. Scott*, 13 Cal. 76; *Heyneman v. Dannenberg*, 6 Cal. 376; 65 Am. Dec. 519. A slight mistake in the computation of interest, the date being given, is no evidence of fraud. It was held that where judgment was confessed on a note, a portion of the consideration being advanced from time to time after the date of the note, which drew interest on the whole amount from date, a portion of the interest was fraudulent, and the entire note therefore held void against creditors: *Scales v. Scott*, 13 Cal. 76. Where fraud is alleged, the facts must be set forth: *Meeker v. Harris*, 19 Cal. 289; 79 Am. Dec. 215. A general allegation that the transaction was to hinder, delay, and defraud is not sufficient: *Meeker v. Harris*, 19 Cal. 289; 79 Am. Dec. 215. It seems that a debtor may prefer a particular creditor by giving a confession of judgment: *Meeker v. Harris*, 19 Cal. 289; 79 Am. Dec. 215.

**Judgment on contingent liability.**— A judgment by confession on a contingent liability can be enforced by execution: *Allen v. Norton*, 6 Or. 344.

*Statement must first be presented to court or judge.*

§ 420. [297.] The statement must be presented to the superior court, or a judge thereof, and if the same be found sufficient, the court or judge shall indorse thereon an order that judgment be entered by the clerk, whereupon it may be filed in the office of the clerk, who shall enter a judgment for the amount confessed, with costs. Execution may be issued and enforced thereon in the same manner as upon judgments in other cases.



## CHAPTER XII.

## OF SUBMITTED CASES.

§ 421. Parties may submit their disputes to court upon agreed facts.

§ 422. Judgment to be entered thereon as in other cases.

§ 423. Such judgment enforced as other judgments

*Parties may submit their disputes to court upon agreed facts.*

§ 421. [298.] Parties to a question in difference which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good faith to determine the rights of the parties. The court shall thereupon hear and determine the case and render judgment thereon as if an action were pending.

**Submitting controversy without action.** — This section contemplates only the determination of questions between the parties and affecting their interests, and the court has no power to go beyond a decision affecting such interests: *Union etc. Bank v. Kuiper*, 63 N. Y. 617; and the section is limited to controversies which can be followed by an effectual judgment upon the submission: *Cunard Steamship Co. v. Voorhis*, 104 N. Y. 525. The facts agreed upon must be such as will enable the court to render the proper judgment, and the submission must be by the parties to be affected thereby: *Dickinson v. Dickey*, 76 N. Y. 602. The court is restricted to the facts agreed, and its judgment cannot be based on any facts

it may suppose either party can establish: *Crandall v. Amador Co.*, 20 Cal. 74. There must be an actual controversy which might be the subject of an action at law. A court will not investigate and decide questions not regularly arising in the due course of litigation, in order to gratify the curiosity of counsel or parties who procure them to be raised against themselves by others who feel no interest in the contest: *People v. Pratt*, 30 Cal. 223. An officer, either of the state or of a county or city, having public funds or property under his control, ought not to enter into a stipulation in respect to the facts in a case affecting such funds or property without acting under the advice of counsel: *Uhlér v. Boyd*, 41 Cal. 60.

*Judgment to be entered thereon as in other cases.*

§ 422. [299.] Judgment shall be entered in the judgment-book as in other cases, but without costs for any proceedings prior to the trial. The case, the submission, and a copy of the judgment shall constitute the judgment roll.

*Such judgments enforced as other judgments.*

§ 423. [300.] The judgment may be enforced in the same manner as if it had been rendered in an action, and shall be in the same manner subject to appeal.

## CHAPTER XIII.

## OF ARBITRATION, AND JUDGMENT THEREON.

- § 424. Disputes may be submitted to arbitration.
- § 425. Agreement to arbitrate must be in writing.
- § 426. How arbitration conducted.
- § 427. Compensation of arbitrators — Penalty for neglect.
- § 428. Exceptions may be taken to the award.
- § 429. Proceeding of court on such exceptions.
- § 430. Powers of arbitrators.
- § 431. Rules of evidence in arbitration proceedings.
- § 432. Arbitrators may punish contempts.
- § 433. Costs taxed against losing party.
- § 434. Award, when affirmed, has force of a judgment.

*Disputes may be submitted to arbitrators.*

§ 424. [264.] All persons desirous to end, by arbitration, any controversy, suit, or quarrel, except such as respect the title to real estate, may submit their difference to the award or umpirage of any person or persons mutually selected.

**Partners.** — While it is true that one partner cannot bind his copartner by a submission of partnership matters to arbitration, such a submission was held good as against himself: *Jones v. Bailey*, 5 Cal. 345.

**Submission, effect of.** — A submission of a cause to arbitration operates as a discontinuance: *Gunter v. Sanchez*, 1 Cal. 47; 18 Johns. 22; 13 Wend. 293.

**Appeal.** — Where appellant stipulated in his submission bond not to appeal from the award of the arbitrators, the court held that the agreements of parties could not divest courts of law or equity of their proper jurisdiction: *Muldrow v. Norris*, 2 Cal. 78.

**Title to real property.** — Where the parties might, by their own act, transfer real property, or exercise any act of ownership with respect to it, they may refer any disputes

concerning it to the decision of arbitrators, who may order the same acts to be done which the parties themselves might do by agreement. The statute does not change the law in this respect: *Blair v. Wallace*, 21 Cal. 321; *Cox v. Jagger*, 2 Cow. 638; Kyd on Awards, 61. But where the subject-matter of an action was the recovery of mining ground on public land, the court said it was regarded in this state as "a question of title to real property in fee," and therefore could not be submitted to arbitration and if so submitted, an award and judgment thereon would, on motion, be vacated and set aside: *Spencer v. Winselman*, 42 Cal. 479.

**Time and place of hearing.** — An award is invalid unless both parties have notice of the time and place of meeting, and have an opportunity to be heard: *Curtis v. Sacramento*, 64 Cal. 102.

*Agreement to arbitrate must be in writing.*

§ 425. [265.] Said agreement to arbitrate shall be in writing, signed by the parties, and may be by bond in any sum, conditioned that the parties entering into said submission shall abide the award.

*How arbitration conducted.*

§ 426. The said arbitrators shall be duly sworn to try and determine the cause referred to them, and a just award make out, under the hands and seals of a majority of them, agreeably to the terms of the submission. Said award, together with the written agreement to submit, shall be sealed up by the arbitrators and delivered to the party in whose favor it shall be made, who shall deliver the same, without breaking the seal, to the clerk of the superior court of the district including the county wherein said arbitration is held, who shall enter

the same on record in his office. A copy of the award, signed by said arbitrators, or a majority of them, shall also be delivered to the party in whose favor it is rendered, who shall, if the matter be not settled, serve a copy of the same on the adverse party, and if no exceptions be filed against the same within twenty days after such service, judgment shall be entered as upon the verdict of a jury, and execution may issue thereon, and the same proceedings upon said award, with like effect as though said award were a verdict in a civil action. [Feb. 26, '91, § 1.]

**Just award, etc.** — It has been said that the arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex æquo et bono*; but that if they mean to decide according to law, and mistake the law, the courts will set their award aside: *Muldrow v. Norris*, 2 Cal. 77.

**Good in part.** — It is proper for courts to distinguish between those portions which are good and those which are not, where the award is attacked on the ground of fraud, and the subject-matter is in its nature divisible: *Muldrow v. Norris*, 2 Cal. 79.

An award may be good in part and bad in part, or void *pro tanto* or *in toto*, and may therefore be enforced or not accordingly; but if the parts be inseparable, the whole must stand or fall together; *Williams v. Walton*, 9 Cal. 146; *Muldrow v. Norris*, 2 Cal. 79; *White v. Arthur*, 59 Cal. 33.

**Entry of judgment.** — Without the provision at the end of this section, it seems that the court would have no right to enter judgment on an award, and that the only mode of enforcing it would be by action on it: *Gunter v. Sanchez*, 1 Cal. 45. To give the award the effect of a judgment, the statute must be strictly pursued: *Heslep v. San Francisco*, 4 Cal. 3; but no order of court for the clerk to enter the award as a judgment is necessary: *Carsley v. Lindsay*, 14 Cal. 395. Where it was claimed that the judgment was void because it was entered by the clerk in less than five days after the award was filed, and without the affidavit, the court held that the judgment being so entered at the instance of the complaining party himself, he could not be allowed to take advantage of his own wrong. The point would have been good for the other side: *Hooys v. Morse*, 31 Cal. 129.

### *Compensation of arbitrators—Penalty for neglect.*

§ 427. [267.] The arbitrators chosen under the provisions of this chapter shall each be allowed three dollars per day, to be taxed with other costs of suit; but if either party fail to appear on the day agreed upon for the arbitrators to meet, said party shall be liable for all costs accruing that day, unless his absence was unavoidable, and shall be so established to the satisfaction of said arbitrators. And any arbitrator failing to attend on the day appointed, unless delayed by sickness or unavoidable accident, shall forfeit and pay the sum of five dollars to the school fund of the county, to be recovered by action before a justice of the peace, in the name of the county commissioners of the county.

### *Exception may be taken to the award.*

§ 428. [268.] The party against whom an award may be made may except in writing thereto for either of the following causes:—

1. That the arbitrators or umpire misbehaved themselves in the case;
2. That they committed an error in fact or law;
3. That the award was procured by corruption or other undue means.

**Substantial compliance with law on the part of arbitrators is sufficient; their award will** not be disturbed for mere technical defects. It is also sufficient if two make report, if it appears



that all three were sworn, the presumption being that all three acted: *Bachelor v. Wallace*, 1 Wash. 107.

**Setting aside award.** — It was held that courts of equity, in the absence of statutes, would set aside awards for fraud, mistake, or accident, and that it made no difference whether the mistake was one of fact or law; that in case of a general finding the courts would not inquire into mistakes by evidence alone; but where the arbitrators had made any point a matter of judicial inquiry by spreading it upon the record, and they mistook the law in a palpable and material point, their award would be set aside: 2 Story's Eq., sec. 1451. The mere act of setting forth their reasons must be considered to have been done for the purpose of enabling those dissatisfied to

take advantage of them: *Kent v. Elstob*, 3 East, 18; *Muldrov v. Norris*, 2 Cal. 78; approved: *Tyson v. Wells*, 2 Cal. 130; *Grayson v. Guild*, 4 Cal. 125.

The misconduct contemplated is improper conduct in fact, as contradistinguished from a mere error of judgment: *Peachy v. Ritchie*, 4 Cal. 207.

**Refusing to hear evidence.** — This objection to the award was raised in *Glass-Pendery M. Co. v. Meyer M. Co.*, 7 Cal. 51, but overruled.

An award cannot be impeached as being contrary to law and evidence. An impeachment on this ground was not admissible at common law; and if it were, the statute prescribes (sections 1287, 1288) other grounds as those upon which alone the award can be vacated: *Carsley v. Lindsay*, 14 Cal. 394.

### *Proceeding of court on such exceptions.*

§ 429. If upon exceptions filed it shall appear to the said superior court that the arbitrators have committed error in fact or law, the court may refer the cause back to said arbitrators, directing the amendment of said award forthwith, returnable to said court, and on the failure so to correct said proceedings, the court shall be possessed of the case and proceed to its determination. [February 26, 1891, § 2.]

### *Powers of arbitrators.*

§ 430. [270.] Arbitrators, or a majority of them, shall have power, —

1. To compel the attendance of witnesses duly notified by either party, and to enforce from either party the production of all such books, papers, and documents as they may deem material to the cause;
2. To administer oaths or affirmations to witnesses;
3. To adjourn their meetings from day to day, or for a longer time, and also from place to place, if they think proper;
4. To decide both the law and the fact that may be involved in the cause submitted to them.

**Majority may decide.** — The question whether the requirement that all the arbitrators must meet is jurisdictional arose in *Glass-Pendery Con. M. Co. v. Meyer M. Co.*, 7 Cal. 51, and it was there determined that the absence of one of the members was but an irregularity, which could be waived by the failure of one present to object.

**What award must include.** — It is the duty of arbitrators to pass upon the whole sub-

ject in controversy: *Porter v. Scott*, 7 Cal. 312. All the matters submitted must be determined, unless the submission discloses a contrary intent, and the award must not go beyond them: *White v. Arthur*, 59 Cal. 33. Although an award not passing upon all the matters submitted is not binding, yet a subsequent ratification removes the objection, and a promise to pay the award is such a ratification: *Bell v. Poppleton*, 11 Or. 201.

### *Rules of evidence in arbitration proceedings.*

§ 431. [271.] The laws in force in this state relating to evidence and the manner of procuring the attendance of witnesses shall govern in arbitrations.

### *Arbitrators may punish contempts.*

§ 432. [272.] The law governing proceedings for contempt, in the trial of cases before justices of the peace, so far as the same may be applicable, shall apply to the proceedings before arbitrators.

*Costs taxed against losing party.*

§ 433. [273.] The costs of witnesses, and other fees in the case, shall be taxed against the losing party; said fees shall be indorsed upon the award, and when said award is affirmed as the judgment of the superior court, execution shall issue therefor as for costs in civil actions.

**Costs.** — The arbitrators have power to award costs, though no mention be made of costs in the submission. And it has been held that, in the absence of any specific directions about costs, they must follow the award: *Mackintosh v. Blyth*, 1 Brod. & Bing. 269. Where there are several separate and distinct submissions to arbitration, the costs ought to be separately estimated: *Springer v. Schutz*, 64 Cal. 454. And the parties are not estopped to dispute the award on this ground by going to trial, or by paying the separate damage.

*Award, when affirmed, has force of a judgment.*

§ 434. [274.] Such award, when so affirmed, shall be in all respects like any other judgment of the superior court, and a transcript of such judgment, or execution issued thereon, recorded in the county auditor's office in the same manner as other judgments, shall be a lien upon real estate in said county.

**Award cannot be altered.** — After award has been once made and delivered, the arbitrators cannot afterwards alter the same, even to correct mistakes. If such alteration is attempted, it will be considered as a mere surplusage, and it will not vitiate the award, which will stand good in its original terms: *Dudley v. Thomas*, 23 Cal. 367; *Henfree v. Bromley*, 6 East, 309; *Irvine v. Elton*, 8 East, 53; *Brooke v. Mitchell*, 6 Mees. & W. 473; *Headley v. Reed*, 2 Cal. 325; *Grayson v. Guild*, 4 Cal. 125; *Porter v. Scott*, 7 Cal. 312.

## CHAPTER XIV.

## OF THE MODE OF TAKING AND ENTERING JUDGMENTS.

- § 435. Time of entering judgment.
- § 436. Proceeding when case reserved for consideration.
- § 437. Judgment in case of set-off.
- § 438. Judgment in action to recover personal property.
- § 439. Judgments must be entered in journal.
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*Time of entering judgment.*

§ 435. When a trial by jury has been had, judgment shall be entered in conformity to the verdict within five days after the filing of the verdict, unless a motion for a new trial shall have been filed, or unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings. In all other cases the judgment shall be entered on the day when it is given. [February 25, 1891, § 1.]

As to time allowed for notice and motion for new trial, see § 404.

**Entry of judgments,** courts are open for, except on non-judicial days: See constitution, art. 4, secs. 2, 6.

A *nunc pro tunc* judgment is allowed only in furtherance of justice: *Hays v. Miller*, 1 Wash. 143.

A judgment is rendered when ordered by the court, and entered when actually entered in the judgment-book: *McLaughlin v. Doherty*, 54 Cal. 519. The successful party is entitled to the security of having the judgment entered at once if there is no stay or other order, as mentioned in this section: *Hutchinson v. Bours*, 13 Cal. 51. It is not a nullity because entered before exceptions to the findings are overruled and additional findings filed: *Haley v. Ameston*, 44 Cal. 135.

If there be interest due on the demand, it should be included in the judgment when en-

tered: *Bibend v. L. & L. etc. Co.*, 30 Cal. 91. But a judgment cannot be rendered against a party who has not been served or appeared: *Hawkins v. Abbott*, 40 Cal. 640.

A judgment need not contain any recitals. A recital that defendant appeared by his attorneys does not make it appear that plaintiff did not appear: *Green v. Swift*, 50 Cal. 455.

Where a map or other paper is referred to in the judgment as a material part of it, it should be identified by the judgment and made part of it, and should not be referred to as a paper recorded elsewhere: *Crosby v. Doud*, 61 Cal. 557; *Emerie v. Alvarado*, 64 Cal. 529.

Where the jury find specially for defendant, but the general verdict is for the plaintiff, the judgment should be entered on the special findings, where they are inconsistent with the general verdict: *Stewart v. Walla Walla etc. Co.*, 20 Pac. Rep. 605; *Silsby v. Frost*, 3 Wash. 388.

### *Proceeding when case reserved for consideration.*

§ 436. When the case is reserved for argument or further consideration, as mentioned in the last section, it may be brought by either party before the court for argument. [February 25, 1891, § 2.]

### *Judgment in case of set-off.*

§ 437. [303.] If a set-off established at the trial exceed the plaintiff's demand so established, judgment for the defendant shall be given for the excess; or if it appear that the defendant is entitled to any affirmative relief, judgment shall be given accordingly.

### *Judgment in actions to recover personal property.*

§ 438. [304.] In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same.

**Judgment for recovery of personal property.** — *Alternative form.* — In an action to recover the possession of personal property, or its value, with damages for its detention, a judgment for the plaintiff must be in the alternative form prescribed by this section, or it will be reversed: *Berson v. Nunan*, 63 Cal. 550; *Stewart v. Taylor*, 68 Cal. 5; *McCue v. Tunstead*, 66 Cal. 486; *Brichman v. Ross*, 67 Cal. 601; see *Burke v. Koch*, 75 Cal. 356. But it is not necessary that the separate value of each article sued for be found by the court: *Whetmore v. Rupe*, 65 Cal. 237; see *Myers v. Moulton*, 71 Cal. 498. An action was brought in a justice's court for the claim and delivery of certain personal property, or for its value in case a delivery could not be had, and for damages for the detention thereof. The jury returned a general verdict in favor of the plaintiff, less damages claimed, but did not find in their

verdict the value of the property. The justice thereupon entered judgment in favor of the plaintiff for the return of the property, or for its value, as alleged in the complaint, in case a return could not be had. It was held that the judgment was not void, although the verdict was erroneous in not specifically finding the value of the property, and that a writ of mandate would lie to compel the justice to issue an execution thereon: *Hogue v. Fanning*, 73 Cal. 54. In such a case, a judgment that the plaintiff have and recover "the possession of the personal property in the complaint herein described" is not void for uncertainty, if the complaint specifically describes the property sued for: *Hogue v. Fanning*, 73 Cal. 54.

*Return to defendant.* — To enable defendant to obtain the value of the property on judgment of dismissal against plaintiff for failure to appear, the answer must contain some allega-



tion, or prayer, relative to the change of possession from defendant to plaintiff. The judgment of return or value is in the nature of a cross-judgment, and must be based upon proper averment: *Gould v. Scannell*, 13 Cal. 430. The right to return is not necessarily dependent upon any finding of the jury, but results as a conclusion of law from the verdict for defendant. It is the right of the court to state this legal conclusion as a portion of its judgment: *Waldman v. Broder*, 10 Cal. 379. Where defendant set up a right to possession under a mortgage, and judgment was in favor of defendant for costs only, and it appeared that after suit brought, plaintiff tendered to defendant the amount secured by the mortgage, the judgment was affirmed, and the tender was a sufficient answer to the demand for a return of the property: *Wildman v. Rudenaker*, 20 Cal. 617. In these actions, where defendant claims a return of the property, both parties are actors, and if plaintiff has obtained possession of the property at the commencement of the

suit, and at the trial it appear that defendant is not entitled to the possession for the reason that his interest ceased between the commencement of the action and the trial, and the right to the possession has vested in the plaintiff, the court will not render a judgment in favor of defendant for the possession of the property or its value, but will leave the property in the possession of the plaintiff, and give the defendant a judgment for costs only: *O'Connor v. Blake*, 29 Cal. 316. A defendant who recovers a judgment in an action of replevin, where the property has been delivered to the plaintiff, is entitled to a judgment for a return of all the property, and if it cannot be returned, then to a judgment for the value of the whole: *Whetmore v. Rupe*, 65 Cal. 237; see *Myers v. Moulton*, 71 Cal. 498. But the separate value of each article sued for need not be found: *Whetmore v. Rupe*, 65 Cal. 237.

**Recovery of personal property:** See *ante*, § 255, and notes.

*Judgments must be entered in journal.*

§ 439. [305.] All judgments shall be entered by the clerk, subject to the direction of the court, in the journal, and shall specify clearly the amount to be recovered, the relief granted, or other determination of the action.

**Judgment not entered in journal.**—The existence of a judgment, though not entered in the court's journal as contemplated by statute, nor having the file-mark of the clerk,

may be established by competent proof after the death of the judge rendering it: *Eakin v. McCraith*, 2 Wash. 112.

*Summons, after judgment, to joint debtor not originally served.*

§ 440. [314.] When a judgment is recorded against one or more of several persons jointly indebted upon an obligation by proceeding as provided in section one hundred and seventy-seven, such defendants who were not originally served with the summons, and did not appear to the action, may be summoned to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons.

*What such summons must contain.*

§ 441. [315.] The summons as provided in the last section must describe the judgment, and require the person summoned to show cause why he should not be bound by it, and must be served in the same manner and returnable within the same time as the original summons. It is not necessary to file a new complaint.

*Must be supported by affidavit.*

§ 442. [316.] The summons must be accompanied by an affidavit of the plaintiff, his agent, representative, or attorney, that the judgment, or some part thereof, remains unsatisfied, and must specify the amount due thereon.

*Defenses in such case.*

§ 443. [317.] Upon the service of such summons and affidavit, the defendant may answer within the time specified therein, denying the judgment, or setting up any defense which may have arisen subsequently to the taking of the judgment, or he may deny his liability on the obligation upon which the judgment was rendered, except a discharge from such liability by the statute of limitations.

*What constitute pleadings in such case.*

§ 444. [318.] If the defendant in his answer deny the judgment, or set up any defense which may have arisen subsequently, the summons, with the affidavit annexed, and the answer, constitute the written allegations in the case; if he deny his liability on the obligation upon which the judgment was rendered, a copy of the original complaint and judgment, the summons with the affidavit annexed, and the answer constitute such written allegations.

*Trial and entry in such cases.*

445. [319.] The issue formed may be tried as in other cases, but when the defendant denies in his answer any liability on the obligation upon which the judgment was rendered, if a verdict be found against him, it must not exceed the amount remaining unsatisfied on such original judgment, with interest thereon.

**Interest.** — Where plaintiffs obtained a verdict for a certain sum, "with legal interest," and the court gave judgment for interest from a date sixty days after the making of the con- tract, the judgment was held to be erroneous: *Western Mill and Lumber Co. v. Blanchard*, 23 Pac. Rep. 839 (Wash.).

*Judgment roll — What constitutes.*

§ 446. Immediately after entering the judgment, the clerk shall attach the following papers in the case, which shall constitute the judgment roll:—

1. If the complaint has not been answered by any defendant, and no pleading has been filed by an intervenor, he shall attach together, in the order of their filing, issuing, and entry, the complaint, summons, and proof of service, and a copy of the entry of judgment.

2. In all other cases he shall attach together in like manner the summons and proof of service, the pleadings, bill of exceptions, all orders relating to change of parties, together with a copy of the entry of judgment, and all other journal entries or orders in any way involving the merits and necessarily affecting the judgment. [February 25, 1891, § 3.]

**Judgment roll.** — The verity conceded to the judgment roll applies to nothing which it is not the duty of the clerk to record: *Hahn v. Kelly*, 34 Cal. 391; *Douglas v. Wickwire*, 19 Conn. 489. As to what is or is not part of the record, it is held that there should be excluded from the judgment roll motions and the papers on which they are founded, together with the ruling of the court thereon: *Cornell v. Davis*, 16 Wis. 686; *Demming v. Weston*, 15 Wis. 236; matters of evidence, oral or written: *Cord v. Southwell*, 15 Wis. 211; including notes: *Reid v. Case*, 14 Wis. 429; and mortgages: *Cord v. Southwell*, 15 Wis. 211; filed in the case and constituting the cause of action, and proof of the filing of *lis pendens*:

*Manning v. McClurg*, 14 Wis. 350; memoranda of costs and notice of adjustment: *S. & S. Plank Road Co. v. Thatcher*, 6 How. Pr. 226; the affidavit requisite to authorize the taking of property in replevin: *Kerri-gan v. Ray*, 10 How. Pr. 213; affidavit and order of arrest: *Corwin v. Freeland*, 6 N. Y. 560; proof of service when the defendant has answered or demurred: *Smith v. Holmes*, 19 N. Y. 271; bill of particulars: *Kreiss v. Seligman*, 8 Barb. 439; pleadings amended or demurrer abandoned: *Brown v. Saratoga R. R. Co.*, 18 N. Y. 495; opinion of the judge: *Thomas v. Tanner*, 14 How. Pr. 426; affidavit used in support of a motion: *Backus v. Clark*, 1 Kan. 303; minutes made by the judge upon the trial docket: *Pennock v. Monroe*, 5 Kan. 578.

An order directing a change of parties forms part of the judgment roll. Where the names of two of the plaintiffs were ordered to be stricken from the complaint, it was held that it was unnecessary to file an amended complaint in the names of the remaining plaintiffs: *Tormey v. Pierce*, 49 Cal. 307. An answer, though ordered to be stricken out, is entitled to its place on the judgment roll: *Abbott v. Douglas*, 28 Cal. 295. Bills of exceptions are part of the judgment roll. *Wetherbee v. Carroll*, 33 Cal. 549; *Moore v. Del Valle*, 28 Cal. 170. The affidavit on which a motion to strike out an answer is based does not form part of the judgment roll: *Dinick v. Campbell*, 31 Cal. 238. The motion and order to strike out portions of the original complaint are not parts of the judgment roll: *Sutter v. San Francisco*, 36 Cal. 114; *Harper v. Minor*, 27 Cal. 109; *Dimick v. Campbell*, 31 Cal. 239; *Sharp v. Daugney*, 33 Cal. 513. The action of the court on demurrer is part of the judgment roll, and no exception need be taken: *Smith v. Lawrence*, 38 Cal. 28; overruling to this extent *Bostwick v. McCorkle*, 22 Cal. 669. An order overruling a demurrer is part of the judgment roll: *Abadie v. Carrillo*, 32 Cal. 172. But the notice of the overruling of the demurrer is not a part of the roll: *Catanich v. Hays*, 52 Cal. 338.

An order sustaining the demurrer to defendant's cross-complaint constitutes part of the judgment roll: *Packard v. Bird*, 40 Cal. 378. On an appeal from a final judgment ordering a peremptory writ of *mandamus*, neither the writ, the sheriff's return, nor an acknowledgment of satisfaction thereon, constitutes a part of the judgment roll: *Gregg v. Pemberton*, 53 Cal. 251. The return to a writ of review forms part of the judgment roll, and should be included: *Johns v. Marin Co.*, 4 Or. 46. An order of court granting leave to file an amended answer is not part of the judgment roll, nor is the proof of its service on the opposite party: *Livermore v. Webb*, 56 Cal. 489. In a proceeding for settlement of an administrator's account, the petition and account, and the written objection filed, constitute part of the judgment roll: *Estate of Page*, 57 Cal. 238.

No judgment roll is provided for until the entry of final judgment, and consequently, an appeal from an interlocutory judgment in partition will not be dismissed because the entire judgment roll has not been brought up: *Emeric v. Alvarado*, 64 Cal. 529. An interlocutory judgment is, it seems, properly part of the judgment roll: *Packard v. Bird*, 40 Cal. 382.

Form of judgment roll in cases of judgment by default: See *Hahn v. Kelly*, 34 Cal. 403.

The judgment does not depend upon the performance of the clerical duty of making up the judgment roll or the preserving of the papers: *Lick v. Stockdale*, 18 Cal. 219; *Sharp v. Lumley*, 34 Cal. 611; *Sharp v. Daugney*, 33 Cal. 505. It is enough if the facts exist which are required to give jurisdiction to the court: *Lick v. Stockdale*, 18 Cal. 223; and the judgment roll is proper evidence, though the papers were never attached together in the form of a roll: *Sharp v. Lumley*, 34 Cal. 614. Absence of a material paper from the transcript, or its loss from the judgment roll, will not affect the judgment so as to prevent the judgment creditor from enforcing his judgment by execution, if otherwise the record is correct, and the entries and recitals are in due form: *Carland v. Heiberg*, 2 Or. 77.

### *How judgment roll indorsed and preserved.*

§ 447. In all cases, the clerk shall attach upon the outside of the judgment roll a blank sheet of paper, upon which he shall indorse the name of the court, the title of the action, for whom judgment was given, and the amount or nature thereof and the date of its entry. [February 25, 1891, § 4.]



## CHAPTER XV.

### OF LIEN BY JUDGMENT.

- § 448. Execution docket required.
- § 449. Entry of judgment of superior court in execution docket.
- § 450. Same as to judgment of supreme court.
- § 451. Entry of subsequent proceedings.
- § 452. Execution docket must be indexed.
- § 453. Book of transcripts.
- § 454. Book of levies, what to contain.
- § 455. Lien by docketing judgment of justice's court.
- § 456. Lien by docketing judgment of United States court.
- § 457. Judgment of United States courts to be docketed in separate book.
- § 458. Satisfaction of such liens.
- § 459. Rate of interest on judgments.
- § 460. Duration of lien by judgment.
- § 461. Appeal does not suspend.

#### *Execution docket required.*

§ 448. [307.] Every clerk shall keep in his office a well-bound book, to be called the execution docket, which shall be a public record, and open during the usual business hours to all persons desirous of inspecting it.

#### *Entry of judgment of superior court in execution docket.*

§ 449. Within twenty days after the entry of any judgment for the recovery of money, the clerk shall enter in said execution docket a statement of the judgment, and shall, at the request of the judgment creditor or his attorney, furnish a transcript of said judgment to the judgment creditor, and upon the filing of said transcript in the office of the county auditor, it shall be a lien upon all real estate of said judgment debtor in the county where such transcript shall be filed, for the period of five years from the time of the entry of said judgment. The lien shall attach from the day of the date of said judgment, if said transcript shall have been filed within the said twenty days; and in case an attachment has been levied upon any real estate, then from the levy of the attachment. The fees for making and filing such transcript shall be paid by the judgment creditor, and be taxed as costs against the judgment debtor, and be collected as other costs in the case. Said statements and transcripts shall contain,—

1. The names, at length, of all the parties;
2. The date of the judgment, and against whom rendered;
3. The amount or nature of the judgment and costs;
4. An abstract of the costs of each party, and to whom belonging.

[February 25, 1891, § 5.]

**Book of transcripts:** See § 453.

**Lien of judgments:** See §§ 460, 461,

*post.*

**Amount of costs** need not be stated in judgment; they are taxed by the clerk from the records and papers on file in his office, and

either party may move for a retaxation: *Huntington v. Blakeney*, 1 Wash. 111.

**Taxation of costs** by the clerk of court below must be a condition precedent to a retaxation by the appellate court: *Miskel v. Stone*, 1 Wash. 229.

*Same as to judgment of supreme court.*

§ 450. [309.] The clerk shall also enter in his execution docket a minute, in like manner, of any transcript of a judgment from the supreme court, or from any superior court of the state, or from a justice of the peace, when the same are presented to him for that purpose, as shall be provided by law. He shall in like manner, at the instance of the judgment creditor, furnish to any county auditor's office any certified transcript of said judgment for filing therein, the fees whereof shall be paid by the party requesting such transcript, but taxable as other costs in the case.

See § 455 as to docketing judgments of justices' courts.

*Form of entries — Entry of subsequent proceedings.*

§ 451. [310.] He shall leave space on the same page, if practicable, with each case, in which he shall enter, in the order in which they occur, all the proceedings subsequent to the judgment in said case until its final satisfaction, including the time when and to what county the execution is issued, and when returned, and the return or the substance thereof. When the execution is levied on personal property which is returned unsold, the entry shall be: "Levied (noting the date) on property not sold." When any sheriff shall furnish the clerk with a copy of any levy upon real estate on any judgment the minutes of which are entered in his execution docket, the entry shall be: "Levied upon real estate," noting the date, and shall refer to the page upon the book of levies where the same is entered, as is hereinafter provided. When any execution issued to any other county is returned levied upon real estate in such county, the entry in the docket shall be: "Levied on real estate of —, in — county," noting the date, county, and defendant whose estate is levied upon, and when the money is made, or any part thereof, the amount and time when made shall be entered; also, when a writ of error has been taken, or the judgment is appealed, modified, discharged, or in any manner satisfied, the facts in respect thereto shall be entered. The parties interested may also assign or discharge such judgment on such execution docket. When the judgment is fully satisfied in any way, the clerk shall write the word "satisfied," in large letters across the face of the entry of such judgment.

**Book of levies:** See § 448.

*Execution docket must be indexed.*

§ 452. [311.] The clerk shall prefix to the execution docket a full and correct alphabetical index, both direct and inverse, containing the names of all persons parties to judgments, plaintiffs and defendants, in separate columns.

*Book of transcripts.*

§ 453. [312.] The auditor of each county shall keep in his office a well-bound book, which shall be a public record, open to inspection at all reasonable hours, in which he shall enter all transcripts of judgments from the supreme or superior courts presented to him for that purpose, and when a judgment is satisfied, he shall write across the face, in large letters, the word "satisfied."

*Book of levies — What to be entered therein.*

§ 454. [313.] The clerk shall also keep in his office a well-bound book, to be called a book of levies, which shall be a public record, and open during the usual business hours to all persons desirous of inspecting the same, in which he shall enter all levies upon real estate in his county, when delivered to him by the sheriff, as provided by law. An alphabetical index shall be prefixed to the book of levies, containing the names of all persons upon whose real estate such levies have been made, and when such levies are discharged in any manner, an entry thereof shall be made in the margin of the book of levies where the levy is recorded.

*Lien by docketing judgment of justice's court.*

§ 455. [753.] Any party having a judgment upon any justice's docket, upon which an execution has been returned unsatisfied, and no property found, may take a transcript of such judgment and return it to the clerk of the superior court embracing his county, and upon making affidavit that the defendant has real estate in any county of said district subject to execution, the clerk shall enter the judgment in the execution docket in the same manner as judgments of the superior court, and thereafter it shall stand and execution be issued thereon as upon the judgment of the superior court. A transcript thereof shall, as in other judgments, be recorded by the county auditor and remain a lien upon real estate in the county where so recorded.

*Lien by docketing judgment of United States courts.*

§ 456. Judgments in the district or circuit court of the United States, if rendered in this state, may be made liens upon the real estate owned by the person against whom said judgment is rendered, and also upon all he may subsequently acquire for a period of five years from the date of the judgment, by filing a certified transcript of the judgment in the office of the auditor or recorder of the county in which the land lies, and no lien shall attach to the lands in any county of this state until the date of filing such transcript, except the county wherein such judgment is rendered, in which case the lien shall attach from the date of such rendition; *provided*, that within twenty days



from such rendition a certified transcript of such judgment shall be filed in the office of the auditor of said county, and if not so filed, the lien of such judgment shall not attach until the actual filing of such certified transcript. [February 19, 1890, § 1.]

*Judgments of United States courts to be docketed in separate book.*

§ 457. The auditor or recorder shall, on the filing of such transcript in his office, immediately proceed to docket and index the same, in a separate book kept for that purpose, in the same manner as though rendered in the superior court of his own county, and he shall be allowed to charge and receive the same fee as provided by law for like service. [February 19, 1890, § 2.]

*Satisfaction of such liens.*

§ 458. When the amount due on any judgment is paid off or satisfied in full, the plaintiff, or those legally acting for him, must acknowledge satisfaction thereof in the margin of the record of the judgment, or by the execution of an instrument in writing referring to the judgment, acknowledged and filed in the office of the auditor or recorder in every county where the judgment is a lien. If he fail to do so within sixty days after having been requested in writing so to do, he shall forfeit to the defendant the sum of fifty dollars. [February 19, 1890, § 3.]

**"Any judgment."**—This section can apply only to judgments of the United States courts. The title of the act is "An act relating to the filing and recording of transcripts of judgments rendered in this state by the district or circuit courts of the United States,"

and the operation of the act will be confined to that subject: Const., art. 2, sec. 19; *Matter of the Mayor of New York*, 100 N. Y. 569; *Mahomet v. Quackenbush*, 117 U. S. 508; *Harland v. Territory*, 3 Wash. 131; *Stewart v. Father Matthew Society*, 41 Mich. 67.

*Rate of interest on judgments.*

§ 459. [320.] Judgments shall bear the legal rate of interest from date thereof, except when rendered upon an express contract in writing wherein a different rate of interest is agreed upon by the parties, in which case the judgment shall, until paid and satisfied, bear the same rate of interest specified in such written contract.

For legal rate of interest, see Vol. I.

**Interest on judgments.**—The legal rate of interest is ten per cent per annum; but any rate agreed upon by the parties to a contract, specifying the same in writing, is valid and legal: See Vol. I., Gen. Laws. By the words "legal interest," found in a statute, is to be understood the rate of interest prescribed by law, in the absence of special agreement, at the date of the passage of the act: *Beals v. Amador Co.*, 35 Cal. 633. Interest upon a judgment which is secured by positive law is as much a part of the judgment as if expressed in it: *Amis v. Smith*, 16 Pet. 303.

At common law, judgments did not carry interest: *Thompson v. Monron*, 2 Cal. 99; and it has been so held with respect to judgments

of this state, and to judgments of other states, which did not disclose, and were not proved to carry, interest: *Cavender v. Guild*, 4 Cal. 251. But in *Emeric v. Tams*, 6 Cal. 155, *Corcoran v. Doll*, 32 Cal. 82, *Lane v. Gluckins*, 38 Cal. 288, and in *Mount v. Chapman*, 9 Cal. 294, it was decided that judgments on contracts bearing interest carried the same interest as the contracts.

Interest is allowable on all money judgments: *Bell v. Knowles*, 45 Cal. 193; *Dougherty v. Miller*, 38 Cal. 548; *Whitcher v. Webb*, 44 Cal. 127; *Randolph v. Bayne*, 44 Cal. 366; including judgments for money in actions of tort: *Atherton v. Fowler*, 46 Cal. 320; and under a statute authorizing "interest on the verdict or decision of the court from the time

it was rendered or made," interest on the amount of the verdict must be included in the judgment from the time the verdict was rendered, though the judgment is not entered until one year from the rendition of the verdict: *Golden Gate etc. Co. v. Joshua Hendy Machine Works*, 82 Cal. 184. It had been held that a judgment for use and occupation did not draw interest: *Osborn v. Hendrickson*, 8 Cal. 32; but in *Burke v. Carruthers*, 31 Cal. 467, a judgment for damages in a forcible entry and detainer case carried interest. So, also, street-assessment judgment: *Himmelman v. Oliver*, 34 Cal. 246; decree in foreclosure on sum due: *Whitcher v. Webb*, 44 Cal. 127; and all final money judgments: *Clark v. Dunam*, 46 Cal. 204.

The judgment bears interest only from the time it is pronounced: *Bibend v. L. & L. Ins.*

*Co.*, 30 Cal. 78. And interest on the demand on which the action is brought should be included in the judgment when entered: *Bibend v. L. & L. Ins. Co.*, 30 Cal. 78.

Compound interest is never to be allowed on judgments: *Quirey v. Hall*, 19 Cal. 97.

As to interest on a foreign judgment, the court held that they must be deemed to know judicially that the common law was the rule of decision in the other states, unless the contrary was expressly shown, and that as no judgment at common law carried interest, none should be here allowed on a judgment rendered in the state of New York, where there was no evidence showing that the common law had been altered by the statute law of that state: *Thompson v. Monroie*, 2 Cal. 100; followed in *Cavender v. Guild*, 4 Cal. 253.

### *Duration of lien by judgment.*

§ 460. [321.] The real estate of any judgment debtor, and such as he may acquire, shall be held and bound to satisfy any judgment of the superior or supreme court, or any judgment of a justice of the peace, authorized by law to be levied upon real estate, for the period of five years from the day on which said judgment was rendered, said lien to commence as follows: On judgments of the superior court of the county in which real estate of the judgment debtor is situated, from the date of the rendition, but within twenty days from the date of such rendition a transcript thereof, certified by the clerk of the said superior court, shall be filed and recorded in the county auditor's office of the county where the said lands are situated, and if not so filed within said period of twenty days, the lien of said judgment shall be suspended until the filing of said transcript. From and after said filing of transcript by the county auditor of any county in the state, such judgment shall be a lien upon all real estate of the judgment debtor in such county for the period of five years, commencing from the date on which said judgment was rendered. In all other judgments which are by law a lien upon real estate, the lien upon lands in any particular county commences and attaches from the date of filing the transcript in the county auditor's office of said county, and continues for the period of five years from the date of rendition of the judgment.

**Lien of judgment** is a strict legal right, and must stand or fall by the statute which gives it: *In re Boyd*, 4 Saw. 262. A judgment which by its terms cannot be enforced against the property of a party cannot become a lien thereon: *In re Boyd*, 4 Saw. 262. A judgment becomes a lien from the time of filing the transcript from another county: *Donner v. Palmer*, 23 Cal. 45; *Creighton v. Leeds*, 9 Or. 215; and continues for the statutory period; and the fact that a lien under the judgment has existed and expired in another county can make no difference: *Donner v. Palmer*, 23 Cal. 45. The lien is not subject to control of the

court so as to confine its operation to a particular piece of property: *Castro v. Illies*, 13 Tex. 229. The character of the cause of action does not affect the nature of the lien. Thus a judgment for purchase-money confers no lien superior to a judgment for any other cause of action: *Fisher v. Foote*, 25 Tex. 311. A judgment at law is generally held not to be a lien upon mere equitable interests in real property: *Smith v. Ingles*, 2 Or. 43; *Bloomfield v. Humason*, 11 Or. 229; note to *Shute v. Harder*, 24 Am. Dec. 436; note to *Filley v. Duncan*, 93 Am. Dec. 348, showing what estates and interests are affected by a judgment lien. But in



California any interest in land, legal or equitable is subject to attachment or execution: *Fish v. Fowlie*, 58 Cal. 373; *Le Roy v. Dunkerly*, 54 Cal. 460. Fixtures are realty, and are affected by a judgment lien: *Railroad Co. v. James*, 6 Wall. 750. Estates for years are not realty within this sense: *Merry v. Hallett*, 2 Cow. 497; *Vredenberg v. Morris*, 1 Johns. Cas. 223. The rights of the lien-owner cannot exceed those which might be acquired by a purchase from the defendant, with full notice of all existing legal or equitable rights belonging to third persons: *Baker v. Morton*, 12 Wall. 150. The attaching of the lien upon the legal title forms no impediment to the assertion of all equities previously existing over the property: *Stannis v. Nicholson*, 2 Or. 332; *Coster's Ex. v. Bank of Ga.*, 24 Ala. 37, 64. A judgment lien will not prevail over a prior unrecorded conveyance unless it appears that the lien was acquired in good faith, without knowledge or notice of such prior unrecorded conveyance: *Baker v. Woodward*, 12 Or. 3. A

vendee under an oral contract for the sale of land who enters into possession has an interest on which his creditors may have a judgment lien: *Logan v. Hale*, 42 Cal. 645. Alteration of county boundaries will not extend the term of the lien: *Bowman v. Horious*, 17 Cal. 474. An injunction does not stop the running of the statute: *Rogers v. Druffel*, 46 Cal. 655; nor is the lien extended by the levy of execution: *Rogers v. Druffel*, 46 Cal. 655.

**Exempt property.**—It will be observed that this section does not expressly state that exempt property shall not be affected by the judgment lien: See Exemption, §§ 479–490. But see *Ackley v. Chamberlain*, 76 Am. Dec. 516, and note to *Filley v. Duncan*, 93 Am. Dec. 351, showing that homesteads are generally regarded as not subject to judgment liens.

**As to priorities of judgment and execution liens**, see *Rogers v. Dickey*, 41 Am. Dec. 204, note 210; *Elston v. Castor*, 51 Am. Rep. 754.

### *Appeal does not suspend lien.*

§ 461. [322.] An appeal to the supreme court or stay of execution shall not affect any existing lien; and in all cases of an appeal the date of final judgment in the supreme court shall be the time from which said five years shall commence to run. Personal property shall only be held from the time it is actually levied upon.

This section, as it stands in the code of 1881, of taking causes to the supreme court having says "appeal or writ of error." The words "or writ of error" are omitted, that method

been abolished by section 11 of the act of March 22, 1890: See title "Of Appeals," in this code.

## CHAPTER XVI.

### OF THE REVIVAL OF JUDGMENTS.

§ 462. Motion for revival, when and how made.

§ 463. Motion, when granted — Effect of revival.

### *Motion for revival, when and how made.*

§ 462. [323.] If any judgment shall remain unsatisfied, in whole or in part, at the end of five years after the date of its rendition, the lien thereof may be revived and continued as in this section provided.

1. The judgment creditor, his assignee, or the party to whom said judgment is due and payable, shall file a motion with the clerk of the court where judgment is entered to revive and continue the lien of the same, with leave to issue an execution. The motion shall state the names of the parties to the judgment, the date of its entry, the amount claimed to be due thereon, or the particular property, of which the possession was thereby adjudged to such party, remaining undelivered. The motion shall be subscribed and verified in the same manner as an original complaint.

2. At any time after filing such motion, the party may cause notice to be served on the judgment debtor in like manner and with like



effect as a summons. Said notice shall be attached to a copy of said motion by the clerk of the court, and be served by the sheriff or other officer as an original summons. It shall cite the judgment debtor to appear and show cause why the said motion should not be allowed. The time in which the judgment debtor shall be required to appear shall be the same as is prescribed for answer to a complaint, and the law applicable to service of a summons shall apply to the service of such notice. In case the judgment debtor be dead, the notice may be served upon his legal representatives.

3. The judgment debtor, or in case of his death his representatives, may file an answer or demurrer to such motion within the time allowed by law to answer a complaint, alleging any defense to such motion which may exist. If no answer be filed within the time prescribed, the motion shall be allowed as of course. The moving party may demur or reply to the answer. The pleadings shall be subscribed and verified, and the proceedings concluded as in original actions.

4. The word "representatives," in this section, shall be deemed to include any or all of the persons in whose possession property of the judgment debtor may be which is liable to be taken and sold or delivered in satisfaction of the execution, and not otherwise.

5. The order shall specify the amount due upon such unsatisfied judgment for which execution is to issue, or the particular property possession of which is to be delivered; it shall be entered in the journal and docketed as a judgment, and a final record shall be made of the proceedings in the same manner as a judgment.

**Motion to revive lien of judgment** is not commencing an action within the meaning of the statute of limitations: *Burns v. Conners*, 23 Pac. Rep. 836 (Wash.); *Murch v. Moore*, 2 Or. 190; *Strong v. Barnhart*, 5 Or. 496.

**Execution on dormant judgments.** — In Oregon it has been held under a somewhat similar section that if five years are allowed to elapse after the entry of judgment without an execution having been issued thereon, no execution can thereafter issue on such judgment without leave of court; that to obtain such leave, the party must file his motion, properly verified, with the clerk, and cause a summons to be served on the judgment debtor in like manner and with like effect as in actions at law; that the right to obtain leave to issue exe-

cution in such a case is "a cause of action," but not "an action relating to real property"; and that the court or judge may order a summons to be served by publication, if a cause of action exist against the defendant, and the requisites of the statute governing this proceeding have been complied with: *Pursel v. Deal*, 16 Or. 295. The application cannot be resisted by showing any matter happening anterior to the judgment; but the execution must issue, unless the judgment has been satisfied or ceased to exist, or the judgment debtor for some reason has been released from his liability: *Lee v. Watkins*, 13 How. Pr. 178. The proceeding under this section is in the nature of a separate proceeding: *Ladd v. Higler*, 5 Or. 296.

*Motion, when granted — Effect of revival.*

§ 463. Such motion shall not be granted unless it be established by oath of the party, or other satisfactory proof, that the judgment, or some part thereof, remains unsatisfied. The order of the court granting such leave shall operate as a revival of the judgment for the amount found due at the time of such revival, and the same shall be and continue a lien upon real estate of the judgment debtor for a period of five years from and after the date of such order, in like man-

ner with the original judgment; *provided*, that a transcript thereof shall within twenty days be filed in the office of the county auditor of the county where the lands lie of such judgment debtor, or said lien shall be suspended till such transcript be filed. Revived judgments shall bear the same interest and be in all respects similar to original judgments as to lien and enforcement or collection; *provided, however*, that no judgment shall be revived or continued unless proceedings for such revival or continuance shall be commenced within six years after the date of its rendition; *provided further*, that this section shall not apply to any judgment now in existence until one year from the time this act takes effect. [March 6, 1891, § 1.]

“Section” substituted for “act,” being identical.

**Motion to revive lien of judgment is not the commencement of an action:** *Burns v. Connors*, 23 Pac. Rep. 836 (Wash.).

## TITLE VIII.

## OF THE ENFORCEMENT OF JUDGMENTS.

## CHAPTER I. — OF EXECUTIONS.

## II. — OF STAY OF EXECUTION.

## III. — OF PROPERTY SUBJECT TO EXECUTION.

## IV. — OF CLAIM BY THIRD PERSONS TO PROPERTY TAKEN UNDER EXECUTION.

## V. — OF SALE OF PROPERTY UNDER EXECUTION.

## VI. — OF PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

## CHAPTER I.

## OF EXECUTIONS.

- § 464. Execution may issue to enforce any judgment.
- § 465. Four kinds of execution.
- § 466. Execution to enforce judgment for money — Judgment served, in what cases.
- § 467. Form and contents of the writ.
- § 468. To what county execution may issue.
- § 469. Sheriff's duty on recovering the execution.
- § 470. Execution against the person, when may issue.
- § 471. Imprisonment of defendant upon execution.
- § 472. Execution in name of assignee, executor, etc.

*Execution may issue to enforce any judgment.*

§ 464. That the party in whose favor judgment has been given or may hereafter be given or entered in any court of record in this state or the territory of Washington may have an execution issued at any time for the collection or enforcement of the same; *providing*, that if a period of five years shall have elapsed without an execution being issued on such judgment, then execution shall not issue thereafter until such judgment shall be revived in the manner provided for by law. [January 27, 1888, § 1. In effect immediately.]

**Limitation of time for issuing execution.** — The statutory time during which execution may be issued is exclusive of any interval during which the right to execution has been suspended: *Underwood v. Green*, 56 N. Y. 247.

**Power of court to stay execution:** See note to *Commonwealth v. Magee*, 49 Am. Dec. 513-516.

**Enforcement of judgment by execution.** — Any court that is competent to pronounce a judgment is competent to enforce it by execution: *United States v. Drennen*, Hemp. 325.

The judgment which will authorize an execution must be final: *Truett v. Legg*, 32 Md. 150. An execution cannot issue on a merged or satisfied judgment: *McGuinty v. Herrick*, 5 Wend. 240; *Ruckman v. Cowell*, 1 N. Y. 505. A judgment by confession on a contingent lia-

bility can be enforced by execution: *Allen v. Norton*, 6 Or. 344; see §§ 418, 419, *ante*. Plaintiff may order execution to issue; the agency of an attorney is not necessary: *Jones v. Spears*, 56 Cal. 163. Clerk of superior court may issue, without previous order of court, execution on a judgment of an old district court: *Dorn v. Howe*, 53 Cal. 129. Entry of judgment in lien docket is not necessary to the issuance of an execution: *Hastings v. Cunningham*, 39 Cal. 137; *Los Angeles Bank v. Raynor*, 61 Cal. 145. A court has authority to order a suspension of the execution of a writ till a motion before the court to recall or quash it can be heard: *Sanchez v. Carriaga*, 31 Cal. 170. When a sheriff levies on property under an execution regularly issued under a judgment by default, and retains the same until the



judgment is set aside, the plaintiff will not be liable in damages, if acting without fraud: *White v. Adams*, 52 Cal. 435. If a judgment plaintiff contracts to sell the land on credit to defendant, the right of possession is not in the vendee till payment, and the vendor can remove him by execution: *Troy v. Clarke*, 30 Cal. 419. If the judgment debtor delivers to the plaintiff a promissory note of third parties, in satisfaction, which note is void because fraudulently obtained by defendant from the makers, plaintiff need not return the note before proceeding by execution: *Mitchell v. Hockett*, 25 Cal. 538. Executions cannot be set off against one another unless the parties are the same: *Calderwood v. Peyser*, 42 Cal. 111.

If sufficient personal property cannot be found, the sheriff may, on the request of defendant, levy on real estate though there be personal property present amply sufficient to satisfy the execution: *Smith v. Randall*, 6 Cal. 47. It is the duty of the sheriff in the execution of a writ of assistance, to place the purchaser on foreclosure of mortgage of an estate in common, in the possession of every part and parcel of the land, jointly with the other tenants in common: *Teris v. Hicks*, 38 Cal. 234. In the execution of the writ, the sheriff cannot remove any of the tenants in common who hold under a title derived from a source independent of him through whom the purchaser claims: *Teris v. Hicks*, 38 Cal. 234.

Where there has been a change of sheriffs, the old sheriff going out after levy on land and before selling the property, a writ of *renditioni exponas* may be issued to the new sheriff: *Clark v. Sawyer*, 48 Cal. 133. The writ of *renditioni exponas* is a simple order of court, directed to the officer, commanding him to sell property

already levied on. It is no authority to levy: *Welch v. Sullivan*, 8 Cal. 186. A *renditioni* issued for the sale of personal property must go to the officer who made the seizure; but when for the sale of land, it may go to his successor in office: *Clark v. Sawyer*, 48 Cal. 133. A sheriff, in enforcing an execution, acts as an officer of the court, and under color of its process: *McMann v. Superior Court*, 74 Cal. 106. The superior court, therefore, has power to recall an execution which had been improperly issued after the expiration of the time allowed by law for its issuance, and to order the sheriff to refund money collected by him thereon: *McMann v. Superior Court*, 74 Cal. 106.

A levy upon sufficient personal property to satisfy it amounts to a satisfaction of the judgment; such is not the case, however, as to the debtor if he consents to an application of the proceeds of sale to junior executions. If a judgment has the first lien on real estate, and mechanics' liens have the second lien, and other judgments the third lien in point of time, and an execution issued on the first judgment is levied on sufficient personal property to satisfy it, and executions on the other judgments are then levied on the same, and the attorney for the plaintiff in the first judgment consents that the proceeds of sale be applied to the other judgments, the first judgment will be deemed satisfied as against the mechanics' liens: *Barber v. Reynolds*, 44 Cal. 520. The mere levy alone will not satisfy the judgment, but the property must be applied to the judgment. One levy will not prevent another if the property was not applied to the judgment: *Wright v. Young*, 6 Or. 87.

As to form and requisites of execution, see § 467, *post*.

#### *Four kinds of executions.*

§ 465. [327.] There shall be four kinds of execution: One against the property of the judgment debtor; another against his person; the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same; and the fourth, commanding the enforcement of or obedience to any special order of the court. And in all cases there shall be an order to collect the costs.

See § 470, *post*, as to execution against the person.

#### *Execution to enforce judgment for money — Judgment served, in what cases.*

§ 466. [326.] When a judgment requires the payment of money, or the delivery of real or personal property, the same may be enforced in those respects by execution, as provided in this chapter. When it requires the performance of any other act, a certified copy of the judgment may be served on the party against whom it is given, or the person or officer who is required thereby, or by law, to obey the same, and a writ shall be issued commanding him to obey or enforce the same. If he refuses, he may be punished by the court as for a contempt.

**Enforcing performance.** — The court cannot make an order directing a sheriff to levy on a particular piece of property, though the

court decide that it belongs to the debtor, and is not exempt: *Fraser v. Thrift*, 50 Cal. 476.

*Form and contents of the writ.*

§ 467. [328.] The writ of execution shall be issued in the name of the state of Washington, sealed with the seal of the court, and subscribed by the clerk, and shall be directed to the sheriff of the county in which the property is situated, or coroner when the sheriff is a party or interested, and shall intelligibly refer to the judgment, stating the court, the county where judgment was rendered, the names of the parties, the amount of the judgment if it be for money, and the amount actually due thereon, and shall require substantially as follows:—

1. If it be against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment, with interest, out of the personal property of the debtor, and if sufficient personal property cannot be found, out of his real property upon which the judgment is a lien.

2. If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the sheriff to satisfy the judgment, with interest, out of such property.

3. If it be against the person of the judgment debtor, it shall require the sheriff to arrest such debtor, and commit him to the jail of the county until he shall pay the judgment, with interest, or be discharged according to law.

4. If it be for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require the sheriff to satisfy any charges, damages, or rents and profits recovered by the same judgment, out of the personal property of the party against whom the judgment was rendered, and the value of the property for which the judgment was recovered, shall be specified therein. If a delivery thereof cannot be had, and if sufficient personal property cannot be found, then out of his real property. When it is to enforce obedience to any special order, it shall particularly command what is required to be done or to be omitted. When the nature of the case shall require it, the execution may embrace one or more of the requirements above mentioned. And in all cases the execution shall require the collection of all interest, costs, and increased costs thereon.

**Style of process.** — Process must run in the name of the state of Washington: Const., art. 4, sec. 27.

**Issuance of writ.** — The form prescribed by the statute need not be strictly followed; it is sufficient if the statute is followed in substance: *Burdick v. Shigley*, 30 Iowa, 63; *McMahon v. Colclough*, 2 Ala. 68. An execution not issued in the name of the people, or not directed to the sheriff is amendable: *Hibbard v. Smith*, 50 Cal. 511. The writ should contain words commanding a levy, or it will be insufficient: *Gaskill v. Aldrich*, 41 Ind. 338. An execution must be warranted by the judg-

ment, and must not exceed it: *Davis v. Robinson*, 10 Cal. 441. If the judgment is for the payment of money, it is indispensable that the amount should be stated: *Maxwell v. King*, 3 Yerg. 460. If it directs the levy of more money than the judgment calls for, it is voidable: *Hunt v. Loucks*, 38 Cal. 372. If for less, it is irregular: *Webber v. Hutchins*, 8 Mees. & W. 319. Where the name of the court was not properly stated, the execution was held to be a nullity: *Palmer v. Crosby*, 11 Gray, 46. Courts have, when enough appears on the face of the execution to connect it with the judgment, disregarded variances in names of the parties: *Blake*



v. *Blanchard*, 48 Me. 297; *Barnes v. Hayes*, 1 Swan, 304; in the date: *Perkins v. Spaulding*, 2 Mich. 157; *Brown v. Betts*, 13 Wend. 30; or in the statement of the amount of the judgment: *Harris v. Alcock*, 10 Gill & J. 226; 32 Am. Dec. 158.

**Delivery of possession of real or personal property.** — The doctrine of *Wood v. Colvin*, 5 Hill, 228, that the judgment being a lien upon the lands, a levy is unnecessary, that the judgment binds the lands and the execution comes as a power to sell, is the correct one: *Bagley v. Ward*, 37 Cal. 131; *Catin v. Jackson*, 8 Johns. 520. Where there are no judgment or attachment liens, the levy operates upon real property as it does upon personal property; that is, the execution first served has priority: *Bagley v. Ward*, 37 Cal. 131.

A defendant, cannot, after judgment, by transferring possession to another, prevent the execution of the writ. Where a writ of restitution has been awarded in such a case, and the sheriff refuses to execute the same, on the ground that the property is in the possession of certain persons not parties to the suit, the court will award a peremptory *mandamus* against the sheriff to compel him to execute the writ: *Fremont v. Crippen*, 10 Cal. 211; 70 Am. Dec. 711; *State v. Gilbert*, 2 Bay, 355.

When a recovery is had against the occupant, the judgment binds all persons under whom he occupies, together with all persons in privity of estate or possession with himself. When a recovery is had against a tenant, the landlord is bound by it. So a recovery against a tenant in common who holds for himself and under the other tenants in common is binding upon all his co-tenants, as well as himself. There is therefore no necessity for making any other than the occupant a defendant, to bind all persons in privity by a recovery: *Sampson v. Ohleyer*, 22 Cal. 204-207; *Hanson v. Armstrong*, 22 Ill. 442. Persons who take possession after the filing of a *lis pendens*, or with notice of the pendency of the action, can be dispossessed by the execution: *Fogarty v. Sparks*, 22 Cal. 148. A person removed from possession of real estate under a writ of restitution, who applies in a summary manner to be reinstated, must make out a clear case, free from ambiguity: *California Q. M. Co. v. Redington*, 50 Cal. 160. A writ of restitution in ejectment, issued after the death of the judgment plaintiff, in his name, is erroneous, as it should be in the name of his executor or administrator; but if in point of fact it is issued at the instance of the latter, defendants will not be restored to possession: *Franklin v. Merida*, 50 Cal. 289.

A writ of assistance is the appropriate remedy to place the purchaser of mortgaged premises under a decree of foreclosure in possession after he has obtained the sheriff's deed. This is so as against the defendants in the suit who are bound by the decree, and who refuse to surrender possession upon the order of the court to that effect. The power of the court rests upon the principle that where the court possesses jurisdiction to make a decree, it possesses the power to enforce its execution: *Montgomery v. Tutt*, 11 Cal. 191.

*Prima facie*, the plaintiff, after the purchase of the mortgaged premises and sheriff's deed,

is entitled to his writ of assistance as against the mortgagor and those entering under him, after the decree, if they refuse to surrender possession. The writ having been ordered, the mortgagor and his wife cannot successfully move to set it aside on the ground that they had, before the mortgage, resided on the premises as a homestead, etc., especially where the premises were mortgaged for the purchase-money: *Skinner v. Beatty*, 16 Cal. 157. To entitle a purchaser at a foreclosure sale to a writ of assistance, it is not essential that the decree of foreclosure direct delivery of possession to the purchaser: *Horn v. Volcano Water Co.*, 18 Cal. 141. But a writ of assistance can only issue against the defendants in the suit, and the parties holding under them, who are bound by the decree: *Burton v. Lies*, 21 Cal. 92.

All that is requisite to obtain the writ, as against the parties and those claiming under them, after the commencement of the action, is to furnish to the court proper evidence of the presentation of the deed to them, and a demand of the possession, and their refusal to surrender it: *Montgomery v. Middlemiss*, 21 Cal. 106, 107. A person who, pending an action for the foreclosure of a mortgage, and with notice of the pendency, purchases from one of the defendants therein a portion of the mortgaged premises, occupies the same position as his grantor in reference to the issuance of a writ of assistance in favor of the purchaser under decree: *Montgomery v. Byers*, 21 Cal. 107. It was held that a writ of assistance would not be issued against a purchaser of the mortgaged premises who bought during the pendency of a suit to foreclose, and who was not a party to that suit, and without actual or constructive notice of its pendency: *Harkin v. Rickerby*, 24 Cal. 561. A sheriff has no authority, by virtue of a writ of restitution, to remove from the premises described in the writ persons who were not parties to the judgment in which the writ was issued, and did not enter under defendant in the judgment pending the suit. One who is the owner of land and in possession of the same is not entitled to an injunction to restrain a sheriff from executing a writ of restitution, issued on a judgment rendered against third parties, to which judgment the plaintiff is a stranger: *Tetis v. Ellis*, 25 Cal. 515. If the court, in an action to foreclose a mortgage, does not acquire jurisdiction of the person owning the land at the time of the foreclosure, a writ of assistance against the owner or his grantees will be refused: *Steinbach v. Leese*, 27 Cal. 295. A party and her tenants coming into possession of lands after action brought to recover possession under a prior unrecorded deed from two of the defendants to an infant whose guardian was in possession, of which deed plaintiff had no notice when the action was commenced, were held properly dispossessed under a writ of restitution issued on a judgment for plaintiff: *Mayne v. Jones*, 34 Cal. 483. But where, before suit, defendant has sold the property, it cannot be taken from the purchaser under an execution issued on the judgment: *Peterie v. Bugby*, 24 Cal. 419. *Prima facie*, all who come into possession after action brought must go out, for the presumption is that they came in under the defendant; but this is rebutted if some person other than the



defendant is in possession under a title adverse to his, for the right to the possession flowing from such a title has not been determined by the judgment. No one who is not party to the action, or privy to him, can be dispossessed: *Long v. Neville*, 29 Cal. 136; *Jones v. Chiles*, 2 Dana, 252; *Leroy v. Rogers*, 30 Cal. 229; *Rogers v. Parish*, 35 Cal. 127; *Mayo v. Sprout*, 45 Cal. 101.

If neither the tenant nor his landlord is a party, and the landlord was in possession when the suit was commenced, but subsequently leased to the tenant, the tenant cannot rightfully be removed: *Watson v. Dowling*, 26 Cal. 125; *Calderwood v. Pyser*, 31 Cal. 333.

If defendant, pending an action against him to recover possession of land, colludes with another person to obtain judgment against him for possession, and to be placed in possession, such other person must go out under a writ against the defendant: *Wetherbee v. Dunn*, 36 Cal. 147.

When a sheriff goes to execute a writ of possession, issued on a judgment in an action to recover land, if he finds parties in possession other than those named in the complaint, who claim that they are rightfully in possession, not in privity with the defendant, and the circumstances are such that a reasonable doubt exists whether the sheriff has a right to turn them out, the sheriff may demand indemnity; and unless it is given, may refuse to execute the writ; and this, even if the premises are specifically described in the writ: *Long v. Neville*, 36 Cal. 455.

If the plaintiff obtains judgment upon an action of forcible entry and detainer, but does not obtain possession of the property, and a writ of restitution is not issued, and the judgment is afterwards reversed and the action dismissed, and during the pendency of the action third parties obtain possession of the property by collusion with a servant of the defendant, the defendant is not entitled to a writ to be restored to possession as against those third parties: *Bowers v. Cherokee Bob*, 46 Cal. 279.

If the decree in a foreclosure suit directs the sale of all the mortgaged premises, and forecloses and bars the equity of redemption of all the defendants, and directs that the purchaser at the sheriff's sale be let into possession, the person who receives the sheriff's deed

after a sale is entitled to a writ of assistance as against all the defendants who were served with process, or who appeared in the action. The above rule prevails as against a defendant who is not mentioned in the sheriff's deed: *Frisbie v. Fogarty*, 34 Cal. 11.

Where a sheriff received a writ of assistance, and went with plaintiff to the premises for the purpose of putting him in possession, but in opposition to plaintiff's wishes declined to take any action in the matter, and on a subsequent day executed the writ, the parties in possession, being the parties against whom the writ ran, having in the mean time destroyed a number of valuable fixtures, and by their willful and malicious acts otherwise injured the premises, it was held that the sheriff was liable for all the damage, however remote: *Chapman v. Thornburgh*, 17 Cal. 87.

If the return of the first writ does not clearly declare that it has been fully executed, and it is made to appear by affidavits that it has not been, it is competent for the court to issue another writ: *Teris v. Hicks*, 38 Cal. 234. A person in possession adverse to the plaintiff cannot be ejected under a judgment collusively obtained by plaintiff against a person who goes into temporary possession for the purpose: *S. B. L. A. v. Christy*, 41 Cal. 502.

On a motion for a writ of assistance, questions of equitable cognizance between the parties in possession of the land, who were not parties to the foreclosure suit, and the plaintiff, as to their respective rights to the lands, cannot be litigated: *Henderson v. McTucker*, 45 Cal. 647.

A person who forecloses a mortgage given by one partner on and obtains a sheriff's deed for an undivided interest in partnership property without making the other partner a party is not entitled to a writ of assistance as against a receiver appointed at the instance of such other partner in an action for dissolution, etc.: *Autenreith v. Hessenauer*, 43 Cal. 356. It seems that the grantee of the holder of the sheriff's deed is not a person in whose favor a writ of assistance should be awarded. Notice of the application for a writ of assistance should be first given to the defendant, and also to the terre-tenant, if there be one, whose interest would be disturbed by the execution of the writ applied for: *San Jose v. Fulton*, 45 Cal. 318.

### *To what county execution may issue.*

§ 468. The party in whose favor judgment has been rendered, entered, or given in any court of record in this state for the recovery of money, or against the property of a judgment debtor, may have execution issued thereon for the collection or enforcement of such judgment to the sheriff of any county in this state; *provided*, that when a judgment requires the delivery of real or personal property execution shall be issued to the sheriff of the county where the property, or some part thereof, is situated. [January 27, 1888. In effect immediately.]

### *Sheriff's duty on receiving the execution.*

§ 469. [330.] The sheriff shall indorse upon the writ or execution

the time when he received the same, and such execution shall be returnable within sixty days after its date to the clerk who issued the same. And no sheriff shall retain any moneys collected on execution more than twenty days before paying the same to the clerk of the court who issues the writ, under penalty of twenty per cent on the amount collected, to be paid by the sheriff, the one half to the party to whom the judgment is payable, and the other half to the county commissioners of the county wherein the action was brought, for the use of the school fund of said county. And the clerk shall, immediately after the receipt of any moneys collected on any judgment, notify the party to whom the same is payable, and pay over the amount to the said party on demand. On failure to so notify and pay over, without reasonable cause shown for delay, the clerk shall forfeit and pay the same penalty to the same parties as is above prescribed for the sheriff.

**Sheriff's return** is not traversable, and a court will not permit it, collaterally, to be attacked, even if the officer is shown to have been guilty of fraud and collusion: *Egery v. Buchanan*, 5 Cal. 56; *Sewell on Sheriffs*, 387; *Watson on Sheriffs*, 72. The remedy is action for a false return. The term "appurtenances," used in a return, was held too vague to comprehend any personal property: *Munroe v. Thomas*, 5 Cal. 471. But a description of lots, as lots 140 and 141 on the official map of the city of San Francisco, was held sufficient: *Welch v. Sullivan*, 8 Cal. 187. A sheriff cannot amend his return so as to affect rights already vested: *Newhall v. Provost*, 6 Cal. 85. A return that "John Moore, plaintiff's attorney, was the purchaser at \$180, and has paid the costs," means that Moore purchased, as attorney, and for the plaintiff, and that he paid the sheriff's costs, taking the property for the judgment: *Moore v. Martin*, 38 Cal. 428. The title of a purchaser does not depend on the sheriff returning the writ: *Sacramento v. Stage Co.*, 12 Cal. 134; *Ten Eyck v. Walker*, 4 Wend. 462; *Clark v. Lockwood*, 21 Cal. 224; *Wilson v. Madison*, 55 Cal. 5.

**Return conclusive upon sheriff:** *Harvey v. Foster*, 64 Cal. 296; *Ferguson v. Tutt*, 8 Kan. 370. Sheriff's return as evidence: See references in note to 43 Am. Dec. 531; *Mitchell v. Hockett*, 25 Cal. 539.

**Amending officer's return.** — Courts exercise great liberality in allowing officers to amend their returns so as to make them conform to the true facts, and to correct errors and mistakes; and if, in thus amending, the officer makes a false return, he is liable there-

for, and such amendments are often allowed after a great lapse of time: *Garitt v. Doub*, 23 Cal. 81; *Thatcher v. Miller*, 11 Mass. 413; *Adams v. Robinson*, 1 Pick. 461; *Haven v. Snow*, 14 Pick. 28; *Johnson v. Day*, 17 Pick. 106; *Buck v. Hardy*, 6 Greenl. 162; *Gilman v. Stetson*, 18 Me. 428; *Williams v. Rogers*, 5 Johns. 163; *Malone v. Samuel*, 3 A. K. Marsh. 350; *Woodward v. Harbin*, 4 Ala. 534; *People v. Ames*, 19 Am. Dec. 64; *Chase v. Merrimack Bank*, 31 Am. Dec. 163; note to *Malone v. Samuel*, 13 Am. Dec. 173-181, on amendment of returns to writs. In one of these cases, a return was allowed to be amended after the lapse of twenty years, and in another after six years: *Garitt v. Doub*, 23 Cal. 81.

**Collection and payment over by sheriff.** — If the sheriff take a note, and return an execution for money as satisfied, such transaction does not satisfy the execution; he is not authorized to receive anything but legal money or currency: *Mitchell v. Hackett*, 14 Cal. 666; 25 Cal. 542; payment over to the creditor by the sheriff cannot be questioned by other holders of executions in the sheriff's hands: *Carlton v. Conroy*, 21 Cal. 172.

Statute penalties are only recoverable when, by the return of the sheriff, he admits the collection of the money, and refuses to pay it over. If it were otherwise, an error of judgment, or even a hesitation to decide between two adverse claimants, might work the ruin of an honest and conscientious officer: *Johnson v. Gorham*, 6 Cal. 196; and see *Wilson v. Broder*, 10 Cal. 486.

### *Execution against the person, when may issue.*

§ 470. [331.] If the action be one in which the defendant may be arrested as provided by law, an execution against the person of the judgment debtor may be issued to any county in the state; *provided*, that the sheriff shall not arrest the defendant if he shall deliver to him the property subject to levy, sufficient to satisfy said judgment.



**Arrest of debtor.** — There shall be no imprisonment for debt, except in cases of absconding debtor: See Const., art. 1, sec. 17. **As to other matters concerning issuance of execution,** see § 464, *ante*.

*Imprisonment of defendant upon execution.*

§ 471. [332.] A person arrested on execution shall be imprisoned within the jail, or the liberties thereof, and kept at his own expense until satisfaction of the execution or his legal discharge; but the plaintiff shall be liable to the sheriff, in the first instance, for such expense as in other cases of arrest in the same manner and to the same extent as therein prescribed.

*Execution in name of assignee, executor, etc.*

§ 472. In all cases in which a judgment has been recovered in any of the courts of this state, which shall have been assigned to any person, execution may issue in the name of the assignee, upon the assignment being recorded in the execution docket by the clerk of the court in which the judgment is recovered; and in all cases in which a judgment has been recovered in any such court, and the person in whose name execution might have issued dies, execution may issue in the name of the executor, administrator, or legal representative of such deceased person upon the letters testamentary or of administration, or other sufficient proof, being filed in said cause and minuted upon said execution docket by the clerk of the court in which said judgment is entered, and upon an order of said court, or the judge thereof, which may be made on an *ex parte* application, and the provisions of this section shall extend to all judgments heretofore recovered, as well as to those hereafter to be recovered, and to cases of persons now deceased, as well as to those who may hereafter die. [January 30, 1886, § 1. In effect immediately.]

## CHAPTER II.

### OF STAY OF EXECUTION.

- § 473. Stay, in what cases allowed.
- § 474. Bond required for stay.
- § 475. Judgment may be entered against sureties.
- § 476. Qualification and justification of sureties.
- § 477. Execution stayed for part of period.
- § 478. Bonds must be lodged with clerk.

*Stay, in what cases allowed.*

§ 473. [335.] Stay of execution shall be allowed on judgments rendered in the supreme court and superior court as follows:—

In the supreme court,—

1. On all sums under five hundred dollars, thirty days;
2. On all sums over five and under fifteen hundred dollars, sixty days;



3. On all sums over fifteen hundred dollars, ninety days.
- . On judgments rendered in the superior court,—
  1. On all sums under three hundred dollars, two months;
  2. On all sums over three hundred and under one thousand dollars, five months;
  3. On all sums over one thousand dollars, six months.

*Bond required for stay.*

§ 474. [336.] Before any execution shall be stayed under the provisions of this chapter, the defendant shall give bond to the opposite party in double the amount of the judgment and costs, with surety, to the satisfaction of the clerk, conditioned to pay said judgment, interest, costs, and increased costs at the expiration of the period of said stay.

**Appeal. stay of execution:** See title on appeals, *post*. where injustice or surprise will result from a false return of the sheriff, courts doubtless

**Stay of proceedings.** — Notice of a motion to set aside an execution and a levy made thereunder will not operate as a stay of proceedings: *Bryan v. Berry*, 8 Cal. 130. But have power, upon a proper showing, to stay proceedings: *Washington Mill Co. v. Kinnear*, 1 Wash. 99.

*Judgment may be entered against sureties.*

§ 475. [337.] If the judgment is not satisfied at any time after the expiration of the period for which execution has been stayed, the plaintiff may, upon motion supported by an affidavit that such judgment, or any part thereof, is unpaid, and stating how much still remains due thereon, have judgment against the sureties upon said bond for the balance remaining due, and have an execution therefor, upon which no stay shall be allowed.

*Qualifications and justification of sureties.*

§ 476. [338.] The sureties upon a bond for stay of execution shall possess the same qualifications and justify in the same manner as bail upon arrest in civil actions.

See §§ 245, 246, as to qualifications and justification.

*Execution stayed for part of period.*

§ 477. [339.] When execution has not been stayed, and execution issues before the time has elapsed for which it might have been stayed, as is herein provided, the defendant may have stay for the balance of the time upon giving the proper bond and surety, which bond and surety shall be approved by and justified before the sheriff.

*Bonds must be lodged with the clerk.*

§ 478. [340.] Bonds required by this act shall, when taken, be lodged with the clerk of the court where the judgment was rendered and placed on file in his office.

## CHAPTER III.

## OF PROPERTY SUBJECT TO EXECUTION.

- § 479. All property subject, except such as is exempt by law.
- § 480. Wife's property not subject to execution for husband's debt.
- § 481. Exemption of homestead.
- § 482. When homestead liable.
- § 483. Homestead may be mortgaged.
- § 484. Proceeding by creditor when homestead is of greater value than allowed by law.
- § 485. On sale of homestead, the proceeds are exempt.
- § 486. Specification of exempt property.
- § 487. Pension money is exempt.
- § 488. Same subject.
- § 489. Exemption may be waived.
- § 490. Claim of exemption, and proceedings thereon.

*All property subject, except such as is exempt by law.*

§ 479. [333.] All property, real and personal, of the judgment debtor, not exempt by law, shall be liable to execution.

**Judgment not subject to levy under execution:** See § 488, *post*.

*Wife's property not subject to execution for husband's debt.*

§ 480. [341.] All real and personal estate belonging to any married woman at the time of her marriage, and all which she may have acquired subsequently to such marriage, or to which she shall hereafter become entitled in her own right, and all her personal earnings, and all the issues, rents, and profits of such real estate, shall be exempt from attachment and execution upon any liability or judgment against the husband, so long as she or any minor heir of her body shall be living; *provided*, that her separate property shall be liable for debts owing by her at the time of her marriage.

**Wife's property.**—The wife's separate property cannot be levied upon for debts of the husband. So held under constitutional provisions, quite similar in language to this section, making the wife's property sacred to the use and enjoyment of the wife: See *Lewis v. Johns*, 24 Cal. 98; *Alverson v. Jones*, 10 Cal. 9. The husband cannot claim any exemption on account of the separate property of the

wife, and where execution has issued against property owned by them jointly, he cannot recover the interest of the wife in such property which has been sold under the execution; *Stanton v. French*, 83 Cal. 194.

**Exemption of earnings or wages from execution and attachment:** See note to *Brown v. Hebard*, 91 Am. Dec. 411-425.

*Exemption of homestead.*

§ 481. [342.] There shall be also exempt from execution and attachment to every householder, being the head of a family, a homestead not exceeding in value the sum of one thousand dollars, while occupied as such by the owner thereof, or his or her family. Said homestead may consist of a house and lot or lots in any city, or of a farm consisting of any number of acres, so that the value of the same shall not exceed the aforesaid sum of one thousand dollars. Such homestead may be selected at any time before sale.

**Homesteads are exempt from execution**, except as in this chapter provided: See *Barrett v. Sims*, 59 Cal. 615; *Ackley v. Chamberlain*, 16 Cal. 183; 76 Am. Dec. 516; *Bowman v. Norton*, 16 Cal. 220; note to *Filley v. Duncan*, 93 Am. Dec. 351; *McCracken v. Adler*, 2 Am. St. Rep. 340; *Kendall v. Powers*, 9 Am. St. Rep. 326; *Lubrock v. McMann*, 82 Cal. 226. And the exemption from execution of a homestead under state laws applies as well to executions in favor of the United States as to others: *Fisk v. O'Neil*, 106 U. S. 272. The proceeds of a sale of a homestead are liable to execution: *Mann v. Kelsey*, 10 Am. St. Rep. 800; unless the vendor at the time of the sale intends to reinvest such proceeds in another homestead: See note to *Mann v. Kelsey*, 10 Am. St. Rep. 800; *Smith v. Gore*, 33 Am. Rep. 188. As to appraisement of value of homestead under

execution, see *Brown v. Starr*, 79 Cal. 608. As to homestead exemptions, see note to *McCoy v. Brennan*, 1 Am. St. Rep. 593.

If after the creation or commencement of a judgment lien against the husband a wife file a declaration of homestead, she acquires thereby such an interest in the homestead as to enable her to maintain an action against the sheriff to compel him to exhaust the husband's personal property before proceeding to sell the homestead: *Bartholomew v. Hook*, 23 Cal. 277. A whole crop of grain, without reference to its quantity, raised upon a homestead farm, is not, because of being so raised, exempt from execution: *Horgan v. Amick*, 62 Cal. 403.

That growing crops are subject to levy, see *Whipple v. Foot*, 3 Am. Dec. 442; *Coombs v. Jordan*, 22 Cal. 238.

### *When homestead liable.*

§ 482. [343.] When any person dies seised of a homestead, leaving a widow or husband or minor children, the survivors shall be entitled to the homestead; but in case there be neither surviving husband, widow, or children, the said homestead shall be liable for the debts of the deceased.

**Widow's right to homestead** cannot be cut off by a general judgment lien on the land on which decedent resided at the time of his death. His having failed to comply during his lifetime with the law to acquire such home-

stead does not debar his widow and children of such right, they living on the land at the time of and since the death of the husband and father: *McMillan v. Man*, 23 Pac. Rep. 441 (Wash.).

### *Homestead may be mortgaged.*

§ 483. Nothing herein contained shall be construed to prevent the owner of a homestead from voluntarily mortgaging the same. But no mortgage shall be valid against the wife of the mortgagor, unless she shall sign and acknowledge the same. [January 31, 1888. In force March 1, 1888.]

### *Proceeding by creditor when homestead is of greater value than allowed by law.*

§ 484. [345.] When any creditor shall be of opinion that any homestead claimed under the provisions of this act is of greater value than one thousand dollars, on filing an affidavit to that effect with the clerk of the superior court, the judgment creditor may proceed against said homestead as in other cases of real estate, and if said homestead shall sell for over one thousand dollars and costs, the surplus shall be applied to the payment of the judgment of said creditor, and in all such cases the sum of one thousand dollars, free of charge or expense, shall be paid to the owner of the homestead; and in case the said homestead shall not sell for more than one thousand dollars and costs, the person instituting the proceeding shall pay all costs of such proceeding, and the said proceeding cease, and not affect or impair the rights of the owner of the homestead.



**Execution on homestead for purpose of determining the value, but it must be done of appraisal.** — A levy of an execution in the manner therein pointed out: *Barrett v. Sims*, 59 Cal. 615.  
on a homestead may be made for the purpose

*On sale of homestead, the proceeds are exempt.*

§ 485. [346.] In case of the sale of said homestead, any subsequent homestead acquired by the proceeds thereof shall also be exempt from attachment and execution; nor shall any judgment or other claim against the owner of such homestead be a lien against the same in the hands of a *bona fide* purchaser for a valuable consideration.

*Specification of exempt property.*

§ 486. The following property shall be exempt from execution and attachment, except as hereinafter specially provided:—

1. All wearing apparel of every person and family.
2. All private libraries, not to exceed five hundred dollars in value, and all family pictures and keepsakes.
3. To each householder, one bed and bedding, and one addition[al] bed and bedding for each additional member of the family, and other household goods and utensils and furniture not exceeding five hundred dollars, coin, in value. The other household goods and utensils and furniture specified above shall, on the demand of the officer having the execution or attachment in hand, be selected by the husband, if present, if not present they shall be selected by his wife, and in case neither husband or wife, nor other person entitled to the exemption by having the description of a householder, shall be present to make the selection, then the sheriff shall make a selection of the household goods, utensils, and furniture equal in value to said five hundred dollars, and shall return the same as exempt by inventory, and such selection by the sheriff or other person described above shall be *prima facie* evidence,—
  1. That such household goods, utensils, and furniture are exempt from execution and attachment;
  2. That the value of the property so selected is not over five hundred dollars.

4. To each householder, two cows, with their calves, five swine, two stands of bees, thirty-six domestic fowls, and provisions and fuel for the comfortable maintenance of such householder and family for six months, also feed for such animals for six months; *provided*, that in case such householder shall not possess or shall not desire to retain the animals named above, he may select from his property and retain other property not to exceed two hundred and fifty dollars, coin, in value. The selection in the proviso mentioned shall be made in the manner and by the person and at the time mentioned in subdivision three, and said selection shall have the same effect as selections made under subdivision three of this section.

5. To a farmer, one span of horses or mules, with harness, or two

yoke of oxen, with yokes and chains, and one wagon; also farming utensils actually used about the farm, not exceeding in value five hundred dollars in coin; also one hundred and fifty bushels of wheat, one hundred and fifty bushels of oats or barley, fifty bushels of potatoes, ten bushels of corn, ten bushels of peas, and ten bushels of onions for seeding purposes.

6. To a mechanic, the tools and instruments used to carry on his trade for the support of himself and family, also material used in his trade, not exceeding in value five hundred dollars in coin.

7. To a physician, his library, not to exceed in value five hundred dollars in coin; also, one horse, with harness and buggy; the instruments used in his practice, and medicines not exceeding in value two hundred dollars in coin.

8. To attorneys, clergymen, and other professional men, their libraries, not exceeding one thousand dollars, in coin, value; also office furniture, fuel, and stationery, not exceeding in value two hundred dollars in coin.

9. All fire-arms kept for the use of any person or family.

10. To any person, a canoe, skiff, or small boat, with its oars, sails, and rigging, not exceeding in value two hundred and fifty dollars.

11. To a person engaged in lightering for his support or that of his family, one or more lighters, barges, or scows, and a small boat, with oars, sails, and rigging, not exceeding in the aggregate two hundred and fifty dollars, in coin, value.

12. To a teamster or drayman engaged in that business for the support of himself or his family, his team, consisting of one span of horses, or mules, or two yoke of oxen, or a horse and mule, with harness, yokes, one wagon, truck, cart, or dray.

13. To a person engaged in the business of logging for his support or that of his family, three yoke of work-cattle and their yokes, and axes, chains, implements for the business, and camp equipments, not exceeding three hundred dollars, coin, in value.

14. A sufficient quantity of hay, grain, or feed to keep the animals mentioned in the several subdivisions of this chapter for six weeks. But no property shall be exempt from an execution issued upon a judgment for the price thereof, or any part of the price thereof, or for any tax levied thereon. Each person shall be entitled to select the property to which he is entitled under the several subdivisions of this act. [January 27, 1886, § 1.]

**Exemption of personal earnings:** See § 526.

*Pension money is exempt.*

§ 487. Any money received by any citizen of the state of Washington as a pension from the government of the United States, whether the same be in the actual possession of such person or be deposited or



loaned by him, shall be exempt from execution, attachment, or seizure by or under any legal process whatever. [March 6, 1890, § 1.]

*Same subject.*

§ 488. When a debtor dies or absconds, and leaves his family any money exempted by section four hundred and eighty-seven, the same shall be exempt to his family as provided in said section. [March 6, 1890, § 2.]

**Exempt property.** — Exemption laws must be liberally construed: *Mikkleson v. Parker*, 3 Wash. 531; *Allman v. Gann*, 29 Ala. 240; *Carpenter v. Herrington*, 25 Wend. 370; 37 Am. Dec. 239; *Good v. Fogg*, 61 Ill. 449; *Beran v. Heyden*, 13 Iowa, 122; *Montague v. Richardson*, 24 Conn. 346; note to *Gilman v. Williams*, 76 Am. Dec. 224. In some states, however, a strict construction is given: *Guillory v. Deville*, 21 La. Ann. 686; *Ward v. Huhn*, 16 Minn. 159. A waiver of prospective right of exemption by contract, while upheld in Pennsylvania and a few states, is generally regarded as contrary to public policy, and not to be enforced: See the note to *Bowman v. Smiley*, 72 Am. Dec. 741. The burden of proving property to be exempt is on the party claiming the privilege: *Stewart v. McClung*, 12 Or. 431.

Funds of a corporation in the hands of a stockholder, which have not been declared a dividend, are subject to execution and garnishment on a judgment against the corporation: *Hughes v. Oregonian R'y Co.*, 11 Or. 158. A patent right to an invention is liable to execution: *Pacific Bank v. Robinson*, 57 Cal. 520. Any interest in lands, legal or equitable, may be sold: *Le Roy v. Dunkerly*, 54 Cal. 460; *Fish v. Fowlie*, 58 Cal. 373.

**Exemption is personal privilege, which debtor may waive or claim at his election:** *State v. Melogue*, 9 Ind. 196; *Hammer-smith v. Avery*, 1 West Coast Rep. 662 (Nev.); *Howland v. Fuller*, 8 Minn. 50; *Borlund v. O'Neal*, 22 Cal. 504; *Baker v. Brintnall*, 52 Barb. 188; *Keybers v. McComber*, 67 Cal. 395; *Stanton v. French*, 83 Cal. 194.

The debtor waives his right by failing to claim it: See note to *Eltzroth v. Webster*, 77 Am. Dec. 78; note to *McDonald v. Snelling*, 92 Am. Dec. 768; *Angell v. Johnson*, 33 Am. Rep. 152; and a claim under one execution, when no sale is made under it, is not sufficient when the property is levied upon and sold under a subsequent execution: *Dodson's Appeal*, 25 Pa. St. 232. Where, on the day of sale, which was about four months after the levy, plaintiff appeared without any reasonable excuse for the delay, and for the first time claimed certain horses as exempt from execution, the court held that he was too late, and said that when the debtor has more horses than the number exempt by law, he has the right to elect, and such election must be made at the time of the levy, or without a reasonable time after notice thereof, by giving the officer notice. The officer is under no obligation to hunt up the debtor in advance of the levy in order to procure a selection by him: *Borlund v. O'Neal*, 22 Cal. 506; *Seaman v. Luce*, 23 Barb. 240; *Lockwood v. Younglove*, 27 Barb. 506. If the

debtor has some horses not in the jurisdiction of the officer, and there is only one within the reach of the execution, he cannot defeat the creditor's levy by electing to keep that one: *Robinson v. Meyers*, 3 Dana, 441. The notice should be promptly given, in order that the officer may levy on other property: *McGee v. Anderson*, 1 B. Mon. 187. What will constitute a reasonable time will therefore depend upon the particular circumstances of each case: *Stanton v. French*, 83 Cal. 194. A notice of claim of exemption from execution signed by two persons is sufficient as a claim for each separately: *Stanton v. French*, 83 Cal. 194. And the fact that a claim of exemption made by a husband is also made and signed by his wife does not invalidate his claim: *Stanton v. French*, 83 Cal. 194. The fact that the claimant had other horses from which to claim exemption, and long delayed in asserting the claim, was held strong evidence of a waiver of his right: *Borlund v. O'Neal*, 22 Cal. 506, 507; *Gavitt v. Doub*, 23 Cal. 82. Where a debtor has more property of a particular kind than is exempt from execution, and a writ is levied upon a portion thereof, leaving as much as the law exempts, and thereafter the debtor claims as exempt a portion of the property levied upon, the residue in the hands of the officer being insufficient to satisfy the writ, the debtor to make good his claim of exemption must offer to surrender to the officer the other property of the same general kind subject to execution, or so much as may be necessary to satisfy the writ, and failing to do so, he is not entitled to recover against the officer for an unlawful seizure: *Keybers v. McComber*, 67 Cal. 395. The right to claim the exemption of personal property from execution is waived by a failure of the debtor to exercise it; and the fact that he might have claimed it will not be sufficient as against his creditors to impart validity to a sale of the property without an actual and continued change of possession: *Barton v. Brown*, 68 Cal. 11.

**Team, teamsters, horses, mules, wagon, and harness.** — Every one who drives a team is not necessarily a "teamster," unless he drives a team continually. One is a "teamster" who is engaged with his own team or teams in the business of hauling freight for other parties for a consideration. While he need not drive his team in person, he must be personally engaged in the business of teaming habitually, and for the purpose of making a living by that business. If a carpenter or other mechanic, who occupies his time in labor at his trade, purchases a team or teams, and also carries on the business of teaming by the employment of others, he does not thereby become a "teamster": *Brusie v. Griffith*, 34 Cal.



302; 91 Am. Dec. 695. The third subdivision of this section evidently applies to such judgment debtors only as were engaged in the business of farming, etc., at the date of the levy: See *Roberts v. Adams*, 38 Cal. 383; *Brusie v. Griffith*, 34 Cal. 302; *Murphy v. Harris*, 77 Cal. 194. Compare *Knapp v. Bartlett*, 99 Am. Dec. 109, *Humphrey v. Taylor*, 30 Am. Rep. 738, exempting mowing-machines where the statute did not name the classes of persons entitled to exemption. "Farmer" is defined in *Hickman v. Cruise*, 2 Am. St. Rep. 256. Under this rule, coal dealers who have a wagon and two horses, which are used in their business and for hire for others, cannot hold them exempt: *Dore v. Nunn*, 62 Cal. 399.

Where two mules are claimed as exempt, it must be shown that the claimant is one of the persons specially mentioned in the statute: *Cuthoun v. Knight*, 10 Cal. 393. The term "wagon" is intended to mean a common vehicle for the transportation of goods of all descriptions. A hackney coach used for the conveyance of passengers does not come within the equity or literal meaning of the act: *Quigley v. Gorham*, 5 Cal. 418; 63 Am. Dec. 139. See note to *Cone v. Lewis*, 53 Am. Rep. 768-771, as to what is and is not a "wagon."

A wagon, horses, and harness are none the less exempt because defendant owns them and uses them in common with a stranger to the action. In exacting an undertaking sued upon as a condition on which he would release property from attachment, the sheriff was held to have violated his duty. So far as the undertaking was founded upon the release of the exempt property, it is without consideration and void: *Servanti v. Lusk*, 43 Cal. 240.

Two horses used by the debtor in carrying on a farm are exempt, although they may be sometimes used for other purposes: *McCue v. Tunstead*, 65 Cal. 506. A stallion used for the purposes of farming by a judgment debtor, whose farm is his main reliance for support, may be exempt from execution, although the stallion is also used for the breeding of mares: *McCue v. Tunstead*, 65 Cal. 506; *contra*, if not used as a work-horse: *Robert v. Adams*, 38 Cal. 383; 99 Am. Dec. 413. The exemption of oxen, horses, or mules is intended to apply to such animals only as are suitable and intended for the ordinary work named in the statute: See case last cited. As to two colts, see *Murphy v. Harris*, 77 Cal. 194. A finding that the horses in controversy "were not exempt from levy and sale under attachment and execution," held to cover the issue: *Paulson v. Nunan*, 11 Pac. C. L. J. 395. Under this subdivision generally, see note to *Rockwell v. Hubbell's Adm'rs*, 45 Am. Dec. 254-256.

**Householder, and household furniture.**—The term "householder" is defined as being the head of a family; one who keeps a house with his family: *Boone v. Witt*, 19 Wend. 475. A married woman may claim exemption as a householder: *Carrington v. Herrin*, 4 Bush, 624. The relation of husband and wife or parent and child need not exist. A man living with his sister, they jointly contributing to their support, is a householder: *Graham v. Crockett*, 18 Ind. 119. So a widow living with her father, if she have children depending upon her for support, is the "head of a family": *Bachman*

*v. Crawford*, 39 Am. Dec. 163; an unmarried woman keeping house, and there bringing up two children of her deceased sister: *Arnold v. Walz*, 36 Am. Rep. 248; the wife of an absconding husband, who continues to carry on his farm: 35 Am. Rep. 466; and a widow remaining upon her husband's farm, after his death, and carrying it on, though her children had married and left her: *Collier v. Lattimer*, 35 Am. Rep. 711; and all entitled to the benefits of exemption. The questions as to who are entitled to the benefits of exemption, and as to who is a "householder" and the "head of a family," are thoroughly discussed in the notes to *Wade v. Jones*, 61 Am. Dec. 586-593; *Rockwell v. Hubbell's Adm'rs*, 45 Am. Dec. 254-256. See also *Race v. Oldridge*, 32 Am. Rep. 27; *Linton v. Crosby*, 41 Am. Rep. 107. "Household furniture" does not include a piano: *Tanner v. Billings*, 18 Wis. 163; 86 Am. Dec. 755; *contra*, *Alsop v. Jordan*, 5 Am. St. Rep. 53; and a trunk and cabinet-box are not exempt as "household furniture": *Towns v. Pratt*, 66 Am. Dec. 726. The debtor is entitled to his exemption whether the furniture is in actual use or not, and though he is negotiating for the sale of it: *Clark v. Averill*, 76 Am. Dec. 131. Under this sub-head generally, see note to *Rockwell v. Hubbell's Adm'rs*, 45 Am. Dec. 256.

**Partnership property—Thrashing-machine.**—Many cases hold that a partner is entitled to an exemption from execution out of partnership property before severance: *Blanchard v. Paschal*, 45 Am. Rep. 474; *Skinner v. Shannon*, 38 Am. Rep. 232; *McCoy v. Brennan*, 1 Am. St. Rep. 589; *Gilman v. Williams*, 76 Am. Dec. 219; others that he is not: *Giovanni v. First Nat. Bank*, 28 Am. Rep. 723; *State v. Spencer*, 27 Am. Rep. 244; *Wise v. Frey*, 29 Am. Rep. 380; *White v. Heffner*, 31 Am. Rep. 238; *Spiro v. Paxton*, 31 Am. Rep. 630. See note to *State v. Spencer*, 27 Am. Rep. 246-250, concerning this sharp conflict of authorities on this point. See also note to *McCoy v. Brennan*, 1 Am. St. Rep. 593, 594, on exemption from execution of property of partners and cotenants, including both personal and homestead exemptions; and note to *McCulloh v. Dashiell's Adm'r*, 18 Am. Dec. 283, on execution sales of individual property for a partnership debt. In New York when a judgment is recovered against all the members of a firm upon a joint obligation not an indebtedness of the firm, the firm property may be levied upon and sold on execution, giving the purchaser a good title, and leaving no rights, legal or equitable, in such property to the firm creditors, though the firm be insolvent: *Saunders v. Reilly*, 105 N. Y. 12; *Davis v. President etc. of Canal Co.*, 109 N. Y. 47. In a proceeding in insolvency instituted by a partnership, neither of the partners can claim to have any part of the partnership assets set apart to him as exempt from execution. Partnership property is not exempt by law from forced sale, though it is such property as would be exempt if one partner were the sole owner: *Cowan et al. v. Their Creditors*, 77 Cal. 403; 11 Am. St. Rep. 294. A "thrashing rig," made up of various kinds of thrashing machinery owned in common by several farmers, and used to thrash the grain of its owners, but used principally for the

purpose of thrashing grain for others for hire, is not exempt from execution, and upon the insolvency of one of the co-owners, his interest therein cannot be set apart for his use and benefit: *In re Baldwin*, 71 Cal. 74; *Meyer v. Meyer*, 92 Am. Dec. 432.

**Trades — Tools — Ferry-boat.** — Where a person carries on two trades, it is held that he cannot claim exemption of implements under both, but must elect which he will claim under: *Lockwood v. Younglove*, 27 Barb. 505; *Knapp v. Bartlett*, 99 Am. Dec. 109. But it has been held otherwise, and that a person is entitled to exemption of tools of both trades to the extent of value limited by statute: See *Pierce v. Gray*, 7 Gray, 67; *Eager v. Taylor*, 9 Allen, 156; *Kenyon v. Baker*, 97 Am. Dec. 158. See also *Smalley v. Masten*, 77 Am. Dec. 467, and note to *Kilburn v. Demming*, 21 Am. Dec. 548, 549, discussing this question.

The tools or implements exempt are such as he uses in his trade, and he cannot claim as exempt tools not necessary thereto: *Grimes v. Byrne*, 2 Minn. 104; nor can he claim tools as exempt where he has abandoned his trade: *Davis v. Wood*, 7 Mo. 162; or has never exercised it: *Atwood v. De Forest*, 19 Conn. 513. They are not exempt where used by an employee, if owned by the employer, who is not a mechanic: *Abercrombie v. Alderson*, 9 Ala. 981.

"Tools," in exemption statute, includes what: See extended note to *Kilburn v. Demming*, 21 Am. Dec. 548; *Batchelder v. Shapleigh*, 25 Am. Dec. 213; note to *Montague v. Richardson*, 63 Am. Dec. 176; *Daniels v. Hayward*, 81 Am. Dec. 731; *Garrett v. Patchin*, 70 Am. Dec. 414; *Henry v. Sheldon*, 82 Am. Dec. 644; note to *Baker v. Willis*, 25 Am. Rep. 63-67; and *Frantz v. Dobson*, 60 Am. Rep. 68. That a dentist is not a "mechanic," see note to *Baker v. Willis*, 25 Am. Rep. 64; *Whitcomb v. Reid*, 66 Am. Dec. 579; but see *Maxon v. Perrott*, 97 Am. Dec. 191, *contra*. That a photographer is not a "mechanic," see *Story v. Walker*, 47 Am. Rep. 305.

Where the sheriff levied upon a ferry-boat, which was at the time in an unfinished condition, and had never been used at the ferry, the court held that ferry-boats, even on mail routes, were not exempt: *Lathrop v. Middleton*, 23 Cal. 259.

**Wearing apparel.** — A watch of moderate value is exempt as wearing apparel: *Stewart v. McClung*, 12 Or. 431; 53 Am. Rep. 374; and so is a lace shawl: *Frazier v. Barnum*, 97 Am. Dec. 666; but rings and jewelry have been held not to be: *Frazier v. Barnum*, 97 Am. Dec. 666.

*Exemption may be waived.*

§ 489. [348.] This chapter shall not be so construed as to prevent any single man, or married man, his wife joining him, from waiving, by agreement in writing, the benefit of this act; *provided*, that any agreement of waiver made by a husband and wife shall be witnessed and acknowledged as required in case of a deed conveying real estate; *and provided also*, that nothing in this chapter shall be construed to exempt from attachment or execution the property, real or personal,

**Judgment.** — A judgment is but the evidence of a debt, and as such is not subject to levy or sale under execution: *Dore v. Dougherty*, 72 Cal. 232; 1 Am. St. Rep. 48; see *McBride v. Fallon*, 65 Cal. 301; *Latham v. Blake*, 77 Cal. 646. The proper practice is to garnish the judgment debtor: *Osborn v. Clout*, 92 Am. Dec. 413. An appellant claimed to be entitled to the money due upon the judgment in question under an execution sale. The execution was issued out of a justice's court against the person in whose favor the judgment was rendered. The levy of the execution was made by the sheriff, who delivered to and left with the judgment debtor a copy of the writ, with a notice in writing that he levied upon the judgment, particularly describing it, and also upon all moneys, goods, credits, effects, debts due or owing, or under his control, and requesting him not to pay or transfer the same to any one except the sheriff. It was held that the service of the writ and notice on the judgment debtor was not a levy on the judgment as such, but a garnishment of the money due thereon: *Dore v. Dougherty*, 72 Cal. 232; 21 Am. St. Rep. 48.

**Lawyer's office furniture is exempt:** *Abraham v. Davenport*, 5 Am. St. Rep. 665.

**Remedy of debtor whose exemption rights have been disregarded** is discussed at length in the note to *Van Dresor v. King*, 75 Am. Dec. 645-653.

**Public property.** — Property held and used for public purposes is not subject to seizure and sale upon execution: *Klein v. New Orleans*, 99 U. S. 149; *Meriwether v. Garrett*, 102 U. S. 472; *Curry v. Mayor etc. of Savannah*, 37 Am. Rep. 74; *State v. Tiedemann*, 33 Am. Rep. 498.

**Private property of individuals in a city or county** is not liable to seizure and sale on execution for the satisfaction of a judgment recovered against such city or county: *Miller v. McWilliams*, 20 Am. Rep. 297; *Emery v. Gilman*, 10 Cal. 404.

**Franchises not subject to execution:** See note to *Ammant v. Turnpike Road*, 15 Am. Dec. 595.

**Unpublished manuscripts not subject to execution:** See *Dart v. Woodhouse*, 29 Am. Rep. 544.

**Creditors may oppose without filing written objections.** — On an application by an insolvent debtor to have certain property set aside to him as exempt from execution, the creditors may appear and object to the property being set aside, without filing any paper setting forth their objections: *In re Baldwin*, 71 Cal. 74.



of non-residents, or a person who has left or is about to leave the state with the intent to defraud his creditors.

**Waiving benefit of exemption.** — The leading case on this question against such waiver is *Kneettle v. Newcomb*, 22 N. Y. 249, 78 Am. Dec. 186, which holds that a debtor cannot, at the time he contracts a debt, agree that exempt property may be taken on execution in case of non-payment. And the result of the cases in many other of the states now seems to be opposed to such contracts on the ground of public policy: See note to *Bowman v. Smiley*, 72 Am. Dec. 741-745, where the subject is discussed; see *Carter's Adm'r's v. Carter*, 51 Am. Rep. 618; *Recht v. Kelly*, 25

Am. Rep. 301. The leading case holding that a person may waive his prospective right of exemption is *Case v. Dunmore*, 23 Pa. St. 94, cited in note above referred to; see also *Brown v. Leitch*, 31 Am. Rep. 42, note 44-46; *Fejary v. Broesch*, 35 Am. Rep. 261, showing other cases in line with those of Pennsylvania.

**Application of exemption laws to non-residents:** See note to *Brown v. Hebard*, 91 Am. Dec. 423. As to validity of judgment against a non-resident founded on attachment and notice by publication, see cases cited in note to *Ewer v. Coffin*, 48 Am. Dec. 589.

*Claim of exemption, and proceedings thereon.*

§ 490. [349.] When a debtor claims personal property as exempt, he shall deliver to the officer making the levy an itemized list of all the personal property owned or claimed by him, including money, bonds, bills, notes, claims, and demands, with the residence of the person indebted upon the said bonds, bills, notes, claims, and demands, and shall verify such list by affidavit. He shall also deliver to such officer a list, by separate items, of the property he claims as exempt. If the husband be absent or incapable of acting, the claim may be made, the list delivered and verified, by the wife. If the creditor, his agent or attorney, demand an appraisement thereof, two disinterested householders of the neighborhood shall be chosen, one by the debtor and the other by the creditor, his agent or attorney, and these two, if they cannot agree, shall select a third; [but if either party fail to choose an appraiser, or the two fail to select a third, or] if one or more of the appraisers fail to act, the officer shall appoint one. The appraisers shall forthwith proceed to make a list, by separate items, of the personal property selected by the debtor as exempt, which they shall decide as exempt, stating the value of each article, and annexing to the list their affidavit to the following effect: "We solemnly swear that, to the best of our judgment, the above is a fair cash valuation of the property therein described," which affidavit shall be signed by two appraisers at least, and be certified by the officer administering the oaths. The list shall be delivered to the officer holding the execution or other process, and be by him annexed to and made part of his return, and the property therein specified shall be exempt from levy and sale, and the other personal estate of the debtor shall remain subject thereto. In case no appraisement be required, the officer shall return with the process the list of the property claimed as exempt by the debtor. The appraisers shall each be entitled to one dollar, to be paid by the creditor, if all the property claimed by the debtor shall be exempt; otherwise, to be paid by the debtor.

**Failure to include some articles in itemized list of exempt property does not** forfeit debtor's right of exemption as to those articles: *Mikkleson v. Parker*, 3 Wash. 527.



## CHAPTER IV.

## OF CLAIM BY THIRD PERSONS TO PROPERTY TAKEN UNDER EXECUTION.

§ 491. How third person may obtain, if property seized on execution.

§ 492. Sureties must justify if required.

§ 493. Trial upon the affidavit of claimant.

§ 494. Who to be deemed plaintiff and defendant in such proceedings.

§ 495. What judgment shall be given in proceedings under this chapter.

*How third person may obtain, if property seized on execution.*

§ 491. When any other person than the judgment debtor shall claim property levied upon or attached, he may have the right to demand and receive the same from the sheriff or other officer making the attachment or levy, upon his making an affidavit that the property is his, or that he has a right to the immediate possession thereof, stating on oath the value thereof, and giving to the sheriff or officer a bond, with sureties in double the value of such property, conditioned that he will appear in the superior court of the county in which the property was seized within ten days after the bond is accepted by the sheriff or other officer, and make good his title to the same, or that he will return the property or pay its value to the said sheriff or other officer.

[February 25, 1891, § 1.]

**This proceeding bars other remedy. —**

A claimant who has pursued the remedy provided in this section, and recovered the property from the sheriff, cannot thereafter maintain an action for the wrongful levy against the sheriff, the attaching creditor, or the sureties in the attachment bond. The remedy here provided is cumulative, but, once adopted, it becomes exclusive: *Dawson v. Baum*, 3 Wash. 464.

**Sheriff may recover indemnity. —**

A sheriff acting under the express direction of the attaching creditor, and attaching property of another than the debtor without notice that it is the property of such third person, may, after judgment against him for such wrongful attachment, recover indemnity against the creditor directing such attachment. *Standley v. Marsh*, 20 Pac. Rep. 592 (Wash.).

*Sureties must justify if required.*

§ 492. [351.] If the sheriff or other officer require it, the sureties shall justify as in other cases, and in case they do not so justify when required, the sheriff or officer shall retain the property; if the sheriff or officer do not require the bail to justify, he shall stand good for their sufficiency. He shall date and indorse his acceptance upon the bond.

*Trial upon the affidavit of claimant.*

§ 493. The officer shall return the affidavit, bond, and justification, if any, to the office of the clerk of the superior court, and this [the] case shall stand for trial in said court. [February 25, 1891, § 2.]

*Who to be deemed plaintiff and defendant in such proceeding.*

§ 494. [353.] The person claiming the property shall be plaintiff, and the sheriff and plaintiff in the execution defendants.

*What judgment shall be given in proceedings under this chapter.*

§ 495. [354.] If the claimant makes good his title to the property,

the bond shall be canceled; if to a portion thereof, a like proportion of the bond shall be canceled; but if he shall not maintain his title, judgment shall be rendered against him and his sureties for the value of the property, or for such less amount as shall not exceed the amount due on the original execution or attachment. When the judgment is in favor of the sheriff for the entire property, the claimant shall pay the costs; when the claimant recovers all the property, judgment shall be given in favor of the claimant for costs; when the claimant recovers a portion of the property only, the costs shall be apportioned. When the plaintiff prevails, the costs may be taxed against the defendant who was plaintiff in the execution or attachment, or the court may, if it shall be of opinion that the sheriff attached or levied upon said property without the exercise of due caution, adjudge him to pay the costs, or any portion thereof.

## CHAPTER V.

### OF SALE OF PROPERTY UNDER EXECUTION.

- § 496. Execution against property, how executed.
- § 497. Property in hands of or debts owing from garnishee.
- § 498. Proceeding when property in possession of garnishee is levied on.
- § 499. Judgment debtor may retain property levied on by giving bond.
- § 500. Notice of sale of property under execution.
- § 501. Manner of selling property on execution.
- § 502. Postponements for want of bidders.
- § 503. Bill of sale by sheriff.
- § 504. Manner of selling real property.
- § 505. Allotment of land sold by the acre.
- § 506. Land sold by tract or parcel not to be measured.
- § 507. Return and entry for confirmation of sale.
- § 508. Confirmation of sale of land.
- § 509. Purchaser evicted may recover back the purchase price and interest.
- § 510. Contribution and subrogation.
- § 511. Real property may be redeemed — Certificate of sale.
- § 512. Who may redeem.
- § 513. Redemption from sale on foreclosure.
- § 514. Successive redemptions.
- § 515. When purchaser or redemptioner entitled to conveyance.
- § 516. Mode of redeeming.
- § 517. Order in which redemptions are to be allowed.
- § 518. Waste before time of redemption expires will be restrained.
- § 519. Purchaser entitled to possession.
- § 520. Time when purchaser entitled to conveyance — Who may execute conveyance.
- § 521. Clerk's duty upon presentation of sheriff's deed.

#### *Execution against property, how executed.*

§ 496. [355.] When the writ of execution is against the property of the judgment debtor, it shall be executed by the sheriff as follows: —

1. If property has been attached, he shall indorse on the execution and pay to the clerk forthwith the amount of the proceeds of sales of

perishable property or debts due the defendant received by him sufficient to satisfy the judgment.

2. If the judgment is not then satisfied, and property has been attached and remains in his custody, he shall sell the same, or sufficient thereof to satisfy the judgment.

3. If then any portion of the judgment remains unsatisfied, or if no property has been attached, or the same has been discharged, he shall levy on the property of the judgment debtor sufficient to satisfy the judgment.

4. Property shall be levied on in like manner and with like effect as similar property is attached.

5. Until a levy, personal property shall not be affected by the execution. When property has been sold or debts received by the sheriff on execution, he shall pay the proceeds thereof, or sufficient to satisfy the judgment, as commanded in the writ.

6. When property has been attached, and it is probable that such property will not be sufficient to satisfy the judgment, the execution may be levied on other property of the judgment debtor without delay. If after satisfying the judgment any property, or the proceeds thereof, remain in the custody of the sheriff, he shall deliver the same to the judgment debtor.

**Manner of executing writ, etc.** — The mere levy alone will not satisfy the judgment, but the property must be applied to the judgment. One levy will not prevent another if the property was not applied to the judgment: *Wright v. Young*, 6 Or. 87. A sheriff, in enforcing an execution, acts as an officer of the court, and under color of its process: *McMann v. Superior Court*, 74 Cal. 106. The receipt by an execution debtor of the excess of the proceeds arising from an execution sale will not be presumed: *Riddell v. Harrell*, 71 Cal. 254.

*Property in hands of or debts owing from garnishee.*

§ 497. [356.] In the case of property in the possession of or owing from any garnishee, the sheriff shall proceed as follows:—

1. If it appear, from the certificate of the garnishee, that he is owing a debt to the judgment debtor which is then due, if such debt is not paid by such garnishee to the sheriff, on demand, he shall levy on the property of the garnishee of the amount thereof, in all respects as if the execution was against the property of the garnishee. But if such debt be not then due, the sheriff shall sell the same, according to the certificate, as other property.

2. If, in like manner, it appear that the judgment debtor has rights or shares in the stock of the garnishee, as provided in subdivision three of section three hundred, the sheriff shall sell the same, according to the certificate, as other property.

3. If, in like manner, it appear that the garnishee has other personal property of the judgment debtor in his possession, and the same has not been bailed to such garnishee for a period then unexpired, unless the same be delivered to the sheriff on demand, he shall levy



upon the same wherever he may find it. But if such property is in the possession of such garnishee upon a bailment then unexpired, the sheriff shall sell the same, or the interest of the judgment debtor therein, according to the certificate, as other property.

Consult §§ 300, 303, 304, 305, 308-313. *Proceedings against garnishee under this section are proceedings at law, and on appeal from the judgment thereon only those errors are reviewable which are assigned in the notice of appeal: Williams v. Gallick, 11 Or. 337.*

*Proceeding when property in possession of garnishee is levied on.*

§ 498. [357.] When a sheriff with an execution levies upon any of the personal property mentioned in subdivision three or four of section three hundred, and if the same is not delivered, paid, or transferred to him at the time, he shall proceed thereafter in reference to such property as provided in section four hundred and ninety-seven. Such property may be delivered, paid, or transferred to the sheriff at the time of the levy, or sufficient thereof to satisfy the execution; and the sheriff's receipt to the person, association, or corporation, as the case may be, shall be a sufficient discharge therefor.

*Judgment debtor may retain property levied on by giving bond.*

§ 499. [358.] When the sheriff shall levy upon personal property by virtue of an execution, he may permit the judgment debtor to retain the same, or any part thereof, in his possession until the day of sale, upon the defendant executing a written bond to the sheriff, with sufficient surety, in double the value of such property, to the effect that it shall be delivered to the sheriff at the time and place of sale; and for non-delivery thereof, an action may be maintained upon such bond by the sheriff or the plaintiff in the execution; but the sheriff shall not thereby be discharged from his liability to the plaintiff for such property.

**Forthcoming or delivery bond.** — The giving of this bond, while it is said to operate as an estoppel upon the defendant to deny the truth of its recitals, — *Crisman v. Matthews*, 1 Seam. 148; 26 Am. Dec. 417; *Portis v. Parker*, 8 Tex. 23; 58 Am. Dec. 95, — is not a waiver of prior irregularities: *Page v. Coleman*, 9 Port. 275; *Van Cleave v. Haworth*, 5 Ala. 188; nor of the right to claim and prove that the property is exempt: *Perry v. Hensley*, 14 B. Mon. 474; 61 Am. Dec. 164; *Robards v. Samuel*, 17 Mo. 555; or that it does not belong to the defendant: *Waterman v. Frank*, 21 Mo. 108.

*Notice of sale of property under execution.*

§ 500. [359.] Before the sale of property on execution, notice thereof shall be given as follows:—

1. In case of personal property, by posting written or printed notice of the time and place of sale in three public places of the county where the sale is to take place, not less than ten days successively.

2. In case of real property, by posting a similar notice, particularly describing the property, for four weeks successively, in three public places of the county where the property is to be sold, and publishing a copy thereof, once a week for the same period, in a newspaper of the

county, if there be one, or if there be none, then in a newspaper published nearest to the place of sale.

**Notice of sale.** — Defendant may waive notice of sale: *Shamburger v. Kennedy*, 1 Dev. 1; *Burroughs v. Wright*, 16 Vt. 619; though in some cases it is held indispensable: *Hiligsberg's Succession*, 1 La. Ann. 340; *Gibbs v. Neely*, 7 Watts, 305. A sale will be vacated or set aside where proper notice was not given: *Wheatley v. Terry*, 6 Kan. 427; *Kellogg v. Howell*, 62 Barb. 280; if the objection is taken without unreasonable delay: *McCormick v. Wheeler*, 36 Ill. 114; *Rigg v. Cook*, 4 Gilm. 336; 46 Am. Dec. 462. But it is generally held

that want of notice or a failure to give the proper notice will not affect the sale in collateral proceedings: *Hobain v. Murphy*, 20 Mo. 447; 69 Am. Dec. 194; *Whittaker v. Sumner*, 7 Pick. 551; 19 Am. Dec. 298; *Pollard v. King*, 63 Ill. 36; *Frank v. Roe*, 70 Cal. 296.

**Newspaper.** — An advertising sheet is not a newspaper: *Tyler v. Bowen*, 1 Pittsb. Rep. 225.

**What is proper and sufficient notice of sale:** See extended note to *Hoffman v. Anthony*, 75 Am. Dec. 704-713.

### *Manner of selling property on execution.*

§ 501. [360.] All sales of property upon execution shall be made by auction between nine o'clock in the morning and four o'clock in the afternoon. After sufficient property has been sold to satisfy the execution, no more shall be sold. Neither the officer holding the execution nor his deputy shall become a purchaser or be interested in any purchase at such sale. When the sale is of personal property capable of manual delivery, and not in the possession of a third person, association, or corporation, it shall be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, and consisting of several known lots or parcels, they shall be sold separately or otherwise, as is likely to bring the highest price; or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion shall be sold separately. Sales of real property shall be made at the court-house door.

**Sales on execution.** — If a sale be made on a day different from that specified in the notice, it is a sale without notice, and may be vacated: *McConnell v. Gibson*, 12 Ill. 128; *Wheatley v. Terry*, 6 Kan. 427; and see the next preceding section. If the sale is not completed on the day named, it may be adjourned by proclamation in presence of the persons in attendance: Crocker on Sheriffs, sec. 468; and see § 502, *post*.

*Sales en masse, etc.*, are not necessarily void, but voidable only: See cases cited in note to *Raymond v. Holborn*, 99 Am. Dec. 108; note to *Piel v. Brayer*, 95 Am. Dec. 703. The officer ought to subdivide the property into advantageous parcels, unless it is clear that they will bring more when sold together: *American Ins. Co. v. Oakley*, 9 Paige, 259; 38 Am. Dec. 561; *Tierman v. Wilson*, 6 Johns. Ch. 411; *Bunker v. Rand*, 88 Am. Dec. 684; but he is only responsible for abuse of discretion if he fails to do so: *Bank v. Page*, 7 Or. 454. And he should discontinue the sale when he has sold enough to satisfy his writ: *Wheeler v. Kennedy*, 1 Ala. 292; *Henson v. Dygert*, 8 Johns. 333; *Drake v. Murphy*, 42 Ind. 82. The mere fact that several separate tracts of land belonging to an execution debtor were sold at the execution sale *en masse* is not sufficient to render the sale

void: *Riddell v. Harrell*, 71 Cal. 254. And where several water ditches and water rights appertaining to them constitute a single connected system of water supply, so that some of the ditches would be useless if owned and held by different parties, they may be sold under execution as a single parcel: *Gleason v. Hill*, 65 Cal. 17. The title to land obtained under a judgment cannot be collaterally attacked on the ground that the land was sold *en masse*, the period for redemption having expired: *Gregory v. Borier*, 77 Cal. 121.

Where land consisted of separate but adjoining tracts, but the sheriff and the purchaser were ignorant of the subdivisions, and the defendant failed to inform the sheriff, or to direct a sale by parcels, it was held that the sale of the land in gross was valid: *Smith v. Randall*, 6 Cal. 47; 65 Am. Dec. 475. In *Bryan v. Berry*, 8 Cal. 135, the court approved of the rule laid down by the supreme court of Illinois in *Day v. Graham*, 1 Gilm. 435, that when the plaintiff in execution is the purchaser, and before he conveys to another, the court will set aside the sale upon motion. But after he conveys to a third person, and when the third person becomes the purchaser, it is necessary to go into equity. A sale *en masse* of known lots is not absolutely void, even when made at a



price greatly below the actual value: *San Francisco v. Pixley*, 21 Cal. 57; that such a sale is voidable, and will be set aside on proper application within a reasonable time, see *Vigouereux v. Murphy*, 51 Cal. 346. A motion to set such sale aside will be entertained although a stranger is the purchaser: *Brown v. Ferrea*, 51 Cal. 552.

Whether this section applies to foreclosure sales, the court would not determine: *Car-michael v. McGillivray*, 57 Cal. 8.

If the lower court refuse to set aside a sale claimed to have been made in violation of this provision, to secure a reversal on appeal, it must be made to appear that the parcels claimed to be distinct were so: *Gleason v. Hill*, 1 West Coast Rep. 770.

While puffing or by-bidding at a sale is discountenanced, and even held to avoid the sale at the instance of the purchaser, it is held that a seller may reserve a price and employ a person to attend and bid up to that price: *Wolfe v. Luyster*, 1 Hall, 146; *Reynolds v. Dechaums*, 24 Tex. 174; but not when a sale is advertised to be "without reserve."

*Who may purchase.* — The officer selling cannot purchase: *Miles v. Goodsell*, 5 Conn. 475; *Scott v. Mann*, 36 Tex. 157; *McConnell v. Gibson*, 12 Ill. 128; nor can he bid for another: *Harrison v. McHenry*, 9 Ga. 164; 52 Am. Dec. 435; *McLeod v. McCall*, 3 Jones, 85; *contra* in Texas: *Scott v. Mann*, 36 Tex. 157.

There is no rule of law which forbids one partner or tenant in common from purchasing the interest of the other at a judicial sale: *Gunter v. Laffan*, 7 Cal. 593; *Bradbury v. Barnes*, 19 Cal. 123. Either of several judgment debtors may purchase the property of his co-defendant: *Kilgo v. Castleberry*, 38 Ga. 512; *Nielson v. Nielson*, 5 Barb. 565.

*Sale of interest of a partner.* — A sheriff, in enforcing a writ of execution against a member of a partnership, should take possession of the partnership property, and sell the interest of the execution debtor therein, and he may de-

liver the possession of the entire property to the purchaser, who becomes a tenant in common with the other partner. Such seizure, sale, and delivery of possession is not a conversion of the other partner's interest, although at the time of the levy and sale the execution debtor would have had no interest in the partnership property had there been an accounting between the partners: *Wright v. Ward*, 65 Cal. 525.

*Regularity of sale* cannot be impeached by a stranger in a collateral proceeding: *Kelsey v. Dunlap*, 7 Cal. 160. Irregularities must be dealt with by motion to the court: *Boles v. Johnston*, 23 Cal. 226. The plaintiff in execution buying the defendant's property to satisfy the debt is chargeable with all irregularities in the sale; but a stranger is chargeable only with defects of substance in the proceeding: *Stephens v. Dennison*, 1 Or. 19. If the plaintiff, in the name of another, buy real estate under an execution, such other person will be deemed to have notice of all matters affecting the validity of the judgment and sale under it which were within the knowledge of the plaintiff: *Barber v. Reynolds*, 44 Cal. 520.

*Action to set aside sale:* See *Hausling v. Hausman*, 73 Cal. 276. In an action by a junior judgment creditor to set aside a prior judgment and execution sale of the property of the debtor on the ground of fraud, the complaint need not allege that an execution had been issued and returned unsatisfied, where it is averred that the judgment debtor has not and never had any property except that sold under the fraudulent judgment: *Lee v. Orr*, 70 Cal. 398.

*In action to enjoin sale under execution* issued upon a judgment rendered by a justice of the peace, the complaint must allege that the plaintiff was neither served with the summons nor appeared in the action in which the judgment was rendered; an allegation that he had no knowledge of the judgment for more than thirty days after its rendition is not sufficient: *Farrington v. Brown*, 65 Cal. 320.

### *Postponements for want of bidders.*

§ 502. [361.] If, at the time appointed for the sale, the sheriff should be prevented from attending at the place appointed, or, being present, should deem it for the advantage of all concerned to postpone the sale for want of purchasers, or other sufficient cause, he may postpone the sale not exceeding one week next after the day appointed, and so from time to time, for the like cause, giving notice of every adjournment by public proclamation made at the same time, and by posting written notices of such adjournment under the notices of sale originally posted by him. The sheriff, for like causes, may also adjourn the sale from time to time, not exceeding thirty days beyond the day at which the writ is made returnable, with the consent of the plaintiff indorsed upon the writ.

### *Bill of sale by sheriff.*

§ 503. [362.] When the purchaser of any personal property capable of manual delivery, and not in the possession of a third person,



association, or corporation, shall pay the purchase-money, the sheriff shall deliver to him the property, and if desired, shall give him a bill of sale containing an acknowledgment of the payment. In all other sales of personal property the sheriff shall give the purchaser a bill of sale with the like acknowledgment.

**Purchaser of personalty.** — A purchase of the one-third interest of the master of a vessel in such vessel does not entitle the purchaser to supersede the master in his command, nor deprive him of the right to possession *qua* master: *Loring v. Illsley*, 1 Cal. 24.

**The purchaser of a judgment on sale** under execution and levy takes as assignee only. The judicial sale of a judgment passes no title other than would pass by an assignment by the owner: *Fore v. Manlove*, 18 Cal. 436.

#### *Manner of selling real property.*

§ 504. [363.] The form and manner of sale of real estate by execution shall be as follows: The sheriff shall proclaim aloud at the place of sale, in the hearing of all the by-standers: "I am about to sell the following tracts of real estate (here reading the description) upon the following execution" (here reading the execution). He shall also state the amount which he is required to make upon the execution, which shall include damages, interests, and costs up to the day of sale, and increased costs. He shall then offer the land for sale, the lots and parcels separately or together, as he shall deem most advantageous. All land, except town lots, shall be sold by the acre.

#### *Allotment of land when sold by the acre.*

§ 505. [364.] When the land is sold by the acre, and any less number of acres than the whole tract or parcel is sold, it shall be measured off to the purchaser in a square form, from the northeast corner of the tract or parcel, unless some person having an interest in the land shall, at the sale, or prior thereto, and before the bidding is made, request that the land sold shall be taken from some other part, or in some other form; in such case, if such request is reasonable, the officer making the sale shall sell accordingly.

#### *Land sold by tract or parcel not to be measured.*

§ 506. [365.] When an entire tract or parcel of land is sold by the acre, it shall not be measured, but shall be deemed and taken to contain the number of acres named in the description, and be paid for accordingly; and when the number of acres is not contained in the description, the officer shall declare, according to his judgment, how many acres are contained therein, which shall be deemed and taken to be the true number of acres.

#### *Return and entry for confirmation of sale.*

§ 507. [366.] The officer shall strike off the land to the highest bidder, who shall forthwith pay the money bid to the officer, who shall return the money with his execution and his doings thereon to the clerk of the court from which the execution issued, according to the order thereof; *provided, however*, that when final judgment shall have

been entered in the supreme court, and the execution upon which sale has been made issued from said court, the proceedings on execution and return shall be docketed for confirmation in the superior court in which the action was originally commenced, and like proceedings shall be had as though said execution had issued from the said superior court.

*Confirmation of sale of land.*

§ 508. [367.] Upon the return of any sale of real estate as aforesaid, the clerk shall enter the cause on which the execution issued, by its title, in the docket of the term next after such return, and mark opposite the same "sale of land for confirmation," and the following proceedings shall be had:—

1. The plaintiff shall be entitled, on motion therefor, to have an order confirming the sale at the term next following the return of the execution, or if it be returned in term time, then at such term, unless the judgment debtor, or in case of his death his representatives, shall file with the clerk, ten days before such term, or if the writ be returned in term time, then five days after the return thereof, his objections thereto.

2. If such objections be filed, the court shall, notwithstanding, allow the order confirming the sale, unless on the hearing of the motion it shall satisfactorily appear that there were substantial irregularities in the proceedings concerning the sale, to the probable loss or injury of the party objecting. In the latter case, the court shall disallow the motion, and direct that the property be resold, in whole or in part, as the case may be, as upon an execution received of that date.

3. Upon the return of the execution, the sheriff shall pay the proceeds of the sale to the clerk, who shall then apply the same, or so much thereof as may be necessary, in satisfaction of the judgment. If an order of resale be afterwards made, and the property sell for a greater amount to any person other than the former purchaser, the clerk shall first repay to such purchaser the amount of his bid out of the proceeds of the latter sale.

4. Upon a resale, the bid of the purchaser at the former sale shall be deemed to be renewed and continue in force, and no bid shall be taken, except for a greater amount. If the motion to confirm be not heard and decided at the term at which it is made, it may be continued, and heard and determined before the judge, or at any term thereafter. An order confirming a sale shall be a conclusive determination of the regularity of the proceedings concerning such sale as to all persons in any other action, suit, or proceeding whatever.

5. If, after the satisfaction of the judgment, there be any proceeds of the sale remaining, the clerk shall pay such proceeds to the judgment debtor or his representative, as the case may be, at any time before the order is made upon the motion to confirm the sale, provided

such party file with the clerk a waiver of all objections made or to be made to the proceedings concerning the sale; but if the sale be confirmed, such proceeds shall be paid to such party of course; otherwise they shall remain in the custody of the clerk until the sale of the property has been disposed of.

The incongruity between the provisions of this section and the system of procedure under the present organization of the courts is manifest. A statute harmonizing them was reported by the commissioner, but was not adopted.

**Confirmation of execution sale.** — The confirmation is merely one step in the course of an execution sale. It does not divest title nor dispense with the necessity for execution of a deed: *Webster v. Hill*, 3 Sneed, 333; *Erb v. Erb*, 9 Watts & S. 147. The court can only confirm or reject the sale reported; it cannot modify the terms or declare another person the purchaser or best bidder: *Kinnear v. Lee*, 28 Md. 488; *Ohio L. Ins. Co. v. Goodin*, 10 Ohio St. 557. The judgment debtor, or his representative in case of his death, is the proper party to object to confirmation of a sheriff's sale: *Miller v. Bank of British Columbia*, 2 Or. 291. Mere judgment creditors, not parties to the action, cannot appear on a motion for confirmation of an execution sale: *Miller v. Oregon C. Mfg. Co.*, 3 Or. 27. Confirmation should be refused if the statute has not been followed in making the sale, as where the sheriff sold real property without first seeking personal

property which was owned by the judgment debtor: *Koehler v. Ball*, 2 Kan. 160; or where notice was not properly given: *Rogers v. Ocheltree*, 4 Houst. 452; *Craig v. Fox*, 16 Ohio, 563. The purchaser cannot object to confirmation because of delay unless he protested against such delay: *Mayor v. Wick*, 15 Ohio St. 548. The officer should retain the proceeds of the sale until it is confirmed: *Stone v. Ruffin*, 2 Ohio, 503.

An order confirming a sale upon execution is a conclusive determination of the regularity of the proceedings concerning the sale as to all persons in any other action, suit, or proceeding: *Dolph v. Barney*, 5 Or. 191; *Wright v. Young*, 6 Or. 87; *McRae v. Daviner*, 8 Or. 63; *Willis v. Nicholson*, 25 La. Ann. 545; *Cockey v. Cole*, 28 Md. 276. The confirmation of sale under a decree of foreclosure concludes all inquiry as to mere irregularities not going to the jurisdiction of the court: *Parker v. Dacres*, 24 Pac. Rep. 192 (Wash.).

Upon setting aside a sheriff's sale, a resale must be in accordance with this section, or it will be insufficient: *Trullinger v. Kofoed*, 8 Or. 436.

*Purchaser evicted may recover back the purchase price and interest.*

§ 509. [368.] If the purchaser of real property sold on execution, or his successor in interest, be evicted therefrom in consequence of the reversal of the judgment, he may recover the price paid, with interest, and the costs and disbursements of the suit by which he was evicted, from the plaintiff in the writ of execution.

**Remedy for eviction.** — This provision merely affords a remedy which the common law did not. It does not deal with the question as to when an execution or a sale shall be deemed valid, and when not: *Hunt v. Loucks*, 38 Cal. 377; *Woodcock v. Bennett*, 1 Cow. 711; 13 Am. Dec. 568.

The doctrine formerly prevailed that whenever a sale was made under an erroneous decree or judgment, which was afterwards reversed, the court rendering the judgment having jurisdiction of the person and subject-matter, the purchaser acquired a good

title, notwithstanding the reversal; that doctrine is so far modified that if the plaintiff himself be the purchaser, the former owner, after reversal, may at his election either have the sale set aside and be restored to the possession, or have his action for damages: *Reynolds v. Hosmer*, 45 Cal. 628; *Reynolds v. Harris*, 14 Cal. 667; 76 Am. Dec. 459; *Johnson v. Lamping*, 34 Cal. 293. Where the property was not the property of the defendant, but wholly that of a stranger, the court held it was a sale of property "not subject to execution and sale": *Cross v. Zane*, 47 Cal. 603.

*Contribution and subrogation.*

§ 510. [369.] When property liable to an execution against several persons is sold thereon, and more than a due proportion of the judgment is levied upon the property of one of them, or one of them pays without a sale more than his proportion, he may compel contributions from the others; and when a judgment is against several, and is upon an obligation or contract of one of them as security for another, and the surety pays the amount, or any part thereof, either by sale of his



property or before sale, he may compel repayment from the principal. In such case the person so paying or contributing shall be entitled to the benefit of the judgment to enforce contribution or repayment if within thirty days after his payment he file with the clerk of the court where the judgment was rendered notice of his payment and claim to contribution or repayment. Upon filing such notice, the clerk shall make an entry thereof in the margin of the docket where the judgment is entered.

**Subrogation.** — It was held that where plaintiff and Green were jointly liable on a judgment, and Green paid the whole amount, he was entitled to be subrogated to the rights of the plaintiff to the extent of the amount paid by him: *Coffee v. Tevis*, 17 Cal. 245; *Scribner v. Hickok*, 4 Johns. Ch. 532.

*Real property may be redeemed — Certificate of sale.*

§ 511. [370.] Upon a sale of real property, when the estate is less than a leasehold of two years unexpired term, the sale shall be absolute. In all other cases, such property shall be subject to redemption, as hereinafter provided in this chapter. At the time of sale the sheriff shall give to the purchaser a certificate of the sale, containing,

1. A particular description of the property sold;

2. The price bid for each distinct lot or parcel;

3. The whole price paid;

4. When subject to redemption, it shall be so stated. The matters contained in such certificate shall be substantially stated in the sheriff's return of his proceedings upon the writ.

See notes to next section.

**Certificate of sale.** — It has been held that the provision for a certificate of sale is merely directory, and that it will not affect the validity of the sale, or at least against all but purchasers without notice: *Jackson v. Young*, 5 Cow. 269; 15 Am. Dec. 473; *Barnes v. Kerlinger*, 7 Minn. 82.

*Certificate may be assigned so as to vest in the assignee the right to take the deed in his name:* *Blount v. Davis*, 2 Dev. 19; *Splahn v. Gillespie*, 17 Ill. 47; *Ehleringer v. Moriarity*, 10 Iowa, 78. But where a purchaser of land at a sheriff's sale, after the time for redemption has expired, quitclaims his interest in the land before a sheriff's deed is given, the quitclaim deed is equivalent to an assignment of the sheriff's certificate of sale, and if the sheriff afterward execute a deed to the purchaser, the same is void as between

the parties: *Ward v. Dougherty*, 75 Cal. 240.

**When title vests.** — On an execution sale the purchaser acquires the debtor's title at the date of the levy: *Fish v. Fowlie*, 58 Cal. 373. The purchaser before and after the time for redemption expires has a leviable interest, though the sheriff's deed has not been executed: *Page v. Rogers*, 31 Cal. 301; *Duprey v. Moran*, 4 Cal. 196; *Guy v. Middleton*, 5 Cal. 392; *McMillan v. Richards*, 9 Cal. 412; *Smith v. Colvin*, 17 Barb. 157; *Cummings v. Coc*, 10 Cal. 531; *People v. Mayhew*, 26 Cal. 655. The purchaser does not acquire any interest in the judgment on the debt or mortgage upon which the judgment was rendered; nor does a redemptioner, as such, or an assignee of the certificate of sale, even when plaintiff in the suit was the purchaser, acquire any such interest: *Abadie v. Lobero*, 36 Cal. 390.

*Who may redeem.*

§ 512. [371.] Property sold subject to redemption, as provided in the last section, or any part thereof separately sold, may be redeemed by the following persons, or their successors in interest: —

1. The judgment debtor, or his successor in interest, in the whole or in any part of the property separately sold.

2. A creditor having a lien by judgment, decree, or mortgage on any portion of the property, or any portion of any part thereof, sepa-

rately sold subsequent in time to that on which the property was sold.

The persons mentioned in subdivision two of this section are termed redemptioners.

**Right to redeem — Who may redeem.**

— No execution issues under the foreclosure act of this state: *Hays v. Miller*, 1 Wash. 143. Prior to the act of February 3, 1886, — § 513, *post*, — this chapter relating to sales of property under execution excluded the right to redeem from foreclosure sales: *Parker v. Dacres*, 2 Wash. 439, 445. This case, involving the construction of the civil practice act of Washington territory of 1873, substantially similar to this chapter of the code, except that section 520 of the code is not found in the law of 1873, went on appeal to the supreme court of the United States, which held that, construing the statute so as to give effect to the object for which it was enacted, a court of equity should refuse aid to a party, asserting under it a right of redemption, who has neglected, at least without sufficient cause, before the expiration of six months from the confirmation of the sale, to invoke the authority of the proper court or judge to compel the recognition of such right by the officer whose duty it was, under the statute, to accept a tender made in conformity with law, and this, upon the principle uniformly proceeded upon by courts of equity, independently of any statute of limitations, of refusing relief to those who unreasonably delay to invoke their aid. In this case the plaintiff had rested nearly nine years after the sheriff had refused his tender of money to redeem before he again took action. The court, in its opinion, stated that the case was unaffected by the act of the territorial legislature, approved February 3, 1886, permitting a redemption within a prescribed time after a sale under a decree of foreclosure: *Parker v. Dacres*, 130 U. S. 43.

Defendant can redeem, notwithstanding he has conveyed to another: *Yoakum v. Bower*, 51 Cal. 530; *Jones v. Planters' Bank*, 5 Humph. 619; *Livingston v. Arnoux*, 56 N. Y. 507. See note to *Rutherford v. Newman*, 82 Am. Dec. 122; note to *Chataque Co. Bank v. Risley*, 75 Am. Dec. 361. A defendant may redeem after he has been compelled to transfer all his assets to a receiver: *Livingston v. Arnoux*, 56 N. Y. 507. A grantee or assignee, or a trustee of

absconding or concealed debtor, is a successor in interest in the meaning of this section: *Hepburn v. Kerr*, 9 Humph. 726; 51 Am. Dec. 685; *Phyfe v. Riley*, 15 Wend. 248.

Creditors having no mortgage lien, who have not reduced their claims to a certainty by action and judgment, cannot redeem: *Woods v. McGarock*, 10 Yerg. 133. A creditor of one co-tenant, if he would redeem his debtor's interest, must redeem the whole tract: *Eldridge v. Wright*, 55 Cal. 531. A judgment creditor may redeem, though his judgment be by confession: *Snyder v. Warren*, 2 Cow. 518; 14 Am. Dec. 519. Because one has other adequate securities, he is not therefore prevented from redeeming: *Muir v. Leitch*, 7 Barb. 341. One creditor may redeem from another: *Jackson v. Budd*, 7 Cow. 658; *Iverson v. Shorter*, 9 Ala. 713; *People v. Fleming*, 2 N. Y. 484.

Redemptioner must make his offer to redeem in the character in which he is entitled to do so: *McMillan v. Richards*, 9 Cal. 413; *Haskell v. Manlove*, 14 Cal. 59. If the purchaser treats one not entitled to redeem as a redemptioner, and gives a certificate of redemption, the most that such person can acquire is the interest of the purchaser as purchaser: *Abadie v. Lobero*, 36 Cal. 590. Third persons have no right to inquire from what source a redemptioner gets the money: *Seale v. Doane*, 17 Cal. 486.

Payment by the debtor extinguishes the purchaser's right, and if he takes a transfer of the certificate, and obtains the sheriff's deed instead of a certificate of redemption, that cannot divest the lien of a subsequent judgment: *McCarty v. Christie*, 13 Cal. 79; *Rutherford v. Newman*, 82 Am. Dec. 122. Tender of redemption money is, as to the extinguishment of the purchaser's lien, equivalent to payment: *Hershey v. Dennis*, 53 Cal. 77.

Judgment debtor who pays sheriff the redemption money in time will be deemed to waive the sheriff's act of delivering the deed to the purchaser if the money is, after such delivery, taken from the sheriff: *Wilkins v. Wilson*, 51 Cal. 212.

*Redemption from sale on foreclosure.*

§ 513. The judgment debtor, or his successor in interest, may redeem any real estate sold under execution of judgment or foreclosure of mortgage at any time within one year from the date of the sale, by paying the amount of purchase-money, with interest at the rate of one per centum per month thereon from the date of sale, together with the amount of any taxes which the purchaser may have paid. [February 3, 1886, § 1. In effect immediately.]

See notes to next preceding section.

**Redemption by judgment debtor.** — If the judgment debtor, or his successor in inter-

est, redeem, the effect is to terminate the effect of the sale on execution, and no further redemption can be had: *Rutherford v. Newman*,



82 Am. Dec. 122; *Lauriat v. Stratton*, 6 Saw. 339; *Cartwright v. Wheeler*, 5 Or. 397. And a judgment debtor whose lands have been sold under execution may redeem the same from the purchaser without paying the amount of a prior judgment against him, held by a partnership of which the purchaser is a member: *Campbell v. Oaks*, 68 Cal. 222.

**When lien creditor may redeem.** — Redemption can be made only by paying the whole sum bid on any distinct piece sold separately, and not by paying a portion of the bid equal to the interest of the redemptioner in the parcel sold: *People v. McKean*, 23 Cal. 57; *Hawkins v. Vineyard*, 14 Ill. 26; 56 Am. Dec. 478; and see *Quinn v. Kenny*, 47 Cal. 150. In *Simpson v. Castle*, 52 Cal. 644, it is determined that a judgment creditor who purchases at an execution sale for a sum less than the amount of the judgment does not have a lien on the land for the residue which the judgment debtor or a redemptioner would have to pay to redeem the land, thus changing the old rule. A redemption cannot be made, where the land was sold on several judgments, by paying the amount of those judgments which, as liens, were paramount to his own: *Silliman v. Wing*, 7 Hill, 159.

The redemption must be made in money. Certified checks are not sufficient: *Thorne v. San Francisco*, 4 Cal. 152; *Lytle v. Etherly*, 10

Yerg. 389; but "legal tenders" are, where the judgment or lien is payable generally in money: *People v. Mayhew*, 26 Cal. 655. An effort to redeem is ineffectual if any portion of the amount paid is counterfeit money, where there was mutual mistake; but in such case a court of equity will relieve: *Pownall v. Hall*, 45 Cal. 192.

The judgment debtor has the whole of the last day in which to redeem: *Perham v. Kuper*, 61 Cal. 331.

The payment is not compulsory, and an excess paid to the sheriff under protest cannot be recovered back from the purchaser, though it may from the sheriff. Interest on the purchaser's bid beyond the two per cent per month cannot be claimed: *McMullan v. Fischer*, 14 Cal. 240.

A judgment creditor for the unpaid portion of a judgment is not a purchaser having a prior lien: *Simpson v. Castle*, 52 Cal. 644.

If the purchaser fails to pay the taxes, permits the premises to be sold, and buys them in, he can derive no benefit from the sale, except that, in equity, the amount paid would probably be considered an advance to the judgment debtor. And this, though the premises were bid in by one of two partners, while the possession, under the sheriff's sale, was by both partners. The duty to pay the tax was several as well as joint: *Kelsey v. Abbott*, 13 Cal. 609.

### *Successive redemptions.*

§ 514. [373.] If the property be so redeemed by a redemptioner, either the judgment debtor or any other redemptioner may, within sixty days from the last redemption, again redeem it on paying the sum paid on the last redemption, with interest at the rate of two per centum per month thereon from the date of the last preceding redemption in addition, together with the amount of any taxes which the last redemptioner may have have paid thereon; and unless his lien be prior to that of such redemptioner, the amount of such lien, with interest. The property may be again, and as often as a debtor or a redemptioner is disposed, redeemed from the last previous redemptioner, within sixty days from the last redemption, on paying the sum paid on the last previous redemption, with interest at the rate of two per centum per month thereon from the date of such previous redemption, together with the amount of any taxes paid thereon by such last redemptioner, and the amount of any liens held by such last redemptioner prior to his own, with interest. Notice of redemption shall be given to the sheriff.

### *When purchaser or redemptioner entitled to conveyance.*

§ 515. [374.] If no redemption be made within six months from the confirmation of the sale, the purchaser shall be entitled to a conveyance from the sheriff; or if so redeemed, whenever sixty days has elapsed, and no other redemption has been made, the time for redemption shall have expired, and the last redemptioner shall be entitled to



a conveyance from the sheriff. If the judgment debtor redeem at any time before the time for redemption expires, the effects of the sale shall be determined, and he shall be restored to his estate.

See note to § 513, *ante*.

**Sheriff's deeds, generally.** — Until the execution and delivery of the sheriff's deed no title vests in the purchaser by a sale on execution: *Anthony v. Wessel*, 9 Cal. 103; *Spoor v. Phillips*, 27 Ala. 193; *Smith v. Colvin*, 17 Barb. 157. Execution of the deed may be compelled by motion in the original case: *People v. Haskins*, 7 Wend. 468; or by *mandamus*: *People v. Irwin*, 14 Cal. 428; *People v. Fleming*, 2 N. Y. 484.

**Who may execute deed.** — A deputy sheriff may execute the deed, but he must do it so in the name of the sheriff: *Rowley v. Howard*, 23 Cal. 403; *Lewes v. Thompson*, 3 Cal. 266; *Jackson v. Bush*, 10 Johns. 224; for if he makes the deed in his own name, it is void: *Lewes v. Thompson*, 3 Cal. 266. The deputy sheriff may execute the deed, it seems, after the term of the sheriff has expired: *Mills v. Tukey*, 22 Cal. 373; *Tuttle v. Jackson*, 6 Wend. 213; 21 Am. Dec. 306; but not after his death: *Anderson v. Brown*, 9 Ohio, 181. It was held in *Sacramento v. Stage Co.*, 12 Cal. 134, that where the deed purported to be executed long after the sheriff's term of office, by one Todd, as deputy, it was necessary to show his authority. The sheriff is not liable in damages for not executing the deed, unless it is alleged and proved that the execution defendant had title: *Knight v. Fair*, 12 Cal. 297.

**When deed takes effect.** — The title vests at the time of the actual delivery of the deed; the preparing of the deed by the sheriff, and notifying the purchaser that it is ready for him, do not amount to a delivery: *Jefferson v. Wendt*, 51 Cal. 573; but it is said that it takes effect when executed, by relation, from the time the first lien in the proceeding attached, whether it was by attachment, docketing of the judgment, levy, or otherwise: *Fehley v. Barr*, 66 Pa. St. 196; *Hutchings v. Ebeler*, 46 Cal. 557; *Jackson v. Dickerson*, 15 Johns. 309; 8 Am. Dec. 236; so that it takes precedence over subsequent liens and transfers.

**Contents of deed.** — The sheriff's deed need not recite the judgment and execution. In setting up the title in evidence, they must be proved *aliunde* the deed: *Montgomery v. Robinson*, 49 Cal. 259; *Quirk v. Falk*, 47 Cal. 455. The deed should recite the recovery of the judgment, the names of the judgment creditor and judgment debtor, the issuing of execution on the judgment, and the levy and sale thereunder, and these recitals are evidence, and as against the execution debtor conclusive evidence, of the facts recited, though not of the judgment and execution: *Hihn v. Peck*, 30 Cal. 287; *Blood v. Light*, 38 Cal. 653; *Donahoe v. McNulty*, 24 Cal. 417; *Mayo v. Foley*, 40 Cal. 281. But a sheriff's deed of land sold at an execution sale, which describes the property intended to be conveyed solely by a general reference to a non-official map, in order to be operative must clearly identify the particular map referred to; and the deed is void for uncertainty when the reference contained therein is equally applicable to two different maps, and

in an action founded thereon, parol evidence of the sheriff to identify the one referred to is inadmissible: *Cadwalader v. Nash*, 73 Cal. 43. The officer's deed is defendant's deed, and defendant is estopped by it: *Dodge v. Walley*, 22 Cal. 224; *McDonald v. Badger*, 23 Cal. 399; *Cooper v. Galbraith*, 3 Wash. C. C. 550; *Blood v. Light*, 38 Cal. 653. A misrecital of the execution in the deed will not affect its validity: *Wilson v. Madison*, 55 Cal. 5. The property should be described with such certainty that it can be ascertained, or the deed will be void: *Jackson v. Rosevelt*, 13 Johns. 97; *Delouch v. Bank*, 27 Ala. 437; *Childs v. Ballou*, 5 R. I. 537.

**When and to whom deed may be made.**

— If executed before the expiration of the period of redemption, it is absolutely void, and is not color of title. The question is one of power: *Gross v. Fowler*, 21 Cal. 392; *Bernal v. Gleim*, 33 Cal. 669; *Moore v. Martin*, 38 Cal. 438; *Hall v. Yoell*, 45 Cal. 588; *Perham v. Kuper*, 61 Cal. 331. The redemptioner is entitled to the full time mentioned in the statute: *Boyle v. Daiton*, 44 Cal. 334; as to whether a deed will be set aside on the ground that the right to demand it is barred by lapse of time, see *Rucker v. Dooly*, 49 Ill. 377, where a conveyance executed twenty-nine years after the sale was set aside.

The deed may be made to the original purchaser: *Rice v. Smith*, 18 N. Y. 369; or to the assignee of the certificate of sale: *Blount v. Davis*, 2 Dev. 19; *Splahn v. Gillespie*, 48 Ind. 397; or to the heirs or devisees: *Summers v. Palmer*, 10 Rich. 98.

**What passes by deed.** — The purchaser acquires all the right, title, and interest of the judgment debtor at the date of sale: *Decelis v. Porter*, 59 Cal. 464; although acquired after the levy: *Frink v. Roe*, 70 Cal. 296. A purchaser at an execution sale of shares of stock in a corporation, having notice that the execution debtor is not the owner thereof, acquires no better title thereto than was possessed by the latter: *Blakeman v. Puget Sound Iron Co.*, 72 Cal. 321. The title of the purchaser does not depend on the sheriff's return to the writ. The title relates back to and takes priority from the date of the judgment lien, and not from the date of any real or pretended statutory levy: *Hibberd v. Smith*, 67 Cal. 547. If the judgment debtor is a pre-emptioner of public land, and subsequently to the sale pays for the land and acquires a patent, it is said he holds the legal title in trust for a purchaser at sheriff's sale: *Kenyon v. Quinn*, 41 Cal. 326; but if the purchaser bought only part of the tract, he cannot compel the register of the state land-office to issue a patent to him: *Mariani v. Dougherty*, 46 Cal. 26. A sheriff's deed executed in pursuance of judgment in an attachment suit takes effect by relation as of the date at which the attachment was levied, and overreaches any subsequent deed: *Sharp v. Bard*, 43 Cal. 577; *Porter v. Pico*, 55 Cal. 165. A purchaser without notice, under proceedings regular on their face, in a court of competent jurisdiction, is not affected by any error for

which the judgment might be reversed on appeal; nor by any secret vice in the judgment not appearing on the face of the record. He is bound to inquire whether it appears on the face of the record that the court had jurisdiction, and whether there is a valid execution, but nothing more: *Reere v. Kennedy*, 43 Cal. 650.

The execution defendant cannot defeat the purchaser's recovery of possession by setting up a title in some third person: *McDonald v. Badger*, 23 Cal. 399; *Jackson v. Graham*, 3 Cal. 188; *Jackson v. Bush*, 10 Johns. 223; *Jackson v. Davis*, 18 Johns. 7. The sheriff's deed does not pass a subsequently acquired interest of the debtor, as, for instance, the title acquired by entering land as a homestead under the act of Congress: *Emerson v. Sansome*, 41 Cal. 552; and a deed executed before a judgment is recovered against the grantor, but which is not recorded until after the judgment is docketed, is good as against the sheriff's sale made on the judgment, if recorded before the record of the sheriff's deed: *Wilcoxon v. Miller*, 49 Cal. 193; and see *Purdy v. Irwin*, 18 Cal. 350. One who buys land in the adverse possession of another is barred by the statute when five years have expired from the time a cause of action first accrued to any of those through whom he has acquired title: *Le Roy v. Rogers*, 30 Cal. 230. Where the purchaser removed buildings from the land, and a redemptioner subsequently sued him for the value of them, it was held that as there was no evidence that the buildings were attached to the soil, the redemptioner could not recover: *Tyler v. Decker*, 10 Cal. 435.

**Deed under void judgment.** — Where a sheriff's deed issues under a void judgment, it passes no title: *Gray v. Hawes*, 8 Cal. 569; *Kelly v. Van Austin*, 17 Cal. 565; *Wiseman v. McNulty*, 25 Cal. 236; or upon a satisfied judgment: *Reynolds v. Lincoln*, 71 Cal. 183. Where execution is erroneous, it is voidable; where irregular, void. Execution for too much money is erroneous merely. Erroneous exe-

cutions cannot be collaterally attacked: *Hunt v. Loucks*, 38 Cal. 375; but one who takes an assignment of an erroneous judgment, issues execution, and purchases under the execution, is not entitled to protection as a *bona fide* purchaser, and is liable in an action for damages caused by the sale: *Reynolds v. Hosmer*, 45 Cal. 617; see *Wells v. Stout*, 9 Cal. 479. Where the execution creditor asked the execution debtor to purchase the land for him, and the defendant purchased and took the certificate in his own name, and afterwards the sheriff's deed was executed to him, the court held that there was a trust, and that as there was fraud the statute did not commence running till the discovery of the fraud: *Currey v. Allen*, 34 Cal. 257. The purchaser cannot claim to be reimbursed the purchase-money by reason of the failure of the title: *Boggs v. Hargrave*, 16 Cal. 562; 76 Am. Dec. 561; *Branham v. Mayor*, 24 Cal. 608. Where the clerk, without an order of court, wrongfully includes costs in a judgment after it has been entered, a sale of land under an execution issued on such judgment confers no title on the purchaser: *Emeric v. Alvarado*, 64 Cal. 529.

**Injunction — Constable's deed as evidence.** — In an action to enjoin a sheriff from executing a deed to a purchaser of real estate sold by him, the complaint must allege facts which show that in an action of ejectment founded on such a deed he would be required to offer evidence to overcome the effect of the deed. A complaint which alleges that the sheriff levied upon the property under a writ of execution issued in a certain action, but omits to allege the rendition of a judgment, is fatally defective. An allegation that the deed if executed would be a cloud upon the title of the plaintiff is a mere conclusion of law: *Schuyler v. Broughton*, 65 Cal. 252. It is error to admit a constable's deed as evidence of title without proof of the judgment and execution under which the constable acted: *Peterson v. Weissbein*, 75 Cal. 174.

### *Mode of redeeming.*

§ 516. [375.] The mode of redeeming shall be as provided in this section.

1. The person seeking to redeem shall give the purchaser or redemptioner, as the case may be, two days' notice of his intention to apply to the sheriff for that purpose. At the time and place specified in said notice, such person may redeem by paying to the sheriff the sum required. The sheriff shall give the person redeeming a certificate as in case of sale on execution, adding therein the sum paid on redemption, from whom redeemed, and the date thereof. A party seeking to redeem shall submit to the sheriff the evidence of his right thereto, as follows:—

2. Proof that the notice required by this section has been given to the purchaser or redemptioner, or waived.

3. If he be a lien creditor, a copy of the docket of the judgment or decree under which he claims the right to redeem, certified by the



clerk of the court where such judgment or decree is docketed, or if he seeks to redeem upon mortgage, the certificate of the record thereof.

4. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself or agent, showing the amount then actually due on the judgment, decree, or mortgage.

5. If the redemptioner or purchaser have a lien prior to that of the lien creditor seeking to redeem, such redemptioner or purchaser shall submit to the sheriff the like evidence thereof, and of the amount due thereon, or the same may be disregarded.

**Notice of intention to redeem property**      **Redemption money may be paid to ad-**  
 sold at sheriff's sale under execution, given on      ministrator of deceased sheriff, to his deputy,  
 the 4th of the month, and naming the 6th as the      or to the purchaser: See *Stone v. Gardner*, 71  
 day when application will be made, is good:      Am. Dec. 268, and note 271.  
*Scott v. Patterson*, 20 Pac. Rep. 593 (Wash.).

*Order in which redemptions are to be allowed.*

§ 517. [376.] When two or more persons apply to the sheriff to redeem at the same time, he shall allow the person having the prior lien to redeem first, and so on. The sheriff shall immediately pay the money over to the person from whom the property is redeemed, if he attend at the redemption, or if not, at any time thereafter when demanded. Where a sheriff shall wrongfully refuse to allow any person to redeem, his right thereto shall not be prejudiced thereby, and upon the submission of the evidence and the tender of the money to the sheriff, as herein provided, he may be required by order of the court, or judge thereof, to allow such redemption.

*Waste before time of redemption expires will be restrained.*

§ 518. [377.] Until the expiration of the time allowed for redemption, the court, or judge thereof, may restrain the commission of waste on the property by order granted, with or without notice, on the application of the purchaser or judgment creditor, but it shall not be deemed waste for the person in possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used, or to use it in the ordinary course of husbandry, or to make the necessary repairs to buildings thereon, or to use wood or timber on the property therefor, or for the repair of fences, or for fuel in his family, while he occupies the property.

*Purchaser entitled to possession.*

§ 519. [378.] The purchaser from the day of sale until a resale or redemption, and the redemptioner from the day of his redemption until another redemption, shall be entitled to the possession of the property purchased or redeemed, unless the same be in the possession of a tenant holding under an unexpired lease, and in such case shall be entitled to receive from such tenant the rents or the value of the use and occupation thereof during the same period.



**Right to possession.** — The purchaser at a judicial sale is entitled to the possession of property when not in possession of a tenant holding over under an unexpired lease, and his rights go to the extent of using and occupying the premises for ordinary purposes: *Cartwright v. Savage*, 5 Or. 397. An undertaking on appeal does not suspend the right of a purchaser

at a judicial sale to possession, though it provide for repayment of the value of the use and occupation in case of failure in judgment: *Bank of British Columbia v. Harlow*, 9 Or. 338. The judgment debtor redeeming may recover the value of the crop growing when the purchaser went into possession, and harvested by him: *Cartwright v. Savage*, 5 Or. 397.

*Time when purchaser entitled to conveyance — Who may execute conveyance.*

§ 520. [379.] In all cases where real estate has been or may hereafter be sold, in pursuance of law, by virtue of an execution or other process, it shall be the duty of the sheriff or other officer making such sale to execute and deliver to the purchaser, or other person entitled to the same, a deed of conveyance of the real estate so sold, as follows: —

1. When such other execution or process issues upon an ordinary money judgment, such sheriff or other officer shall execute and deliver such deed within six months after the confirmation of such sale.

2. When such execution or other process issues upon a decree for the foreclosure of a mortgage, such sheriff or other officer shall execute and deliver such deed within five days after the confirmation of such sale.

3. In case the term of office of the sheriff or other officer making such sale shall have expired before a sufficient deed has been executed, then the successor in office of such sheriff or other officer shall, within the time specified in this act, execute and deliver to the purchaser, or other person entitled to the same, a deed of the premises so sold; and such deed shall be as valid and effectual to convey to the grantee the lands or premises so sold as if the deed had been made by the sheriff or other officer who made the sale.

*Clerk's duty on presentation of sheriff's deed.*

§ 521. [380.] The party to whom such sheriff's deed is given shall, upon the receipt thereof, take the same to the clerk of the superior court, who shall enter in his book of levies, where the levy is recorded, the sale of real estate therein conveyed, and shall indorse the fact upon the deed, with the date when presented to him and when made. And no county auditor shall record any such deed without such indorsement.

**Book of levies:** See § 454, *ante*.

## CHAPTER VI.

### OF PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

- § 522. Debtor may be examined — May be arrested.
- § 523. Debtor may pay sheriff.
- § 524. Proceedings to obtain order for examination of debtor.
- § 525. Witnesses on such examination — Trial by jury.
- § 526. Judge or referee may order property applied on execution — Exemption of wages.
- § 527. Judge may order action commenced against a third person when.
- § 528. Disobedience to orders of court or referee are punishable as contempta.

#### *Debtor may be examined — May be arrested.*

§ 522. [381.] After the issuing of an execution against property, and upon proof by affidavit of a party, or otherwise, to the satisfaction of the court, or of a judge thereof, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may, by an order, require the judgment debtor to appear, at a specified time and place, before such judge, or a referee appointed by him, to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as are provided upon the return of an execution. Instead of the order requiring the attendance of the judgment debtor, the judge may, upon affidavit of the judgment creditor, his agent or attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before such judge. Upon being brought before the judge, he may be ordered to enter into a bond, with sufficient surety, that he will attend from time to time, before the judge or referee, as shall be directed during the pendency of proceedings and until the final determination thereof, and will not, in the mean time, dispose of any portion of his property not exempt from execution. In default of entering into such bond, he may be committed to prison.

**Supplementary proceedings** hereunder are said to be purely legal in their nature, and limited to a particular object and mode of investigation, and cannot be used to enforce a lien by virtue of a chattel mortgage: *Knowles v. Herbert*, 11 Or. 54, 241. But in this state such proceedings are held to be of equitable jurisdiction, intended to serve the end of a creditor's bill, and to be heard and determined by the judge with or without a jury, as he may desire: *Murne v. Schwabacher*, 2 Wash. 130, where it was also held that the prior right to

execution and supplementary proceedings were not cut off by the code of 1881, without the allowance of a reasonable limitation of time.

**Affidavit may be amended** in supplementary proceedings, by permission, so as to make it conform to the original proceedings: *Murne v. Schwabacher*, 2 Wash. 130.

**After arrest**, and being advised of supplementary proceedings against him, a party cannot dispose of property in question and thus avoid responsibility: *Murne v. Schwabacher*, 2 Wash. 130.

#### *Debtor may pay sheriff.*

§ 523. [382.] After the issuing of an execution against property, any person indebted to the judgment debtor may pay to the sheriff

the amount of his debt, or so much thereof as may be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid.

*Proceedings to obtain order for examination of debtor.*

§ 524. [383.] After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may by an order require such person or corporation, or any officer or member thereof, to appear, at a specified time and place, before him, or a referee appointed by him, and answer concerning the same.

**Examination.** — A garnishee can be required to answer only as to his liability to the debtor defendant at time of the garnishment: *Norris v. Burgoyne*, 4 Cal. 410.

**The property or funds of private corporation,** not having been declared a divi-

dend in the hands of a stockholder, are subject to execution against the corporation, and the execution creditor is entitled to the remedy under this provision to enforce payment of his demand: *Hughes v. Oregonian Ry Co.*, 11 Or. 158.

*Witnesses on such examination — Trial by jury.*

§ 525. Witnesses may be compelled to appear and testify before the judge or referee upon any proceeding under this chapter as upon the trial of an issue of fact; and if the judgment debtor deny that he has property which he unjustly refuses to apply towards the satisfaction of the judgment, then and in such case the judgment debtor may demand a trial by jury, and upon such demand being made, the [said] proceedings shall stand for trial in the court from whence the execution issued, and be docketed and tried by a jury as other civil actions are tried. [February 24, 1891, § 1.]

**Who may examine.** — The judgment debtor and creditor are parties to the proceeding, and each is at liberty to examine witnesses in respect to any contested fact which may be brought in issue. The parties to such a proceeding, as between themselves and privies, are estopped from again litigating the same matters: *McCullough v. Clark*, 41 Cal. 302.

**Witness, etc.** — Where the appellant was summoned to appear and answer touching his

property, and alleged that he was not a resident of San Francisco, but of another county, and that he was in San Francisco for the most part in attendance as a suitor upon the board of the United States land commissioners, but did not allege that, at the precise time of the summons, he was in attendance upon any court as witness, juror, or party, it was held he showed no excuse for not obeying the process: *Page v. Randall*, 6 Cal. 33.

*Judge or referee may order property applied on execution — Exemption of wages.*

§ 526. [385.] The judge or referee may order any property of the judgment debtor, not exempt from execution, in the hands of such debtor or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within sixty



days next preceding the order, shall not be so applied, when it shall be made to appear, by the debtor's affidavit or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor.

**Order to hand over property, etc. —** This order cannot be made on the mere affidavit of plaintiff mentioned in sections 522 and 524. There must be an examination. The affidavit serves only as a basis for acquiring jurisdiction: *Hathaway v. Brady*, 26 Cal. 589.

It is the duty of the court to render judgment against the garnishee for the amount found due, and an order to pay the same into court is improper: *Brummagim v. Boucher*, 6 Cal. 17; and see *Brown v. Moore*, 61 Cal. 432, and *Hartman v. Olvera*, 51 Cal. 501. But

where it was ordered to be paid into court, the supreme court held it made no difference in the substantial rights of the parties, and the plaintiff was entitled to have the money paid on his execution: *Smith v. Brown*, 5 Cal. 119. The court may order the property to be delivered or assigned to a receiver, to be disposed of in aid of the execution, — here a patent right: *Pacific Bank v. Robinson*, 57 Cal. 520. But a garnishee cannot be required to turn over property upon which he has a lien until such lien is satisfied: *Coombs v. Davis*, 2 Wash. 466.

*Court may order action commenced against third person when.*

§ 527. [386.] If it appear that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may authorize, by an order to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the court or judge may by an order forbid a transfer or other disposition of such interest or debt until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just.

**Answers of garnishee. —** It was held that where a garnishee answered under oath that he was released by the plaintiff from his obligation to answer, and that the plaintiff had abandoned his examination, the supreme court held he should have been discharged without further delay, unless his answer was controverted by the affidavit of the plaintiff; and that where a party was garnished to answer on a certain day, and appeared, and the summoning party declined, or was not prepared to take his answer, and a term elapsed without any action on the garnishment, the summons was discontinued and the party discharged from liability to answer: *Ogden v. Mills*, 3 Cal. 254.

**Interpleader action. —** A garnishee who, evidently, is acting in bad faith is not entitled to have an action authorized, and make it a shield for fraud instead of an instrument of justice. But when the referee or the court disregards the adverse claim or denial on this

ground, the better practice is so to state in the finding, in order that the action in that behalf may be reviewed in the appellate court: *Parker v. Page*, 38 Cal. 525.

Where the answer of the garnishee did not disclose that there were any liens upon the fund, it was held that the district court erred in presuming the existence of such claims and authorizing an action. It was held that the doctrine of garnishment, although partially regulated by statute, is not the less a common-law proceeding, and therefore the parties are entitled to a jury trial: *Cahoon v. Lery*, 5 Cal. 294.

**Order to pay into court. —** Neither this section nor section 524, *ante*, confers upon the court the power to order property in possession of an officer by virtue of legal process to be sold, or to direct that the proceeds be paid into court: *Brown v. Moore*, 61 Cal. 432; *Hartman v. Olvera*, 51 Cal. 501.

*Disobedience to orders of court or referee are punishable as contempts.*

§ 528. [387.] If any person, party, or witness disobey an order of the referee, properly made in the proceedings before him under this chapter, he may be punished by the court or judge ordering the reference for a contempt.

**Contempt.** — If after the commencement of the examination of the judgment debtor, and pending determination of the referee of a motion to compel the debtor to deliver to the sheriff property which the examination has disclosed, the debtor turns over the property to a third person, in anticipation of and to defeat the order of the referee, he may be punished

for contempt of court: *Ex parte Kellogg*, 64 Cal. 343.

*Refusal to answer.* — If the person summoned refuses to attend, he may be punished for contempt; but judgment by default cannot be rendered against him: *Hibernia S. & L. Society v. Sup. Court*, 56 Cal. 265.

## TITLE IX.

### OF ACTIONS IN PARTICULAR CASES, AND OF SPECIAL PROCEEDINGS.

#### CHAPTER I.—OF ACTIONS TO RECOVER THE POSSESSION OF OR QUIET THE TITLE TO REAL PROPERTY.

II.—OF THE ACTION OF FORCIBLE ENTRY AND DETAINER.

III.—OF PARTITION.

IV.—OF FORECLOSURE OF MORTGAGES.

V.—OF THE APPROPRIATION OF LANDS AND OTHER PROPERTY FOR PUBLIC USE BY THE STATE.

VI.—OF THE APPROPRIATION OF PRIVATE PROPERTY BY CORPORATIONS.

VII.—OF WASTE, TRESPASS, AND NUISANCE.

VIII.—OF PROCEEDINGS TO ESTABLISH BOUNDARIES OF LAND.

IX.—OF ACTIONS BY AND AGAINST PUBLIC CORPORATIONS.

X.—OF ACTIONS TO PREVENT THE USURPATION OF AN OFFICE OR FRANCHISE, AND TO AVOID CHARTERS AND LETTERS PATENT.

XI.—OF ACTIONS ON OFFICIAL BONDS, FINES, AND FORFEITURES.

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XIV.—OF HABEAS CORPUS.

XV.—OF MANDATE AND PROHIBITION.

XVI.—OF NE EXEAT.

XVII.—OF DIVORCE AND ALIMONY.

XVIII.—OF CHANGE OF PERSON'S NAME.

XIX.—OF CONTEMPTS AND THEIR PUNISHMENT.

#### CHAPTER I.

#### OF ACTIONS TO RECOVER POSSESSION OF OR QUIET TITLE TO REAL PROPERTY.

- § 529. Actions for possession or to quiet title, who may bring.
- § 530. Substitution of landlord in action against tenant.
- § 531. Pleadings in such action — Agent's title prevails.
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- § 533. Verdict in such actions.
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- § 538. Alienation *pendente lite*.
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- § 542. Possession not disturbed by order vacating.
- § 543. Rule of decision between claimants — Actions under donation laws.
- § 544. Action to determine adverse claims to real property — Parties to such action.
- § 545. Of action by occupant of land.



*Actions for possession or to quiet title, who may bring.*

§ 529. Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title; and in all actions, under this section, to quiet or remove a cloud from the title to real property, if the defendant be absent or a non-resident of this state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, service may be made upon such defendant by publication of summons as provided by law; and the court may appoint a trustee for such absent or non-resident defendant, to make or cancel any deed or conveyance of whatsoever nature, or do any other act to carry into effect the judgment or the decree of the court. [March 14, 1890, § 1.]

See §§ 543, 544.

**Scope and nature of action.** — The primary object of this chapter is to determine the question of title, but in the action of ejectment that question is to arise as an incident to questions concerning the right of possession. The action for possession herein contemplated is the common-law action of ejectment: *Smith v. Wingard*, 3 Wash. 291; *Burmeister v. Howard*, 1 Wash. 207; *Goldsmith v. Smith*, 10 Saw. 294; with the added incident of determining in the action the paramount, legal, or equitable title, and with the departure of permitting the action to be brought against one not in possession, but who claims title to or interest in the land. The determination of title in this action is *res judicata*: *Smith v. Wingard*, 3 Wash. 291.

The holder of the naked fee cannot recover possession, if by his acts the equitable title be in the adverse party: *Burmeister v. Howard*, 1 Wash. 207. A complaint averring that defendant has put a division fence upon plaintiff's land, and withholds a portion of the land inclosed by such fence, and cut off thereby, and by reason thereof obstructs plaintiff in reaching other portions of his farm, and to his damage, states a good cause of action under this chapter, and equitable relief will not be granted: *Meeker v. Gilbert*, 3 Wash. 369.

**Action to recover real property, generally.** — To maintain an action for possession under this chapter, the plaintiff must have a present right of possession: *Cincinnati v. White*, 6 Pet. 431; *Heffner v. Betts*, 32 Pa. St. 376; *Payne v. Treadwell*, 5 Cal. 310; at the commencement of the suit: *Kile v. Tubbs*, 32 Cal. 332; and at the time of trial: *Cresap v. Hutson*, 9 Gill, 269; *Alden v. Grove*, 18 Pa. St. 377.

The right of possession is the question in controversy, and a perfect title need not be shown: *Fowler v. Nixon*, 7 Heisk. 719; unless plaintiff's title is subsequent to the date of defendant's possession: *Patterson v. Litton*, 23 La. Ann. 274. In a suit by several, all must show a legal title and present right to possession: *Cheney v. Cheney*, 26 Vt. 606. Where it

appeared, during the course of the trial, that at the time of the commencement of the action the claims of the respective parties were then being heard in the department of the interior, and not fully determined, the action was dismissed at the cost of plaintiff: *Hays v. Parker*, 2 Wash. 198.

A party claiming a right to lands must recover, if at all, on the strength of his own title, and not on the defects of that of his adversary: *Wallace v. Swinton*, 64 N. Y. 188; *Roberts v. Baumgarten*, 110 N. Y. 380; *Butler v. Davis*, 5 Neb. 52; *Goulding v. Clark*, 34 N. H. 148. Title is presumed from possession: *Stark v. Starr*, 1 Saw. 15; and the presumption of title in the defendant arising from his possession must be overcome by proof of title in plaintiff which is good, at least, against the defendant: *People v. Leonard*, 11 Johns. 504; *Eldon v. Doe*, 6 Blackf. 341; *Stanford v. Mangin*, 30 Ga. 355. Proof of prior possession is sufficient to maintain ejectment against a mere trespasser: *Mickey v. Stratton*, 5 Saw. 475. Where both parties derive title from the same source, the question is as to which has the better title, and the fact that a third person has a still better title is of no consequence: *Union Bank v. Manard*, 51 Mo. 548; *Seabury v. Stewart*, 22 Ala. 207; 58 Am. Dec. 254; *Ames v. Beckley*, 48 Vt. 395; *Touchard v. Crow*, 20 Cal. 150.

**Who can maintain the action.** — Besides the persons mentioned in the sections following, the class of persons who have such a title as enables them to maintain the action under this section includes assignees in bankruptcy: *Bartow v. Adams*, 2 Day, 70; corporation, private: *Henley v. Bank*, 16 Ala. 552; or municipal: *San Francisco v. Sullivan*, 50 Cal. 603; a guardian: *Holmes v. Seely*, 17 Wend. 75. The donee of a land claim may maintain an action under this section for the recovery of real property against one who shows no title but possession: *Keith v. Cheeny*, 1 Or. 285. An executor or administrator cannot sue for possession: *Humphreys v. Taylor*, 5 Or. 260; and one claiming under a conveyance, in form a deed, but in fact given

as a mortgage, cannot maintain ejectment against the grantor or any other person: *Shattuck v. Bascom*, 105 N. Y. 39. A deed conveying title to the members of a firm enables one partner to maintain ejectment against an intruder: *Smith v. Smith*, 80 Cal. 323. So one tenant in common may recover the possession of the entire tract from an intruder without joining his co-tenants as parties plaintiff: *Moulton v. McDermott*, 80 Cal. 629. And an action of ejectment founded only upon adverse possession may be maintained, even against the true owner: *Barnes v. Light*, 116 N. Y. 34.

**Who may be sued.** — If both husband and wife are in possession, they may be joined in an action to recover the premises: *Tilton v. Barrell*, 8 Saw. 412; and where both are in possession by virtue of a joint grant, the wife claiming title, they are both proper and necessary parties: *Stewart v. Patrick*, 68 N. Y. 450. The plaintiff in ejectment is not entitled to judgment unless the defendant was in possession of some part of the land sued for at the time of the commencement of the action: *Dillon v. Center*, 68 Cal. 561; *Mahoney v. Middleton*, 41 Cal. 41, 53, and cases there cited; but defendant's possession need not be actual; it may be shown to be constructive: *Crane v. Ghirardelli*, 45 Cal. 235; *Noe v. Card*, 14 Cal. 609; and the possession of a mere employee, not claiming any right in the premises, is the possession of his employer: *Harkins v. Reichert*, 28 Cal. 536; *Polack v. Mansfield*, 44 Cal. 36.

**Landlord and tenant:** See the next section.

**Mortgagor and mortgagee:** See § 539, *post*.

**Quieting title, removing cloud, etc.** — A suit to ascertain and quiet title under this section extends to and includes all the grounds of controversy between the parties as to the title of the premises; and by the final decree therein all matters affecting such title are determined: *Starr v. Stark*, 1 Saw. 270. Possession by the plaintiff is not necessary: See *Williams v. Corcoran*, 46 Cal. 556; *Leet v. Ruter*, 48 Cal. 623; *Coleman v. S. R. T. R. Co.*, 49 Cal. 517; *Hartman v. Reed*, 50 Cal. 485; *Garvey v. Willis*, 50 Cal. 619; *Brandt v. Wheaton*, 52 Cal. 430; *Culliam v. Cherokee F. B. G. Co.*, 52 Cal. 605; *Pierce v. Felter*, 53 Cal. 18; *Stoddard v. Burge*, 53 Cal. 395; *Hewlerson v. Grammar*, 53 Cal. 649; nor is it necessary, in order to maintain suit under this section, that the claim sought to be determined should be a technical "cloud upon title," as the term is understood in equity; it is enough if calculated to create doubt and uncertainty in respect to the title of the true owner, or if operating injuriously in any way to his enjoyment of or beneficial dominion over such property. Any attempt persisted in to have such property sold on execution against a third party is an adverse claim in the meaning of this section: *Murphy v. Sears*, 11 Or. 12. A party has the right to be quieted in his title whenever any claim is made to real estate, the effect of which claim might be litigation or a loss to him of the property: *Horn v. Jones*, 28 Cal. 204. If the title against which relief is sought be of such a character that if asserted by action the other party would have to produce his own title to establish a defense, it constitutes a cause of action

under this section; otherwise not: *Lick v. Ray*, 43 Cal. 84. It is not enough that a deed which is sought to be set aside may possibly be a cloud; it must clearly appear that the claim set up under it is in fact in hostility to plaintiff's title: *Hartman v. Reed*, 50 Cal. 485.

Where plaintiff purchased at sheriff's sale property for twenty dollars which was shown to be worth three thousand dollars, and the defendant purchased the property under another mortgage sale for two thousand dollars, and the plaintiff, being in possession, filed his bill to cancel defendant's deed and remove the cloud from the title, it was held that to entitle a party to this relief it must appear that the contract was fair, just, and reasonable, and founded upon an adequate consideration; and the court further held that the above purchase was not such a contract: *Dunlap v. Kelsey*, 5 Cal. 181. Where a co-tenant is in possession, and another co-tenant claims an estate or interest in the premises held in common, adverse to him, his remedy is by a suit in equity for the purpose of determining such adverse claim, as provided in this section: *Goldsmith v. Smith*, 10 Saw. 294; *Ross v. Heintzen*, 36 Cal. 321. The existence of a decree founded on proceedings taken prior to plaintiff's title, which was under a sheriff's sale, and seeking to condemn the property by virtue of an asserted lien older than such title, would be a cloud upon such title: *Head v. Fordyce*, 17 Cal. 149. It is said that the section may perhaps be broad enough to authorize an action against the tenant himself, but that there are conclusive reasons why it should not be so construed. A tenant may acquire an adverse title, but he cannot use it against the landlord so long as the tenancy continues, and the effect of the action would be to cut him off without an opportunity to be heard: *Van Winkle v. Hinckle*, 21 Cal. 343.

An apparently good record title to land constitutes a cloud upon a title thereto previously acquired by adverse possession: *Arrington v. Liscom*, 34 Cal. 366. In an action to quiet title to a quartz-mining claim, where plaintiffs claimed only a possessory title in the public lands of the United States, the court held such a claim or title sufficient to entitle plaintiff to maintain the action: *Pralus v. Pacific etc. Co.*, 35 Cal. 34; *Merced Mining Co. v. Fremont*, 7 Cal. 319; 68 Am. Dec. 262; *Smith v. Brannan*, 13 Cal. 107; *Boggs v. Merced Mining Co.*, 14 Cal. 279; *Curtis v. Sutter*, 15 Cal. 259; *Head v. Fordyce*, 17 Cal. 149. An allegation in the complaint that "by means of the false representations and pretenses aforesaid" of the said defendant, "the plaintiffs are greatly embarrassed in the free enjoyment, use, and disposition of their said described mining claim, and that the interest of these complainants in said mining claim is greatly depreciated by reason of the possibility of title in the said defendant, resulting from and growing out of said false and pretended claims," is sufficient averment of injury under the statute, resulting from such adverse claim, to sustain the action: *Pralus v. Pacific etc. Co.*, 35 Cal. 34.

A tax deed based on an assessment made under an unconstitutional law is not a cloud: *Williams v. Corcoran*, 46 Cal. 556. One who claims title to land alleged to be a public street or highway cannot maintain an action to quiet



his title thereto against a street commissioner of a city, who claims no interest in the land. Such street commissioner is the mere servant of the city, and his acts in the performance of his duty are the acts of the city: *Leet v. Rider*, 48 Cal. 623.

A plaintiff cannot ask that the defendant be debarred from asserting a claim under an instrument executed by the former, without restoring the consideration received: *Chandler v. Chandler*, 55 Cal. 267.

It is necessary, in a suit to remove a cloud, to state facts from which the court can properly draw the conclusion that defendant's claim is a cloud on plaintiff's title: *King v. Higgins*, 3 Or. 406. Thus it is held that the facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the fact showing its invalidity, ought to be stated: *Teal v. Collins*, 9 Or. 89; *Hibernia Sav. & L. Soc. v. Ordway*, 38 Cal. 681; but see *Goldsmith v. Gilliland*, 10 Saw. 606, where it is held that it is not necessary to state the nature or circumstances of the defendant's claim, but it is sufficient to allege that the defendant wrongfully makes such claim, and call upon him to set it forth in his answer, and submit its validity to the judgment of the court.

Under the above section it is not essential that the complaint should aver the plaintiff to be the owner in fee; it will be sufficient if it appear that the plaintiff claims an interest in the land, and that the defendant asserts a claim of title adverse to the plaintiff's claim: *Stoddard v. Burge*, 53 Cal. 394; so also *Rough v. Simmons*, 65 Cal. 227. The owner of an estate in lands less than a fee can maintain an action to determine an adverse claim made by another person: *Pierce v. Feller*, 53 Cal. 18.

In actions of this character, want of title in the plaintiff renders it unnecessary to examine the title of the defendant: *San Francisco v.*

*Ellis*, 54 Cal. 72. If neither party owns the property, neither is entitled to judgment against the other: *San Diego v. Allison*, 46 Cal. 167.

Where the defendant relies upon title in himself, a cross-complaint is unnecessary, and if filed, will not entitle the defendant to have the issues thereon tried first: *Wilson v. Madison*, 55 Cal. 5. A denial of plaintiff's ownership and of his possession other than as tenant for another, and an averment of a conveyance from plaintiff to defendant of a portion of the land, is such an answer as does not justify judgment for plaintiff on the pleadings: *Garvey v. Willis*, 50 Cal. 619. Defendant cannot prove prior possession in a third party with whom defendant does not connect his title: *Niagara G. & S. M. Co. v. Bunker Hill Con. M. Co.*, 59 Cal. 612.

The plaintiff, if successful, may have an injunction restraining defendant from further setting up his claim: *Brooks v. Calderwood*, 34 Cal. 566.

A plaintiff in a suit to quiet title cannot, at his option, split it up into many suits, and if he omits to set forth and prove all the grounds of his right, or his adversary's want of it, he cannot afterward bring another suit upon the fragment or portion of the case omitted; and where one of the grounds of the relief sought is abandoned by the complainant because adjudged to be inconsistent with another ground of relief alleged in his complaint, and such suit is finally determined adversely to the complainant, he is barred from maintaining another suit for the same relief upon such abandoned ground: *Starr v. Stark*, 1 Saw. 270. In an action to quiet title the plaintiff was not precluded from bringing forward certain facts in his complaint which he might have set up, but did not, in his answer in a previous action of ejectment by the then defendant against the then plaintiff: *Ayres v. Bensley*, 32 Cal. 628.

### *Substitution of landlord in action against tenant.*

§ 530. [537.] A defendant who is in actual possession may, for answer, plead that he is in possession only as a tenant of another, naming him and his place of residence, and thereupon the landlord, if he apply therefor, shall be made defendant in place of the tenant, and the action shall proceed in all respects as if originally commenced against him. If the landlord do not apply to be made defendant within the time the tenant is allowed to answer, thereafter he shall not be allowed to, but he shall be made defendant if the plaintiff require it. If the landlord be made defendant on motion of the plaintiff, he shall be required to appear and answer within ten days from notice of the pendency of the action and the order making him defendant, or such further notice as the court, or judge thereof, may prescribe.

**Landlord and tenant.** — A landlord has no right to apply to be made a defendant in an action of ejectment in place of the tenant until the latter files his answer, stating "that

he is in possession only as the tenant of another, naming him and his place of residence": *Fitch v. Cornell*, 1 Saw. 156.

Under the New York code, where the occu-



plaint only is required to be made defendant, raised in the action open to controversy, in the only effect of not joining as defendants case they subsequently assert title or adverse other parties is simply to leave the questions rights: *Bradt v. Church*, 110 N. Y. 537.

*Pleadings in such actions—Equitable title prevails.*

§ 531. [538.] The plaintiff in such action shall set forth in his complaint the nature of his estate, claim, or title to the property, and the defendant may set up a legal or equitable defense to plaintiff's claims; and the superior title, whether legal or equitable, shall prevail. The property shall be described with such certainty as to enable the possession thereof to be delivered if a recovery be had.

**Complaint in ejectment.** — In an action of ejectment, the plaintiff must set forth the nature of the estate which he has and the premises claimed: *Parker v. Dacres*, 24 Pac. Rep. 192 (Wash.). And when he omits to do so his action will be regarded as one brought under the forcible entry and detainer act: *Thompson v. Wolf*, 6 Or. 308. It is said that it is not necessary for the plaintiff to set out his muniments of title: *Pease v. Hannah*, 3 Or. 301. But where plaintiff fails to set out fully his chain of title, and defendant is not advised as to the source of it, the court will permit the latter, under a general denial, to introduce any equitable as well as legal defense tending to defeat plaintiff's title. Plaintiff should so frame his complaint as to compel defendant to fully disclose his defense in his answer: *Parker v. Dacres*, 24 Pac. Rep. 192 (Wash.); see next succeeding section. A tract of land known by a particular name may be described by such

name in the complaint: *Hildreth v. White*, 66 Cal. 549.

**Paper title—Onus probandi, etc.** — If both parties rely on a paper title, plaintiff cannot recover unless he shows the better title: *Irwin v. Towne*, 42 Cal. 331. And if plaintiff so relies, the defendant may show the true title to be outstanding in a third person, without connecting himself with it: *Cranmer v. Porter*, 41 Cal. 463. Where the plaintiff establishes title by proper and sufficient conveyance and possession prior to the entry by defendant, and that entry is not attempted to be justified by any claim of right, the burden of establishing a better title than plaintiff's is cast upon defendant: *Dunham v. Towshend*, 118 N. Y. 281. In ejectment, defendant must, if relying upon an equitable defense, as against the owner of the legal title make out a complete equitable title, and the right of possession thereunder: *Wallace v. Maples*, 79 Cal. 433.

*Defendant must plead title—Judgment, when defense as to only part of the property.*

§ 532. [539.] The defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer. If so pleaded, the nature and duration of such estate or license or right to the possession shall be set forth with the certainty and particularity required in a complaint. If the defendant does not defend for the whole of the property, he shall specify for what particular part he does defend. In an action against a tenant, the judgment shall be conclusive against a landlord who has been made defendant in place of the tenant, to the same extent as if the action had been originally commenced against him.

**In action of ejectment,** where plaintiff pleads title by virtue of a certificate of purchase from a receiver of public money of the United States, defendant may plead, by way of inducement, a certain state of facts, by reason of which the commissioner of the general land-office of the United States caused such certificate to be canceled: *Hays v. Parker*, 2 Wash. 198.

**Answer of defendant.** — A defendant in ejectment should state in his answer the nature and duration of the estate he claims in the

premises, if any, but not the evidence of it: *Fitch v. Cornell*, 1 Saw. 156. The code does not allow a defendant in ejectment to defeat the plaintiff by giving in evidence any estate in himself or another in the property in controversy, unless the same be pleaded in his answer: *Stark v. Starr*, 1 Saw. 15. The defendant may allege in his answer that he is the owner of the premises in controversy, but if he couples such allegation with a statement of the grounds of his title, from which it does not appear that he is such owner, the matter may be stricken out

as sham: *Wythe v. Myers*, 3 Saw. 595. The next preceding section provides that defendant may set up equitable as well as legal defenses.

**Judgment in ejectment, conclusiveness of:** See extended note to *Caperton v. Schmidt*, 85 Am. Dec. 208-211. As to when judgment against the tenant may bind the landlord, see extended note to *Oetgen v. Ross*, 95 Am. Dec. 473, 474. A judgment in ejectment will not estop the losing party from rely-

ing upon a title subsequently acquired, or one not in issue in the action: *People's Savings Bank v. Holydon*, 64 Cal. 95.

**Title acquired pendente lite.** — Defendant in ejectment can only set up a title acquired pending the action by amending his answer and averring the fact: *Reily v. Lancaster*, 39 Cal. 354; *Foscalina v. Doyle*, 47 Cal. 457; *Thompson v. McKay*, 41 Cal. 221; *McMinn v. O'Connor*, 27 Cal. 239.

### *Verdict in such actions.*

§ 533. [540.] The jury by their verdict shall find as follows:—

1. If the verdict be for the plaintiff, that he is entitled to the possession of the property described in the complaint, or some part thereof, or some undivided share or interest in either, and the nature and duration of his estate in such property, part thereof, or undivided share or interest in either, as the case may be.

2. If the verdict be for the defendant, that the plaintiff is not entitled to the possession of the property described in the complaint, or to such part thereof as the defendant defends for, and the estate in such property, or part thereof, or license, or right to the possession of either, established on the trial by the defendant, if any, in effect as the same is required to be pleaded.

**Verdict of jury.** — If a verdict for the defendant in an action of ejectment only states that the defendant is entitled to the possession of the premises, a judgment therein is not necessarily a bar to another action between the same parties for the same property: *Fitch v. Cornell*, 1 Saw. 157. As to the requisite cer-

tainty of verdict and judgment for part of property claimed, see note to *Bullance v. Rankin*, 54 Am. Dec. 417.

**In ejectment, under claim for whole of premises,** a distinct separable part, or an undivided interest, may be recovered: See note to *Bullance v. Rankin*, 54 Am. Dec. 415-418.

### *Damages for withholding limited to six years — Permanent improvements as set-off.*

§ 534. [541.] The plaintiff shall only be entitled to recover damages for withholding the property for the term of six years next preceding the commencement of the action, and for any period that may elapse from such commencement to the time of giving a verdict therein, exclusive of the use of permanent improvements made by the defendant. When permanent improvements have been made upon the property by the defendant, or those under whom he claims holding under color of title adversely to the claim of the plaintiff, in good faith, the value thereof at the time of trial shall be allowed as a set-off against such damages.

**Recovery of damages; set-off of improvements, etc.** — The right to damages for withholding the possession of real property given by the code is equivalent to the action of trespass for mesne profits given by the common law, and includes all damages to which the owner is entitled on account of the wrongful occupation of the premises, as well for waste committed or suffered by the occupant as for the value of the use and occupation; such right is a distinct cause of action, and if

joined with a claim for possession should be separately stated: *Wythe v. Myers*, 3 Saw. 595.

**A mere intruder,** having had the use of property held by plaintiff under color of title, is liable to plaintiff for such use; the fact of plaintiff's title being defective is no defense: *Blumberg v. McNear & Co.*, 1 Wash. 141; *Meeker v. Gardella*, 23 Pac. Rep. 837 (Wash.).

Where one recovers in an action of ejectment the possession of real property, and in



the same action recovers a judgment for mesne profits for the withholding of the land, and afterwards the defendant in an action of ejectment brings suit in equity against the plaintiff, in which it is determined and decreed that such defendant was the owner in equity of the land at and before the commencement of the action of ejectment, and that the plaintiff in such action was holding the legal title as the trustee of such defendant, such defendant may recover of such plaintiff the amount of the judgment for the mesne profits and costs and disbursements recovered of him: *Stark v. Stark*, 7 Or. 500.

**Improvements, value of.** — This is only allowed to be proved as a set-off against the damages for withholding the premises, and where no proof was introduced as to such damages it was held that proof of the value of the improvements was rightly rejected: *Ford v. Holton*, 5 Cal. 322. Where defendant claimed such value in his answer and it exceeded the damages, the plaintiff was not allowed to recover any damages. The improvements allowed for were those made before suit: *Weich v. Sullivan*, 8 Cal. 187, 511; and see *Yount v. Howell*, 14 Cal. 466; *Moss v. Shear*, 25 Cal. 44. But the value of the improvements cannot be claimed if they were made before the plaintiff's title accrued, nor unless the holding of defendant is adverse: *Bay v. Pope*, 18 Cal. 695; and adverse under color of title: *Lore v. Shartzer*, 31 Cal. 495.

When a purchaser for a valuable consideration without notice of any infirmity of his title has, by his improvements, added to the permanent value of the estate, he is entitled to full remuneration for such added value, and the same is a lien and charge upon the estate, which the absolute owner is bound to discharge before he can be restored to his original rights in the estate: *Hatcher v. Briggs*, 6 Or. 31.

The value of improvements made by mere trespassers cannot be claimed: *Carpentier v. Mitchell*, 29 Cal. 335; nor if they are not permanent; nor if they are not made in good faith: *Carpentier v. Small*, 35 Cal. 355; *Carpentier v.*

*Mitchell*, 29 Cal. 330; *Lore v. Shartzer*, 31 Cal. 488; *Carpentier v. Mendenhall*, 28 Cal. 485. And they must add to the future value of the property for the ordinary purposes for which it is or may be used: *Stark v. Starr*, 1 Saw. 15.

When it is provided in a lease that improvements made during the term shall be made at the expense of the tenant, and that at the expiration of the term he shall surrender the premises to the lessor, all improvements made by the tenant which become a part of the freehold are the property of the landlord: *Gett v. McManus*, 47 Cal. 56. An agreement to pay for the improvements, if made, is no defense in ejectment: *Norris v. Hoyt*, 18 Cal. 219. If the defendant pleads the statute of limitations, the plaintiff can only recover the rents and profits: *Carpentier v. Mitchell*, 29 Cal. 330; or damages for the detention for the statutory period next before the commencement of the action: *Lore v. Shartzer*, 31 Cal. 488; and "for any period that may elapse from such commencement to the time of giving a verdict therein," etc., as prescribed by the above section.

A person in possession under color of title, who makes permanent improvements upon the property, is presumed to be acting in good faith until the contrary appears: *Stark v. Starr*, 1 Saw. 15. A permanent improvement is something done or put upon the land by the occupant which he cannot remove, either because it has become physically impossible to separate it from the land, or in contemplation of law it has been annexed to the soil and become a part of the freehold: *Stark v. Starr*, 1 Saw. 15. A counterclaim for permanent improvements should not be pleaded to the whole complaint, but only to so much thereof as to which it is an answer or defense; and it should allege the present value of said improvements, and that they better the condition of the property for the ordinary purposes for which it is used: *Wythe v. Myers*, 3 Saw. 595; *Fitch v. Cornell*, 1 Saw. 157; *Neff v. Pennoyer*, 3 Saw. 496. Taxes paid under such conditions are a proper subject of counterclaim: *Id.*

*Plaintiff cannot recover if his right expires before trial.*

§ 535. [542.] If the right of the plaintiff to the possession of the property expire after the commencement of the action, and before the trial, the verdict shall be given according to the fact, and judgment shall be given only for the damages.

*Court may grant order for admeasurement before trial.*

§ 536. [543.] The court, or judge thereof, on motion, and after notice to the adverse party, may, for cause shown, grant an order allowing the party applying therefor to enter upon the property in controversy and make survey and admeasurement thereof for the purposes of the action.

*Contents, service, and effect of such order.*

§ 537. [544.] The order shall describe the property, and a copy thereof shall be served upon the defendant, and thereupon the party



may enter upon the property and make such survey and admeasurement; but if any unnecessary injury be done to the premises, he shall be liable therefor.

*Alienation pendente lite.*

§ 538. [545.] An action for the recovery of the possession of real property against a person in possession cannot be prejudiced by any alienation made by such person either before or after the commencement of the action; but if such alienation be made after the commencement of the action, and the defendant do not satisfy the judgment recovered for damages for withholding the possession, such damages may be recovered by action against the purchaser.

*Mortgagee cannot maintain ejectment.*

§ 539. [546.] A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law.

**Actions to foreclose mortgages:** §§ 625 et seq.

**Conveyance absolute on its face** will be treated as a mortgage when it is clearly shown that such was the intention of the parties: *Miller v. Ausenig*, 2 Wash. 22. A mortgage of real property is only a lien: *Parker v. Dacres*, 2 Wash. 439.

**Mortgagor and mortgagee.** — A mortgagee who obtains possession of mortgaged premises with the assent of the mortgagor, after default of the latter, may retain such possession until payment of the mortgage debt. Such possession is a good defense against an action of ejectment brought by the mortgagor so long as the mortgage debt remains unpaid: *Roberts v. Sutherland*, 4 Or. 219; *Hu'bell v. Moulson*, 53 N. Y. 225; 13 Am. Rep. 519; but possession by the mortgagee, acquired by force or

fraud without the consent of the owner, and without color of lawful authority, would be no defense to such an action: *Howell v. Leavitt*, 95 N. Y. 617. Where, after the commencement of an action of ejectment, the defendant becomes the assignee of a mortgage, which is forfeited before trial, he may defend as mortgagee in possession, and the action may be converted, by supplemental pleadings on the part of the plaintiff and defendant, into an action for foreclosure on the defendant's part, and for redemption on the plaintiff's part: *Madison etc. Church v. Baptist etc. Church*, 73 N. Y. 82. A mortgage does not convey the legal title, and a defendant in ejectment cannot set up a mortgage with which he is not connected as an outstanding title: *Woods v. Hildebrand*, 2 Am. Rep. 513.

*What must be shown in action against co-tenant.*

§ 540. [547.] In an action by a tenant in common or a joint tenant of real property against his co-tenant, the plaintiff must show, in addition to his evidence of right, that the defendant either denied the plaintiff's right or did some act amounting to such denial.

**Action by co-tenant.** — A co-tenant cannot maintain this action against his co-tenant unless the possession is actually and wrongfully withheld from him, or his right thereto

wholly denied: *Goldsmith v. Smith*, 10 Saw. 294. A claim of title may be made by acts as well as assertions: *Barnes v. Light*, 116 N. Y. 34.

*Effect of judgment — Order vacating judgment.*

§ 541. [549.] In an action to recover the possession of real property, the judgment therein shall be conclusive as to the estate in such property and the right to the possession thereof, so far as the same is thereby determined, upon the party against whom the same is given, and against all persons claiming from, through, or under such party

after the commencement of such action, except as in this section provided. When service of the notice is made by publication, and judgment is given for failure to answer, at any time within two years from the entry thereof, the defendant, or his successor in interest as to the whole or any part of the property, shall, upon application to the court, or judge thereof, be entitled to an order vacating the judgment, and granting him a new trial, upon the payment of the costs of the action.

**Conclusiveness of judgment.** — A judgment in ejectment is conclusive as to the legal title and right of possession as between the parties, and cannot be collaterally impeached: *Hill v. Cooper*, 8 Or. 254. As to conclusiveness of judgment in ejectment generally, see notes to *Caperton v. Schmilt*, 85 Am. Dec. 208-211; *Oetjen v. Ross*, 95 Am. Dec. 473, 474. See § 539, *ante*.

*Possession under, is not disturbed by order vacating.*

§ 542. [550.] If the plaintiff has taken possession of the property before the judgment is set aside and a new trial granted, as provided in the preceding section, such possession shall not be thereby affected in any way; and if judgment be given for defendant in the new trial, he shall be entitled to restitution by execution in the same manner as if he were plaintiff.

*Rule of decision between claimants — Actions under donation law.*

§ 543. [551.] In an action at law for the recovery of the possession of real property, if either party claim the property as a donee of the United States, and under the act of Congress approved September 27, 1850, commonly called the donation law, or the acts amendatory thereof, such party, from the date of his settlement thereon, as provided in said act, shall be deemed to have a legal estate in fee in such property, to continue upon condition that he perform the conditions required by such acts, which estate is unconditional and indefeasible after the performance of such conditions. In such action, if both plaintiff and defendant claim title to the same real property, by virtue of settlement, under such acts, such settlement and performance of the subsequent condition shall be *prima facie* presumed in favor of the party having or claiming under the elder certificate or patent, as the case may be, unless it appears upon the face of such certificate or patent that the same is absolutely void.

**Possession of donation claim** under what purports to be a quitclaim deed, but executed before the expiration of necessary four years' residence required by the act, is possession under a contract prohibited by law, and gives no color of title: *Bullene v. Garrison*, 1 Wash. 587.

**Compliance with act confers title.** — When selection, residence upon, and cultivation of land under the donation law are completed, the transaction is closed; nothing remains except for donee to furnish proof of these acts, and for government to furnish proof of

title; these acts, complied with, affect the transfer of title, and not the patent; the latter only evidences title and relates back to the acts: *Brazee v. Schofield et al*, 2 Wash. 209; *Blakesly v. Caywood*, 4 Or. 279; *Chapman v. School District*, Deady, 112; *Hall v. Russell*, 3 Saw. 506; *McKay v. Freeman*, 6 Or. 449; *Love v. Love*, 8 Or. 23.

Title to land under donation law was acquired by compliance with the requirements of the act on the part of claimant; and the residence upon and cultivation of claim under that

act by a man after having been legally divorced *et al. v. Hill et al.*, 2 Wash. 321; reaffirming was that of a single man only; the divorced *Maynard v. Valentine*, 2 Wash. 3; *Bullene v. wife* can make no claim for one half: *Maynard Garrison*, 1 Wash. 587.

*Action to determine adverse claims to real property — Parties to such action.*

§ 544. [551.] Any person in possession, by himself or his tenant, of real property, and any private or municipal corporation in possession, by itself or its tenant, of any real property, or when such real property is not in the actual possession of any one, any person, or private or municipal corporation, claiming title to any real property under a patent from the United States, or during his or its claim of title to such real property under a patent from the United States for such real estate, may maintain a civil action against any person or persons, corporations or associations, claiming an interest in said real property, or any part thereof, or any right thereto, adverse to him, them, or it, for the purpose of determining such claim, estate, or interest; and where several persons, or private or municipal corporations, are in possession of, or claim as aforesaid, separate parcels of real property, and an adverse interest is claimed, or claim made in or to any such parcels, by any other person, persons, corporations, or associations, arising out of a question, conveyance, statute, grant, or other matter common to all such parcels of real estate, all or any portion of such persons or corporations so in possession or claiming such parcel of real property may unite as plaintiffs in such suit to determine such adverse claim or interest against all persons, corporations, or associations claiming such adverse interest.

See § 529, which is a later statute, covering part, but not all, of the subject-matter of this section.

*Action by occupant of public land.*

§ 545. Any person now occupying and settled upon, or who may hereafter occupy or settle upon, any of the unsurveyed public lands, not to exceed one hundred and sixty acres, in this state, for the purpose of holding and cultivating the same, may commence and maintain any action, in any court of competent jurisdiction, for interference with or injuries done to his or her possessions of said lands, against any person or persons so interfering with or injuring such lands or possessions; *provided always*, that if any of the aforesaid class of settlers are absent from their claims continuously for a period of six months in any one year, the said person or persons shall be deemed to have forfeited all rights under this section. [November 26, 1883, § 1. *In effect immediately.*]

“Section” substituted for “act,” being identical as to the provisions referred to.



## CHAPTER II.

## OF THE ACTION OF FORCIBLE ENTRY AND DETAINER.

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- § 570. Appeal suspends writ of restitution.
- § 571. Unlawful detainer of certain lands — What constitutes.
- § 572. Same — Complaint and answer — Requisites of.
- § 573. Same — Proof required of plaintiff — Cause, how to be tried.
- § 574. Same — Parties defendant — Trial of separate issues.

*What are forcible entries.*

§ 547. Every person is guilty of a forcible entry who either,—

1. By breaking open windows, doors, or other parts of a house, or by fraud, intimidation, or stealth, or by any kind of violence or circumstance of terror, enters upon or into any real property; or

2. Who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct the party in actual possession.

[*March 7, 1891, § 1.*]

**Forcible entry and detainer, generally.**

— *Force* is the gist of the action, either in the entry or detainer, or both. The object of the statute is to prevent and punish the use of forcible and violent means of obtaining possession, irrespective of the question of actual title, and where these do not exist, the action cannot be maintained: *Taylor v. Scott*, 10 Or. 484. To constitute forcible entry, there must be something more than a mere trespass: *Merrill v. Forbes*, 23 Cal. 381; and it is held that the action cannot be maintained when the facts and circumstances indicate no purpose or determination upon the part of the defendant to resist the entry of the plaintiff by force: *Harrington v. Watson*, 11 Or. 143.

Where a party of four or five men enter a building occupied by another, in the night-time, during the hours of sleep, and take possession, and avow the intention to keep possession, and actually do keep possession, it is sufficient evidence of force to maintain the action: *Scarlett v. Lamarque*, 5 Cal. 63.

An unusual assemblage of armed men with the defendant, from which plaintiff had just grounds to apprehend violence if he had attempted to retain possession or remove defendant from his land, accompanied by actual threats of violence to the plaintiff, or those who accompanied him, was held sufficient: *Watson v. Whitney*, 23 Cal. 376; *Polack v. McGrath*, 25 Cal. 54. Two hostile parties cannot

be in possession of the same premises at the same time, and the possession is not changed until the invaders have expelled the former occupants: *Valencia v. Couch*, 32 Cal. 344. There must be something approximating to force, violence, or some effort at intimidation, or threat of force or violence, on the part of the defendants: *Buel v. Frazier*, 38 Cal. 696. Where a large number of men were employed by defendants, and the entry was made at an unusual time, possession taken in a hasty manner, small arms fired, etc., it was held that such circumstances of terror left no room to doubt that the entry was not of that peaceable character which the law permits to be made, though no actual collision ensued: *Gray v. Collins*, 42 Cal. 157. Tearing down and removal of the house and fence of plaintiff while he was in possession is a forcible entry; and whether it causes a breach of the peace or not, it tends to such a result. The law prohibits a forcible entry, even by the person entitled to the possession, for the reason, among others, that it necessarily tends to a breach of the peace: *Brown v. Perry*, 39 Cal. 23. A landlord has no right to enter, for a breach of covenant in the lease, and forcibly eject the tenant, if the lease reserve no right of entry for such breach: *Fox v. Brissac*, 15 Cal. 223; 4 Kent's Com. 119; Taylor's Landlord and Tenant, 531; *Sampson v. Henry*, 11 Pick. 379.

One who has title and present right of entry is not guilty of a forcible entry into a building if he enters in the absence of the occupant, and quietly and peaceably removes the occupant's furniture: *Powell v. Lane*, 45 Cal. 677. A person being put in possession by a ministerial officer of the law, under the authority and by the command of a court of competent jurisdiction, is not a forcible entry and detainer within either the letter or the spirit of the law. The person ejected has an ample and summary remedy by petition to the court, setting forth the facts, and asking to be restored to his possession; or if he really had a superior title to the land, he might have resorted to an action of ejectment; but if he were a mere intruder,

on the land, with neither title nor right of possession, he has no just cause of complaint on the ground of being turned out: *Janson v. Brooks*, 29 Cal. 218. Where plaintiff was maneuvering to acquire, without violence, if possible, a right of action for forcible entry, while the defendant was maneuvering to avoid that result, and these objects of the respective parties were clearly manifest to each other, the court said it would be a perversion of the action of forcible entry and detainer from its legitimate uses, for the plaintiff to recover: *Thompson v. Smith*, 28 Cal. 534.

Questions relating to the circumstances of the entry, to show that it was forcible, are admissible; as "State if anything occurred with reference to that crowd of people there with reference to the mayor's going on the ground and ordering them to stop": *Voll v. Hollis*, 60 Cal. 569.

An unlawful entry, unaccompanied with force, is not a forcible entry: *Romero v. Gonzales*, 1 West Coast Rep. 160 (N. M.). Insufficient evidence of forcible entry: *Aleman v. Ortega*, 3 West Coast Rep. 51 (N. M.).

**Parties, and nature of remedy.** — Forcible entry does not lie to enforce the right of a widow to remain in her husband's dwelling-house one year after his death without liability for rent: *Aiken v. Aiken*, 12 Or. 203.

Tenant in common cannot maintain this action against his co-tenant: *Lick v. O'Donnell*, 3 Cal. 63; but he may maintain it against third persons: *Bowers v. Cherokee Bob*, 45 Cal. 495. A person may be guilty of a forcible entry who is not actually present and does not actually assist therein. He is guilty of an entry made with force by one acting at the time under his direction and procurement: *Minturn v. Burr*, 20 Cal. 48. A married woman doing business as a sole trader, whose husband is in possession with her, may be joined with him as a defendant: *Howard v. Valentine*, 20 Cal. 287.

This remedy is exclusive, and one wrongfully dispossessed or excluded must avail himself of it; he cannot bring trespass: *Canavan v. Gray*, 64 Cal. 5.

### *What are forcible detainers.*

§ 548. Every person is guilty of a forcible detainer who either, —

1. By force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or

2. Who in the night-time, or during the absence of the occupant of any real property, enters thereon, and who, after demand made for the surrender thereof, refuses for the period of three days to surrender the same to such former occupant. The occupant of real property within the meaning of this subdivision is one who, for the five days next preceding such unlawful entry, was in the peaceable and undisturbed possession of such real property. [March 7, 1891, § 2.]

**By force, etc.:** See notes to § 547. There must be something of a personal violence, threatened or actual. If, when possession is demanded, the party, by word or act, look or

gesture, gives reasonable ground to apprehend the use of force to prevent the rightful claimant from obtaining peaceable possession, this is sufficient. It is not necessary for the claimant



to wait till actual violence is resorted to: *Dickinson v. Maguire*, 9 Cal. 50.

A naked avowal of intention to keep possession, and actually keeping possession, does not necessarily amount to force, or a threat of force. Such avowal should have some relation to a demand of the possession by the party claiming to have been ousted, and it should, at least, be accompanied by some act or word tending to show an intent to maintain the possession by force: *Fogarty v. Kelly*, 24 Cal. 319. And the mere surmise or apprehension of the plaintiff that if he attempts to regain the possession he will be repelled by force is not enough; the words or acts of the defendant must manifest the present purpose to resort to force to defeat the attempt then being made by plaintiff to re-enter into the possession of the premises: *Hedgkins v. Jordan*, 29 Cal. 578; and see *Brawley v. Risdon Iron Works*, 38 Cal. 677; *Wilbur v. Cherry*, 39 Cal. 661. That the possession must be held by force is also laid down in *Taylor v. Scott*, 10 Or. 485; *Harrington v. Watson*, 1 West Coast Rep. 59 (Or.).

**Occupant.** — The party is not required to show a possession which differs at all from the possession which he would have to show were he seeking relief under § 549: *Shelby v. Houston*, 38 Cal. 422; *Wilson v. Shakelford*, 41 Cal. 630.

If the plaintiff had a house, in which he had lived on a tract of land, and had the year before cultivated it to grain, and at the time of the alleged unlawful entry had a volunteer crop growing on it, it tends to prove such possession as makes plaintiff an occupant within the meaning of subdivision 2 of the above section, even if he had been absent from the land several weeks before the defendant's entry: *Leroux v. Murdock*, 51 Cal. 541.

**Unlawful entry.** — A clear and distinct demand of possession, accompanied with an offer to take peaceable possession, by the claimant, puts the party making the unlawful entry at once in the wrong, if he refuses peaceably to yield up possession. There should be something to show that the claimant cannot obtain peaceable and easy redress by his own act before he can sue in this action. If the party making an unlawful entry will peaceably quit

the premises when demanded, he will be only responsible for a trespass, not for a forcible detainer: *Dickinson v. Maguire*, 9 Cal. 50. It is, however, absolutely necessary that the entry of defendant should have been unlawful: *Owen v. Doty*, 27 Cal. 505. A defendant in an action for an unlawful entry may therefore produce evidence of title, not for the purpose of establishing or trying title, but for the purpose of showing that his entry, if wrongful, was not made with a wrongful intent, but in good faith, and in the belief that he had a legal right to enter: *Dennis v. Wood*, 48 Cal. 363; *Shelby v. Houston*, 38 Cal. 422; *Townsend v. Little*, 45 Cal. 676; *Hoag v. Pierce*, 28 Cal. 187; *Randal v. Falkner*, 41 Cal. 242. Compare *Phoenix M. & M. Co. v. Lawrence*, 55 Cal. 143, where the defendants entered upon the plaintiff's mining claim, on the plea that his location was void, and were held responsible if they did not enter in good faith under claim or color of title. In *Voll v. Hollis*, 60 Cal. 569, the subject was carefully reconsidered, and the conclusion reached that, "under the code, all entries on the actual possession of another are unlawful, and the question of good or bad faith on the part of the defendant no longer affects the right of the recovery in this form of action." This decision was followed in *Holland v. Green*, 62 Cal. 67. If the entry was unlawful, and the detainer was forcible, the defendant is guilty of a forcible detainer, whether he originally obtained possession peaceably or otherwise: *Conroy v. Duane*, 45 Cal. 597.

If the owner peaceably gains possession of lands which have been wrongfully withheld, and keeps out the late unlawful occupant by force, the latter cannot maintain an action for forcible entry or forcible detainer: *Potter v. Mercer*, 53 Cal. 667.

**Demand.** — The demand and refusal must be after the entry complained of: *Mechem v. McKay*, 37 Cal. 166; and defendant must be in possession when the demand is made: *Brawley v. Risdon Iron Works*, 38 Cal. 678.

**Lessee of tort-feasor** is not, it seems, liable to be sued for a forcible detainer if he had no connection with the original tortious act: *Kennedy v. Hamer*, 19 Cal. 387.

### *What are unlawful detainers.*

§ 549. A tenant of real property for a term less than life is guilty of unlawful detainer either, —

1. When he holds over or continues in possession, in person or by subtenant, of the property or any part thereof after the expiration of the term for which it is let to him. In all cases where real property is leased for a specified term or period by express or implied contract, whether written or by parol, the tenancy shall be terminated without notice at the expiration of such specified term or period; or

2. When he, having leased real property for an indefinite time, with monthly or other periodic rent reserved, continues in possession thereof, in person or by subtenant, after the end of any such month or period, in cases where the landlord, more than twenty days prior to the end of such month or period, shall have served notice (in manner



in this act provided) requiring him to quit the premises at the expiration of such month or period.

3. When he continues in possession in person or by subtenant after a default in the payment of any rent, and after a notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, served (in manner hereafter in this act provided) in behalf of the person entitled to the rent upon the person owing the same, shall have remained uncomplied with for the period of three days after service thereof. Such notice may be served at any time after the rent becomes due; or

4. When he continues in possession in person or by subtenant after a neglect or failure to keep or perform any other condition or covenant of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than one for the payment of rent, and after notice in writing requiring in the alternative the performance of such condition or covenant or the surrender of the property, served (in the manner provided in this act) upon him, and if there be a subtenant in actual possession of the premises, also upon such subtenant, shall remain uncomplied with for ten days after service thereof. Within ten days after the service of such notice the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform such condition or covenant, and thereby save the lease from such forfeiture; or

5. When he commits or permits waste upon the demised premises, or when he sets up or carries on therein or thereon any unlawful business, or when he erects, suffers, permits, or maintains on or about said premises any nuisance, and remains in possession after service (in manner in this act provided) of three days' notice to quit upon him. [March 7, 1891, § 3.]

**"This act."**—This chapter, down to and inclusive of section 570, embraces the entire act of March 7, 1891.

**Commencement of detainer — Designation of premises in notice.**—Where the complaint averred that the defendant entered upon the demanded premises as a tenant at will of the plaintiff, under a verbal lease, and "that the time for which said premises were demised as aforesaid was terminated, and that the said defendants hold over and continue in possession of the said demised premises without the permission of said plaintiff, and contrary to the terms of said lease"; and then averred that "since the expiration of the term for which said premises were demised" the plaintiff made a demand in writing upon the lessee to surrender the possession, and that more than sixty days had elapsed since the demand, but the defendants had during all that time refused, and still refuse, to surrender the possession; and at the trial the only notice proved was a written demand on

the lessee to deliver up to the plaintiff the possession of the premises,—the court held that it must appear that after the tenant commenced to hold over the landlord made a demand in writing for the possession; that the only demand made had no other effect than to terminate the tenancy at the expiration of one month from that time, during which interval the lessee was lawfully in possession under the lease. The unlawful detainer did not commence until the expiration of the month; after which there was no demand in writing for the possession: *King v. Connolly*, 51 Cal. 118.

Where a tenant held over after the expiration of his lease, he was regarded by the common law as a tenant of sufferance; that this estate might be destroyed whenever the owner should make an actual entry on the lands and oust the tenant. The code does away with the necessity for an entry, and substitutes a demand, which revokes any implied acquiescence by plaintiff: *Urdius v. Morrell*, 25 Cal.

35. A notice in which the premises were designated as follows: "Those certain premises now held by you, under lease from me, and being part of Mission block No. 24, of the city and county of San Francisco, and described as follows: Beginning at the junction of Market and Guerrero streets, and thence running southwesterly along Market Street 130 feet; thence easterly to Guerrero Street, and thence northerly along the western line of Guerrero Street 130 feet, more or less, to point of commencement," etc., — was held sufficient, as it did not appear that the defendant held of the plaintiff any premises in the city and county of San Francisco other than those which were part of Mission block No. 24. These premises extended 140 feet upon Market Street, and the like distance upon Guerrero Street: *King v. Connolly*, 44 Cal. 238.

**Landlord and tenant, relation of.** — It has been repeatedly held that the letting of land to a person to cultivate the crops to be divided between the owner and the cropper in certain proportions — does not amount to a lease, or create the relation of landlord and tenant between them. In such case, the owner is held to be in possession of the land, and the parties are joint tenants in the crop: *Bernal v. Horious*, 17 Cal. 541; *Bradish v. Schenk*, 8 Johns. 151; *Foote v. Colvin*, 3 Johns. 216; *De Mott v. Hagerman*, 8 Cow. 220; *Putnam v. Wise*, 1 Hill (N. Y.), 234; but see *Walls v. Preston*, 25 Cal. 63.

Where the agreement was to work a mine on shares, it was held that this kind of action would not lie: *Henderson v. Allen*, 23 Cal. 521. The entry of the defendant under the alleged permission of the plaintiff does not create the relation of landlord and tenant: *Owen v. Doty*, 27 Cal. 506. If the tenant, after the expiration of his lease, leaves his premises, and removes his property therefrom, and notifies the landlord that he delivers him possession, and the landlord takes possession, the relation of tenant and landlord ceases; and if the tenant afterwards enters, the landlord cannot remove him under this section. A re-entry without the consent of the landlord does not restore the relation of landlord and tenant: *Walls v. Preston*, 28 Cal. 124.

An unlawful detainer necessarily implies a forfeiture of the tenant's estate in the leased premises: *Brummagim v. Spencer*, 29 Cal. 662. Where the technical relation of landlord and tenant was created by a lease and entry, that relation was held dissolved by the execution of papers intended as an assignment and release and cancellation of the lease. The term of the leasehold expired by the contract of the parties on the date when the lessees were in law bound to surrender possession, but did not. It was held that their possession after that date was a holding over contrary to their agreement, and they were liable to be proceeded against under the act: *Kover v. Gluck*, 33 Cal. 406. The action cannot be maintained unless the relation of landlord and tenant is shown to exist between plaintiff and defendant at the time of the preliminary demand for possession. If a tenant has been evicted on final process in an action of ejectment by a party claiming title adverse to his lessors, his tenancy ceases, and he is at liberty to take a lease from the successful

plaintiff in ejectment, and under such lease he holds adversely, provided the original lessors had notice of the pendency of the ejectment suit in time to have interposed a defense before judgment: *Steinbach v. Krone*, 36 Cal. 309; *Washburn on Real Property*, 359; *Wheelock v. Warschauer*, 21 Cal. 316; 34 Cal. 265. Whenever a landlord is entitled to bring an action under this section against a tenant at sufferance, after having given the requisite notice to quit, etc., he may, instead of so proceeding, maintain an action of ejectment. In such action, it is not requisite that the complaint should state the tenancy, its termination, the notice, etc.: *McCarthy v. Yale*, 39 Cal. 587. In such action, the relation of landlord and tenant must be shown to exist, otherwise the plaintiff cannot recover; and if that relation is shown to exist, the defendant must be permitted to prove, if he can, that he did not enter under the lease, but being already in possession, was induced to accept a lease from the plaintiff by false representations that the plaintiff owned the property when it belonged to another; and if the tenant can show such a state of facts, he is not estopped by the lease. The rule in ejectment as to this is also the rule in unlawful detainer: *Johnson v. Cheley*, 43 Cal. 299. If the lessor of a hotel, after the lease is made, enters into a contract of partnership in keeping the hotel, with the lessee, which contract is carried into execution, the lessee may prove the same as a defense in an action of unlawful detainer afterwards brought by the lessor to recover possession of the premises: *Pio Pico v. Cuyas*, 47 Cal. 180; 48 Cal. 639.

If the landlord evict the tenant from part of the demised premises, he cannot have this statutory remedy to oust the tenant from the remainder on the ground of non-payment of rent: *Skaggs v. Emerson*, 50 Cal. 3.

In this action it is error to allow the defendant to prove that his signature to the lease was obtained by fraud; nor will a prior agreement under which the defendant might have held but for the lease entitle him to possession: *McCreary v. Marston*, 56 Cal. 403.

**Notice.** — The time during which defendant was to occupy must have actually expired: *Ray v. Armstrong*, 4 Cal. 208; *Rogers v. Hackett*, 49 Cal. 121. The fact that the agreement under which the defendant occupies is a verbal one, and that by its terms it was to continue for two years, does not change the rule: *Rogers v. Hackett*, 49 Cal. 121. A notice demanding payment of rent for "the preceding month of your tenancy" sufficiently described the month: *Newman v. Bird*, 60 Cal. 372.

*Tenant at will* is entitled to a notice of thirty days terminating his estate, and then to the three days' notice of demand of possession: *King v. Connolly*, 51 Cal. 181. So, also, under the present section: *Martin v. Splivalo*, 56 Cal. 129.

**Right of re-entry**, reserved in a lease, requires that the three days' notice must be given before these summary proceedings can be commenced: *Smith v. Hill*, 63 Cal. 51.

**Non-payment of rent.** — If there is a partial eviction by the landlord, he cannot claim a forfeiture for non-payment of rent accruing whilst the eviction lasts: *Skaggs v. Emerson*, 50 Cal. 6. A precise sum must be



demand: *Gage v. Bates*, 40 Cal. 385. A tender by the tenant after the expiration of the three days of the rent, with interest and costs, is no defense in an action of unlawful detainer: *Roussel v. Kelly*, 41 Cal. 360. If the reversion is assigned without the tenant's knowledge, a refusal by the tenant to pay the rent to the assignee is not a forfeiture: *O'Connor v. Kelly*, 41 Cal. 432.

*Executor of tenant* is not within the purview of this section: *Martel v. Meehan*, 63 Cal. 47.

*Under-tenant*. — If the premises are under-let, the subtenant is liable to be proceeded against by the landlord equally as the original tenant: *Schilling v. Holmes*, 23 Cal. 229.

*Waiver of forfeiture*. — The receipt of rent accruing subsequent to the act or omission which works the forfeiture waives the forfeiture: *Jackson v. Allen*, 3 Cow. 229; *Bleecker v. Smith*, 13 Wend. 530; *Jackson v. Sheldon*, 5 Cow. 448; 2 Platt on Leases, 468; Taylor's Landlord and Tenant, sec. 497. But it must

appear that the lessor, at the time of the receipt of the rent, knew that the forfeiture had been incurred: *Jackson v. Bronson*, 7 Johns. 227; *Jackson v. Schultz*, 18 Johns. 174; *Clark v. Cummins*, 5 Barb. 359; 2 Platt on Leases, 468; *McGlynn v. Moore*, 25 Cal. 394.

**Subd. 4. Non-performance of other covenants.** — The statutory remedy must be strictly applied. Under this subdivision a three days' notice, in writing, to perform the covenant or deliver possession must be given. A notice to deliver possession is not sufficient: *Opera House Association v. Bert*, 52 Cal. 471. If after breach of covenant it cannot be performed, notice to perform is not necessary: *Kelly v. Teague*, 63 Cal. 68.

*Right of re-entry*: See *supra*, under "Notice."

**Judgment.** — The section must be carefully followed. The court cannot give judgment of restitution against the subtenants, and then, several months after, give triple damages against the tenants: *Iburg v. Fitch*, 57 Cal. 159.

### *Tenancy upon agricultural lands—Effect of holding over.*

§ 550. In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than sixty days after the expiration of his term, without any demand or notice to quit by his landlord or the successor in estate of his landlord, if any there be, he shall be deemed to be holding by permission of his landlord or the successor in estate of his landlord, if any there be, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during said year, and such holding over for the period aforesaid shall be taken and construed as a consent on the part of a tenant to hold for another year. [March 7, 1891, § 4.]

### *Service of notice.*

§ 551. Any notice provided for in this act shall be served either, —

1. By delivering a copy personally to the person entitled thereto; or  
2. If he be absent from his place of business, by leaving there a copy, with some person of suitable age and discretion, and sending a copy through the mail addressed to the person entitled thereto at his place of residence; or

3. If the person to be notified be a tenant and his place of residence is not known, or if a person of suitable age and discretion there cannot be found, then by affixing a copy of the notice in a conspicuous place on the demised property, and also delivering a copy to a person there residing, if such person can be found, and also sending a copy through the mail addressed to the tenant at the place where the demised property is situated. Service upon a subtenant may be made in the same manner. Any service in this act provided for may be made by any person who is over the age of twenty-one years. [March 7, 1891, § 5.]

See note to § 549.



*Venue of the action.*

§ 552. The superior court of the county in which the property or some part of it is situated shall have jurisdiction of proceedings under this act. [March 7, 1891, § 6.]

See note to § 549.

*General provisions relating to such action.*

§ 553. No person other than the tenant of the premises, and subtenant, if there be one, in the actual occupation of the premises when the complaint is filed, need be made parties defendant in any proceeding under this act, nor shall any proceeding abate, nor the plaintiff be nonsuited, for the non-joinder of any person who might have been made party defendant; but when it appears that any of the parties served with process, or appearing in the proceeding, are guilty of the offense charged, judgment must be rendered against him. In case a person has become a subtenant of the premises in controversy after the service of any notice in this act provided for, the fact that such notice was not served on such subtenant shall constitute no defense to the action. All persons who enter the premises under the tenant, after the commencement of the action hereunder, shall be bound by the judgment the same as if they had been made parties to the action. [March 7, 1891, § 7.]

See note to § 549.

"Provisions relating to parties": See §§ 110-157.

*Complaint and summons in such action.*

§ 554. The plaintiff in his complaint, which shall be in writing, must set forth the facts on which he seeks to recover, and describe the premises with reasonable certainty, and may set forth therein any circumstances of fraud, force, or violence, which may have accompanied the said forcible entry, or forcible or unlawful detainer, and claim damages therefor, or compensation for the occupation of the premises, or both; in case the unlawful detainer charged be after default in the payment of rent, the complaint must state the amount of such rent. Upon filing the complaint a summons must be issued thereon as in other cases, returnable at a day designated therein, which shall not be less than six nor more than twelve days from its date, except in cases where the publication of summons is necessary, in which case the court or judge thereof may order that the summons be made returnable at such time as may be deemed proper, and the summons shall specify the return day so fixed. [March 7, 1891, § 8.]

**Complaint.** — An objection to a pleading not taken by demurrer or answer is waived: *Martun v. Burr*, 16 Cal. 110; *Valencia v. Cuch*, 32 Cal. 342. The complaint must state facts sufficient to constitute a cause of action: *McEvoy v. Igo*, 27 Cal. 375. Thus, where it appears that the plaintiff, by an instrument in writing, not witnessed or acknowledged, leased the premises to defendant for at least one year, and probably for a longer period, and that the defendant went into possession; that the plaintiff had the option of terminating the tenancy at the end of one year by giving one month's notice; that such notice was given, but that

defendant refused to vacate, — it is a sufficient complaint without a formal averment that the premises are withheld by force: *Chambers v. Hoover*, 3 Wash. 107. Complaint is sufficient which contains the allegations prescribed by the statute giving the remedy. It is not essential to aver service of notice to quit. It may be proved by parol: *Chung Yow v. Hop Chung*, 11 Or. 220. An allegation respecting plaintiff's tools and stock in trade, and the defendant's appropriation thereof to his own use, have no place in a complaint in this action: *Gillam v. Sigman*, 29 Cal. 642. Where the first count of the complaint charged "a forcible entry with a multitude of people," and a "forcible and unlawful detainer," the forcible entry was held the gist of the action, the averment of forcible detainer not being stated as an independent ground of relief, but as a mere continuance or consequence of the first act: *McMinn v. Bliss*, 31 Cal. 126; *Preston v. Kehoe*, 15 Cal. 318; *Thompson v. Smith*, 28 Cal. 532. For a sufficient allegation, bringing the case under § 549, subd. 1, see *Holland v. Green*, 62 Cal. 67.

Where a complaint was in two counts, — in the first the plaintiff stated his possession, and the entry of defendant during his absence, but did not allege a withholding of any character, or a demand of possession, or a refusal, or the use of any force or menace; in the second count he showed, "for a further, separate, and distinct cause of action," that the defendant being in possession, plaintiff demanded that he surrender possession, which defendant refused to do, but still retained it by force, etc., — the court held neither count by itself stated a cause of action: *Barlow v. Burns*, 40 Cal. 353.

It seems that a count for forcible entry and detainer, under § 549, subds. 1, 2, cannot be

joined in the same action with a count under subd. 3. In the one case the forcible entry or withholding is the gist of the action; in the other, the remedy is for the breach of a special class of contracts: *Polack v. Shafer*, 46 Cal. 276; but see *Shelby v. Houston*, 38 Cal. 419. And it would seem that a cause of action for a forcible entry and detainer, and one for an unlawful entry and detainer (see § 549, subd. 2), cannot be joined, though if no demurrer be interposed for the misjoinder, the objection is waived: *Treat v. Forsyth*, 40 Cal. 487.

**Description of premises.** — The mere fact that the corner of a tract was called the northeasterly instead of the northwesterly corner was held insufficient to defeat the plaintiff's action if the other and more definite marks of description sufficiently indicated and identified the premises trespassed upon: *Paul v. Silver*, 16 Cal. 75. The description of the premises in a complaint in forcible entry and detainer, as follows: "That tract or parcel of land situated in the county of Santa Barbara, and known as the Rancho Sespe, granted by the Mexican nation to Don Carlos Antonio Carillo, by grant dated November 29, 1833, and bounded and described as follows: Bounded by the mission San Fernando and San Buenaventura, situated in the then jurisdiction of Santa Barbara, containing six square leagues, a little more or less," — was held sufficient. If the complaint avers that the lands are in the county where the suit is brought, a failure to mention the state will not be a fatal defect. If the complaint sufficiently shows an actual peaceable possession in plaintiff, it will be sufficient without the use of the word "actual"; but it is better to use the statutory term: *More v. Del Valle*, 28 Cal. 170.

### *What the summons must show — Return — Alias summons.*

§ 555. The summons must state the names of the parties to the proceeding, the court in which the same is brought, the nature of the action, in concise terms, and the relief sought, and also the return day; and must notify the defendant to appear and answer within the time designated or that the relief sought will be taken against him. The summons must be directed to the defendant, and in case of summons by publication, be served at least five days before the return day designated therein. The summons must be served and returned in the same manner as summons in other actions is served and returned. Upon the return of any summons issued under this act, when the same has not for any reason been served, or has not been served in time, the plaintiff may have a new summons issued the same as if no previous summons had been issued. [March 7, 1891, § 9.]

See note to § 549.

### *Provisional writ of restitution.*

§ 556. The plaintiff, at the time of commencing an action of forcible entry or forcible detainer or unlawful detainer, or at any time afterwards, may apply to the judge of the court in which the action is pend-

ing for a writ of restitution restoring to the plaintiff the property in the complaint described, and the judge shall order a writ of restitution to issue. The writ shall be issued by the clerk of the superior court in which the action is pending, and be returnable in twenty days after its date; but before any writ shall issue prior to judgment the plaintiff shall execute to the defendant and file in court a bond in such a sum as the court or judge may order, with two or more sureties, to be approved by the clerk, conditioned that the plaintiff will prosecute his action without delay, and will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the writ of restitution having been issued, should the same be wrongfully sued out. [*March 7, 1891, § 10.*]

*Same — Service and execution of — Defendant's bond.*

§ 557. The sheriff shall, upon receiving the writ of restitution, forthwith serve a copy thereof upon the defendant, his agent or attorney, or a person in possession of the premises, and shall not execute the same for three days thereafter, within which time the defendant, or those in possession of the premises, may execute to the plaintiff a bond to be filed with and approved by the clerk of the court, in such a sum as may be fixed by the judge, with two or more sureties to be approved by the clerk of said court, conditioned that they will pay the plaintiff such sum as the plaintiff may recover for the use and occupation of the said premises, or any rent found due, together with all damages the plaintiff may sustain by reason of the defendant occupying or keeping possession of said premises, and also all the costs of the action. The plaintiff, his agent or attorneys, shall have notice of the time and place where the court or judge thereof shall fix the amount of the defendant's bond, and shall have notice and a reasonable opportunity to examine into the qualifications and sufficiency of the sureties upon said bond before said bond shall be approved by the clerk. [*March 7, 1891, § 11.*]

*Application to raise or lower amount of undertaking.*

§ 558. The plaintiff or defendant at any time, upon two days' notice to the adverse party, may apply to the court or any judge thereof for an order raising or lowering the amount of any bond in this act provided for. Either party may, upon like notice, apply to the court or any judge thereof for an order requiring additional or other surety or sureties upon any such bond. Upon the hearing of any application made under the provisions of this section evidence may be given. The judge after hearing any such application shall make such an order as shall be just in the premises. [*March 7, 1891, § 12.*]

See note to § 549.



*Judgment by default.*

§ 559. If at the time appointed in the summons the defendant do not appear and defend, the court must render judgment in favor of the plaintiff as prayed for in the complaint. [March 7, 1891, § 13.]

*Pleading by defendant.*

§ 560. On or before the day fixed for his appearance the defendant may appear and answer or demur. [March 7, 1891, § 14.]

**Demurrer.** — In forcible entry and detainer the defendant does not waive his right to answer by demurring, unless he answers at the same time. He may demur without answering, and if his demurrer be overruled, he may answer upon terms in the discretion of the court: *Mumus v. Hamblon*, 38 Cal. 539.

**Answer.** — A denial that the plaintiff owned the buildings on the premises in controversy does not raise an issue that can be tried in an action of forcible entry and detainer. New matter pleaded by the defendant, in respect to a lease of the premises to the plaintiff, its expiration, and the subsequent forcible and fraudulent entry and detainer by the plaintiff, his attempt to place other persons in possession, and the claim of the defendant against the

plaintiff for rent of the premises, do not constitute a defense to the action. A set-off or counterclaim is not admissible in actions of this class, and it makes no difference whether it be a demand for money, or a previous forcible entry of the plaintiff: *Warburton v. Doble*, 38 Cal. 619.

If the allegations in a complaint in forcible entry and detainer are conjunctively stated, an answer which denies them in that form does not raise an issue: § 194, note; *Burke v. Carruthers*, 31 Cal. 467.

If the complaint alleges an unlawful entry, and the answer denies the unlawful entry, it admits the entry and raises an issue only on the question of lawfulness: *Leroux v. Murdock*, 51 Cal. 541.

*Trial by jury unless waived.*

§ 561. Whenever an issue of fact is presented by the pleadings it must be tried by a jury, unless such a jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the court in which the action is pending, and in all cases actions under this act shall take precedence of all other civil actions. [March 7, 1891, § 15.]

See note to § 549.

*Proof required of plaintiff.*

§ 562. On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to a forcible entry complained of, that he was peaceably in the actual possession at the time of the forcible entry; or in addition to a forcible detainer complained of, that he was entitled to the possession at the time of the forcible detainer. [March 7, 1891, § 16.]

**Possession of plaintiff.** — Plaintiff must show an actual and peaceable, not scrambling, possession in himself at the time of the entry or detainer: *Trent v. Stuart*, 5 Cal. 114; *House v. Keiser*, 8 Cal. 501; *Cummins v. Scott*, 23 Cal. 527; *Hoag v. Pierce*, 28 Cal. 187; *Voll v. Butler*, 49 Cal. 75; *Warburton v. Doble*, 38 Cal. 620. By "scrambling possession" is meant a struggle for possession on the land itself, not such a contest as is waged in the courts. Actual and peaceable possession, although contested in the courts, is sufficient: *Spiers v. Duane*, 54 Cal. 176. Constructive possession is not sufficient: *Conroy v. Duane*, 45 Cal. 597. If the plaintiff was not in possession at the time of the entry, but the defendant's lessor

had possession, the action cannot be maintained: *Aleman v. Ortega*, 3 West Coast Rep. 51. Whether actual possession of part of a tract of land is actual possession of the whole must be in many cases a question of fact. It would be a great hardship to require a party, in every instance, to fence: *O'Callaghan v. Booth*, 6 Cal. 65; *Preston v. Kehoe*, 15 Cal. 317. Several persons were owners of separate tracts of land within an outside fence, which formed a common inclosure; but the division lines of the separate tracts within the common inclosure were well known and defined, and each person cultivated his own tract. A and B, two of these owners, disposed of their tract to C. Soon after this, D, who was the owner of

another tract within the inclosure, went on the tract sold to C and commenced plowing it. C went to D, took hold of his horses, and commenced turning them from the tract, when D drew a pistol, and, aiming it at him, threatened to hurt him if he did not leave. D continued plowing on the land. It was held that the acts committed by D clearly amounted to a forcible entry and detainer, and that the general outside fence constituted a full and complete actual possession in the owner of each separate tract: *Hussey v. McDermott*, 23 Cal. 413. Where plaintiffs had a stable upon the lot which was adjoining the lot upon which they were living; the lot was being cultivated by them at the time, in part as a vegetable garden, and its exterior lines were fenced, though not in a very substantial manner; the lot was only thirty-eight feet by one hundred and thirty-two feet, and if not a part of the plaintiffs' house-lot, was immediately adjoining it, without any fence between the two: this was held sufficient possession of the lot: *Valencia v. Couch*, 32 Cal. 344. By entering into another's inclosure, erecting a house on some part of the premises, and asserting a claim to the whole, or a large part, while the other party is himself living within the same general inclosure, occupying the premises, and also asserting his possession to the whole, the intruder does not acquire possession so as to enable him to maintain this action: *Ross v. Roadhouse*, 36 Cal. 583. Where a person entered upon a vacant quarter-section of public land, erected a small dwelling-house upon it, slept there several nights, and then, locking the house and taking the key with him, returned to an adjoining county, where he had previously resided, with intention immediately to return with his family to the new house as his home, but found his wife too ill to be removed, and she continued so for several months, it was held sufficient possession: *Wilson v. Shackelford*, 41 Cal. 630.

Residence upon the premises is not indispensable, nor is cultivation, nor improvement, as contradistinguished from the erection of fences or substantial barriers, marking the line of the premises over which control is asserted. The subjection of the premises to the exclusive will and control of the possessor by means of the exercise by him of visible and notorious acts of dominion over them constitute actual possession: *Gray v. Collins*, 42 Cal. 157. A lease of land, with a reservation in it that the lessor may, during the term of the lease, occupy any part or all of the demised premises, does not prevent the lessor from maintaining forcible entry and detainer against a stranger to the lease for a forcible entry into the demised premises, if the lessor, notwithstanding the lease, continues to occupy the same: *Bowers v. Cherokee Bob*, 45 Cal. 495. But a lease which contains a clause merely giving plaintiffs the right to occupy one room in a house is insufficient to entitle them to maintain the action as to the whole house: *Polack v. Schafer*, 46 Cal. 278.

If one who is in the actual possession of a marsh or mud flat, incapable of habitation or use in its then condition, conveys his title and possession, and the vendor promptly prepares to assert his title and enter into possession, he

acquires a possession which is sufficient to enable him to maintain forcible entry or unlawful detainer against an intruder, although at the time the intruder entered he had exercised no actual dominion or control over the land. One who goes upon the land several weeks after the alleged ouster and forcible detainer simply as an employee of the parties who ousted the plaintiffs, and has no other connection with the transaction, is not guilty of an unlawful entry and forcible detainer. *Conroy v. Duane*, 45 Cal. 597.

A sufficient inclosure is, of itself, an actual possession of land, without a residence upon it, cultivation, or other act of dominion. A natural barrier, such as a deep stream, a precipitous cliff, the shore of the ocean, and the like, will serve as a portion of an inclosure, and render a fence or other obstruction on that side unnecessary: *Brummagin v. Bradshaw*, 39 Cal. 24; *Conroy v. Duane*, 45 Cal. 597. Neither a good and substantial fence nor a residence upon the premises is necessary; there may be an actual possession without fences or inclosure of any kind: *Goodrich v. Van Landigham*, 46 Cal. 603.

Stock ranging over uninclosed public lands is not evidence of such a possession of any specific portion of such lands in the owner of the stock as will enable him to maintain this action: *Buel v. Frazier*, 38 Cal. 696. The acts of an agent in controlling the property for the plaintiff are enough to show that the property was held and possessed by the principal, whether the agent had any written authority or not. The statute does not require the plaintiff to be in the actual occupancy of the premises. "Actual possession" as much consists of a present power and right of dominion as an actual corporal presence: *Minturn v. Burr*, 16 Cal. 109.

A person who is in the actual and peaceable possession of land as the tenant at will of another may maintain an action of forcible entry and detainer if forcibly dispossessed: *Jones v. Shay*, 50 Cal. 508. A person who has worked on a mining claim, and run tunnels and sunk shafts on the same for prospecting purposes, but who has ceased work and has not occupied the same for several months, cannot maintain an action of forcible detainer against one who enters upon the same. The mere fact that the one who makes such entry does not deliver possession to the other on demand does not make him guilty of a forcible detainer: *Laird v. Waterford*, 50 Cal. 315.

An agent or servant having the care of real estate cannot be considered as a tenant at will of his principal or master, and cannot, therefore, sue in his own name: *Mitchell v. Davis*, 20 Cal. 47; *Higginbotham v. Higginbotham*, 10 B. Mon. 371; *Bertie v. Beaumont*, 16 East, 33. But see *Hammel v. Zolbein*, 51 Cal. 532, where it was held that a person whose occupancy of land is through his servants, and who has never been in possession, cannot maintain an action for unlawful entry. This remedy cannot be sustained by merely showing a constructive possession or a right of possession: *Barlow v. Burns*, 40 Cal. 354; *Conroy v. Duane*, 45 Cal. 597. A deed of conveyance does not show, nor tend to show, any actual possession in the plaintiff, nor any actual change of possession from the grantor to the grantee. The right of



possession cannot be tried in this action: *Sanchez v. Loureyro*, 46 Cal. 642.

**Evidence.** — To prove forcible detainer, it is not indispensable to show the actual use of force. But threats of personal violence, or proof of an evident intention to resist by force attempts to regain possession, must be shown; proof of mere surmise or apprehension of the use of force is insufficient evidence of forcible detainer: *Taylor v. Scott*, 10 Or. 484; *Wilbur v. Cherry*, 39 Cal. 661. A mere avowal of intention to keep possession is not of itself a threat which will constitute the keeping of possession a detention by force: *Fogarty v. Kelly*, 24 Cal. 319.

In forcible entry and detainer, the defendant cannot, for the purpose of showing that the plaintiff had only a scrambling possession, introduce evidence to show that during the whole period of the plaintiff's possession third persons, with whom the defendants were not in privity, were stopping near the demised premises, awaiting an opportunity to enter and take possession when they could do so without force; but may prove that before the entry made by defendants and complained of, they had made attempts to take possession, but were prevented from entering by an exhibition of force by the plaintiff or his servants. If the plaintiff in forcible entry and detainer entered into the demanded premises without resistance, and remained for some weeks in the undisturbed possession, the defendants cannot prove that before his entry they had, under a claim of title, inclosed and occupied the premises, and were thus occupying it when he entered: *Bowers v. Cherokee Bob*, 45 Cal. 495.

It is not error to exclude evidence that defendant, during two years last past, had been in the actual, open, and notorious possession of large portions of said tract, of several hundred acres of land, which originally included the land in controversy. And where plaintiff showed peaceable possession for a long time before and up to the forcible entry complained of, and defendant admitted by answer its possession at the commencement of the suit, but produced no evidence of right to possession, and none to controvert plaintiff's evidence, a verdict for plaintiff was sustained: *Bellingham Bay etc. R'y Co. v. Strand*, 23 Pac. Rep. 928.

**Title to land** cannot be inquired into in an action for forcible entry and detainer: *Shortess v. Wirt*, 1 Or. 90; *Voll v. Hollis*, 60 Cal. 569; *McCauley v. Weller*, 12 Cal. 524; *Mecham v. McKay*, 37 Cal. 154; the possession is the only matter in issue; and defendant cannot defeat the action by proving paramount title in himself: *Altsee v. Moore*, 1 Or. 350. Proof of prior possession is no defense: *Brown v. Perry*, 39 Cal. 23. If defendant claims right or title, he should first give up the possession which he has wrongfully obtained, and then he may litigate by proper action any right or title he may have: *Mitchell v. Davis*, 23 Cal. 384. The principle established in *Tewksbury v. Magrath*, 33 Cal. 237, that a tenant may, in certain cases, dispute his landlord's title without first delivering possession of the demised premises, does not apply to actions of this character; the question of title is not involved, and cannot be raised: *Mason v. Wolff*, 40 Cal. 250.

### *Amendments to conform pleadings to proof.*

§ 563. When upon the trial of any proceeding under this act it appears from the evidence that the defendant has been guilty of either a forcible entry or a forcible or unlawful detainer, in respect of the premises described in the complaint, and other than the offense charged in the complaint, the judge must order that such complaint be forthwith amended to conform to such proofs; such amendment must be made without any imposition of terms. No continuance shall be permitted on account of such amendment unless the defendant shows to the satisfaction of the court good cause therefor. [March 7, 1891, § 17.]

See note to § 549.

### *Judgment and execution.*

§ 564. If upon the trial the verdict of the jury, or if the case be tried without a jury the finding of the court, be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceeding be for unlawful detainer after neglect or failure to perform any condition or covenant of a lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of the



lease, agreement, or tenancy. The jury, or the court if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and if the alleged unlawful detainer be after default in the payment of rent, find the amount of any rent due, and the judgment shall be rendered against the defendant guilty of the forcible entry, forcible detainer, or unlawful detainer for twice the amount of damages thus assessed and of the rent, if any, found due. When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant or any subtenant, or any mortgagee of the term, or other party interested in its continuance, may pay into court for the landlord the amount of the judgment and costs, and thereupon the judgment shall be satisfied and the tenant restored to his estate; but if payment, as herein provided, be not made within five days, the judgment may be enforced for its full amount and for the possession of the premises. In all other cases the judgment may be enforced immediately. If writ of restitution shall have been executed prior to judgment, no further writ or execution for the premises shall be required. [*March 7, 1891, § 18.*]

**What is determined on trial.**—In an action for forcible entry, the jury must decide whether defendant ousted plaintiff: *Ross v. Routhouse*, 36 Cal. 581. The judgment simply decides a restoration to immediate possession, which has been taken away by an illegal and unwarranted ouster tending to produce a breach of the peace: *Mitchell v. Hagood*, 6 Cal. 148.

**Damages.**—The section does not say the damages must be alleged and claimed in the complaint, but they probably must: *Hicks v. Herring*, 17 Cal. 567; *Holmes v. Horber*, 21 Cal. 56. It is made the duty of the court to double the damages found: *Watson v. Whitney*, 23 Cal. 378; *Turkshury v. O'Connell*, 25 Cal. 265; but it seems a question whether the doubling ought not to be claimed as part of the relief. When damages are claimed which do not necessarily result from the forcible entry or detainer, title to the property alleged to have been injured may be a proper subject of inquiry. If the plaintiff does not own buildings, he does not sustain damages to the extent of their value by their destruction: *Warburton v. Doble*, 38 Cal. 620. If the plaintiff was only ousted from a part, he is not entitled to recover damages for the detention of the whole: *Thompson v. Smith*, 28 Cal. 531. Where, in an action for holding over by a tenant, plaintiffs claimed that they could not rent one part of land without having possession of the part demised to defendants,

and that they could have rented the whole together for one hundred and fifty dollars or two hundred dollars per month, while the demised premises only brought much less, the court held that such damage was not a proper subject of inquiry, because it related to property respecting which there was no subsisting relation of landlord and tenant between the parties. The plaintiffs were entitled to judgment for restitution of the premises, and a judgment for three times the amount of the damages which they sustained by the unlawful detainer. The measure of damage in such case was the actual value of the use and occupation of the premises while unlawfully detained: *Kower v. Gluck*, 33 Cal. 402. The damages to be recovered must be the natural and proximate consequence of the act complained of; accordingly, an allegation that the complainant, by reason of the forcible entry and detainer, had suffered greatly in his credit, and great bodily and mental pain and anguish, will not support a judgment for damages: *Anderson v. Taylor*, 56 Cal. 131.

**Rent.**—The rent intended must be the rent specified in the lease. It would perhaps not follow that a further sum might not also be recovered as damages, if it were shown that the plaintiff suffered a greater loss by the unlawful detainer; but the legislature seems to have provided that, in case of holding over, the tenant shall at least pay the stipulated rent: *Mason v. Wolff*, 40 Cal. 250.

*Amendments allowed as in other actions.*

§ 565. Amendments may be allowed by the court at any time before final judgment, upon such terms as to the court may appear just, in the same cases and manner and to the same extent as in civil actions. [March 7, 1891, § 19.]

*General provisions of code, how far applicable.*

§ 566. Except as otherwise provided in this act, the provisions of the laws of this state with reference to practice in civil actions are applicable to and constitute the rules of practice in the proceedings mentioned in this act; and the provisions of such laws relative to new trials and appeals, except so far as they are inconsistent with the provisions of this act, shall be held to apply to the proceedings mentioned in this act. [March 7, 1891, § 20.]

See note to § 549.

*In what case tenant may be relieved against forfeiture.*

§ 567. The court may relieve a tenant against a forfeiture of a lease and restore him to his former estate, as in other cases provided by law, where application for such relief is made within thirty days after the forfeiture is declared by the judgment of the court, as provided in this act. The application may be made by a tenant or subtenant, or a mortgagee of the term, or any person interested in the continuance of the term. It must be made upon petition, setting forth the facts upon which the relief is sought, and be verified by the applicant. Notice of the application, with a copy of the petition, must be served on the plaintiff in the judgment, who may appear and contest the application. In no case shall the application be granted except on condition that full payment of rent due, or full performance of conditions of covenants stipulated, so far as the same is practicable, be first made. [March 7, 1891, § 21.]

*Either party may appeal—Bond for.*

§ 568. If either party feels aggrieved by the judgment he may appeal to the supreme court, as in other civil actions; *provided*, that if the defendant appealing desires a stay of proceedings pending such appeal, he shall execute and file a bond, with two or more sufficient sureties to be approved by the judge, conditioned to abide the order of the court on such appeal, and to pay all rents and other damages justly accruing to the plaintiff during the pendency of the appeal. [March 7, 1891, § 22.]

**Bond.** — On appeal by a defendant from a judgment against him, in an action of forcible entry and detainer, the giving of the bond required is a prerequisite to a stay of proceedings: *Danvers v. Durkin*, 14 Or. 37.

*Proceedings stayed pending appeal.*

§ 569. When the defendant shall appeal, and shall file a bond as provided in the preceding section, all further proceedings in the case shall be stayed until the determination of said appeal, and the same has been remanded to the superior court for further proceedings therein. [March 7, 1891, § 23.]

*Appeal suspends writ of restitution.*

§ 570. If a writ of restitution has been issued previous to the taking of an appeal by the defendant, and said defendant shall execute and file a bond as provided in this act, the clerk of the court, under the direction of the judge, shall forthwith give the appellant a certificate of the allowance of such appeal; and upon the service of such certificate upon the officer having such writ of restitution the said officer shall forthwith cease all further proceedings by virtue of such writ; and if such writ has been completely executed, the defendant shall be restored to the possession of the premises, and shall remain in possession thereof until the appeal is determined. [March 7, 1891, § 24.]

See note to § 549. By section 25 of the act but express provision is made saving vested of March 3, 1891, all previous acts on the sub- rights and guarding abatement of actions com- menced under previous acts.

*Unlawful detainer of certain lands — What constitutes.*

§ 571. Any person who shall, without the permission of the owner and without having any color of title thereto, enter upon the lands of another, and shall refuse to remove therefrom after three days' notice, shall be deemed guilty of unlawful detainer, and may be removed from such lands. [March 7, 1891, § 1.]

*Same — Complaint and answer — Requisites of.*

§ 572. The complaint in all cases under the provisions of the act shall be upon oath, and then [there] shall be embodied therein or amended thereto an abstract of the plaintiff's title, and the defendant shall, in his answer, state whether he makes any claim of title to the lands described in the complaint, and if he makes no claim to the legal title, but does claim a right to the possession of such lands, he shall state upon what grounds he claims a right to such possession. [March 7, 1891, § 2.]

The "act" referred to is composed of this section, the next preceding one, and the next two succeeding ones.

*Same — Proof required of plaintiff — Cause, how to be tried.*

§ 573. It shall not be necessary for the plaintiff, in proceedings under this act, to allege or prove that the said lands were, at any time, actually occupied prior to the defendant's entry thereupon, but it shall be sufficient to allege that he is the legal owner and entitled to the immediate possession thereof; provided, that if the defendant shall, by his



answer, deny such ownership, and shall state facts showing that he has a lawful claim to the possession thereof, the cause shall thereupon be entered for trial upon the docket of the court in all respects as if the action were brought under the provisions of Chapter XLVI. of the code of eighteen hundred and eighty-one. [*March 7, 1891, § 3.*]

As to what constitutes "this act," see note by subsequent statutes, are found in Chapter I. to § 572. The provisions of chapter 46 of the of Title IX. of this code. code of 1881, so far as not heretofore repealed

*Same—Parties defendant—Trial of separate issues.*

§ 574. All persons in actual possession of any portion of the several subdivisions of any section of land, according to the government surveys thereof, may be made defendants in one action; *provided*, that they may, in their discretion, make separate answers to the complaint, and if separate issues are joined thereupon, the same shall nevertheless be tried as one action, but the verdict, if tried by jury, shall find separately upon the issues so joined, and judgment shall be rendered according thereto. [*March 7, 1891, § 4.*]

## CHAPTER III.

### OF PARTITION.

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### *Who may have partition.*

§ 577. [552.] When several persons hold and are in possession of real property as tenants in common, in which one or more of them have an estate of inheritance, or for life or years, an action may be maintained by one or more of such persons for a partition thereof, according to the respective rights of the persons interested therein, and for sale of such property, or a part of it, if it appear that a partition cannot be made without great prejudice to the owners.

**Who may compel partition.** — No one has a right to the remedy of partition unless he is entitled to the possession, or to enjoy the present rents: *Brownell v. Brownell*, 19 Wend. 367; *Striker v. Mott*, 3 Paige, 387; 22 Am. Dec. 646. Thus the grantee of one who reserves in the deed the right of possession during his life cannot maintain the suit: *Nichols v. Nichols*, 28 Vt. 23; 67 Am. Dec. 699. The fact of a tenant in possession will not prevent the maintenance of the action, for the plaintiff may still have an estate in possession: *Woodworth v. Campbell*, 9 Paige, 518. It is generally held that one who has been disseised cannot maintain the action, but must first establish his title by action to recover possession, etc.: *Mattherson v. Johnson*, Hoff. Ch. 560; *Harman v. Kelley*, 14 Ohio, 502; 45 Am. Dec. 552. But if a court of equity has acquired jurisdiction for some other purpose, it may, to do full justice between the parties, decree a partition, though there be conflicting claims to the property: *Scott v. Guernsey*, 60 Barb. 178. One who conveys his moiety transfers also his right to compel partition, and his grantee acquires his rights in that regard: *King v. Howard*, 27 Mo. 21; *Ragan's Estate*, 7 Watts, 442. A mortgagor, before entry for condition broken, has a right to partition, provided his mortgagee is not prejudiced thereby: *Upham v. Bradley*, 17 Me. 427; *Green v. Arnold*, 11 R. I. 364. An administrator has no such right of possession as entitles him to partition: *Nason v. Willard*, 2 Mass. 478; *Whitlock v. Willard*, 18 Fla. 156. By this section a tenant for years may sue for

partition, and this is so though the tenant of the other moiety holds in fee: *Mussey v. Sanborn*, 15 Mass. 155. A tenant by curtesy, as he has a life estate, may, when lands are held in co-tenancy, have a partition: *Riker v. Darke*, 4 Edw. Ch. 668. But a tenant in dower has no such right: *Coles v. Coles*, 15 Johns. 320; 8 Am. Dec. 231; *Wood v. Clute*, 1 Sand. Ch. 200. An infant may apply for partition: *Postley v. Cain*, 4 Sand. Ch. 509; *Clark v. Clark*, 14 Abb. Pr. 299.

**What may be partitioned.** — Partition may be made of water rights: *McGillivray v. Evans*, 27 Cal. 96; *Morrill v. Morrill*, 5 N. H. 134; of mills and mill privileges: *Hanson v. Willard*, 12 Me. 142; 28 Am. Dec. 162. The interest of miners in mining claims and ditch property upon the public lands is an estate of inheritance, etc., within the section: *Hughes v. Devlin*, 23 Cal. 505. But a mere "mining right," the right to enter and work a mine, is not susceptible of partition: *Hughes v. Devlin*, 23 Cal. 505; *Smith v. Cooley*, 1 West Coast Rep. 855.

A decree of partition of public lands not yet patented to the occupants is not a bar to subsequent partition of the lands after patent issues: See *Mound City L. & W. Association v. Phillips*, 64 Cal. 493.

**Partition, generally.** — One tenant in common out of possession may, as collateral to a partition, compel his co-tenant in possession to account for rents and profits received; the tenant in possession may deduct amounts paid for taxes and proper repairs and additions for

the preservation and security of the building. And where the building contained theater-rooms, which were let from time to time, with furniture which was the individual property of the tenant in possession, he was entitled to a reasonable allowance for its use, when such

use was required in order to let the premises themselves; but not for the use of any individual property not thus required, nor for his personal services in taking charge, etc., and collecting the rents: *Goodenow v. Ewer*, 16 Cal. 464.

*All known interests must be stated in the complaint.*

§ 578. [553.] The interest of all persons in the property shall be set forth in the complaint specifically and particularly, as far as known to the plaintiff, and if one or more of the parties, or the share or quantity of interest of any of the parties be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact shall be set forth in the complaint.

**Complaint.**—In the complaint in partition the particular property must be designated, and also the interests of the parties therein: *Hammer v. Silver*, 2 Or. 336. If the complaint fails to sufficiently state the origin, nature, or extent of the interests of the plaintiffs, the objection should be presented by demurrer, or it is waived: *Broad v. Broad*, 40 Cal. 495. If defendant has two deeds, each purporting to convey an undivided two thirds of the property, and one of them was given as a substitute for the other, that fact must be averred, and if not averred, the plaintiff cannot prove it. All the rights of the several parties plaintiff, as well as defendant, must be put in issue, or they cannot be tried: *Miller v. Sharp*, 48 Cal. 394. The complaint must aver that the co-tenants hold and are in possession of real property as joint tenants or as tenants in common, in which property one or more of them have an estate or inheritance, for life or lives, or for years; and if these averments are not made, it does not state facts sufficient to constitute a cause of action: *Bradley v. Harkness*, 26 Cal. 76. A general allegation that "the premises cannot be divided by metes and bounds without prejudice" is sufficient, without an allegation of the facts upon which the plaintiff is to obtain a particular mode of partition: *De Uprey v. De Uprey*, 27 Cal. 331.

**Parties.**—All the tenants in common should be made parties. All grantees of original owners should be joined as parties: *Sutter v. San Francisco*, 36 Cal. 112. A tenant in common of part of a tract of land is a proper party in a suit for partition of the whole: *Gates*

*v. Salmon*, 35 Cal. 576; *Dutton v. Warschauer*, 21 Cal. 609; *Hathaway v. De Soto*, 21 Cal. 191. One tenant in common who owns an undivided interest consisting of a certain quantity cannot have partition by making the original holder of the whole tract sole defendant when he has sold divers parts thereof to various persons, but retains more than the quantity to which the plaintiff in the partition suit is entitled. All the grantees of the original owner should be joined as parties: *Sutter v. San Francisco*, 36 Cal. 113. An action for partition under our code is to some extent *sui generis*. The parties named in the complaint, whether as plaintiffs or defendants, are all actors, each representing his own interest. Whether plaintiffs or defendants, they are required to set forth fully and particularly the origin, nature, and extent of their interests in the property, and the interests of each and all may be put in issue by the others and tried: *Morehout v. Higuera*, 32 Cal. 295; *Senter v. De Bernal*, 38 Cal. 642. A tenant in common of land is entitled to partition although never in the actual occupancy, and notwithstanding his grantor and co-tenant were copartners in the crops raised on the land: *Voce v. Daveggio*, 3 West Coast Rep. 491. A contract of partition between tenants in common, to be effective, must be binding on all the parties; if one or more of them are not bound, the contract fails to work a partition: *Gates v. Salmon*, 46 Cal. 362.

**Adverse possession of co-tenant will not** bar right of tenant out of possession to institute proceedings for partition: *Martin v. Walker*, 58 Cal. 590.

*Lien creditors may be made parties, and their liens adjusted.*

§ 579. [554.] The plaintiff may, at his option, make creditors having a lien upon the property, or any portion thereof, other than by a judgment or decree, defendants in the suit. When the lien is upon an undivided interest or estate of any of the parties, such lien, if a partition be made, is thenceforth a lien only on the share assigned to such party; but such share shall be first charged with its just proportion of the costs of the partition, in preference to such lien.



*In what cases service may be made by publication.*

§ 580. [556.] If a party having a share or interest in or lien upon the property be unknown, or either of the known parties reside out of the state, or cannot be found therein, and such fact be made to appear by affidavit, the notice may be served by publication, as in ordinary cases. When service is made by publication, the notice must contain a brief description of the property which is the subject of the suit.

*Notice, to whom directed.*

§ 581. [555.] The notice shall be directed by name to all the tenants in common who are known, and in the same manner to all lien creditors who are made parties to the suit, and generally to all persons unknown having or claiming an interest or estate in the property.

*What the answer must show.*

§ 582. [557.] The defendant shall set forth in his answer the nature and extent of his interest in the property, and if he be a lien creditor, how such lien was created, the amount of the debt secured thereby and remaining due, and whether such debt is secured in any other way, and if so, the nature of such other security.

**Answer, and defendant's pleadings, generally.** — Except as otherwise provided by statute, the pleadings on defendant's part correspond with those in other actions: *Reed v. Child*, 4 How. Pr. 125, and *Jennings v. Jennings*, 2 Abb. Pr. 14, decisions under statutes similar to ours. A defendant may deny that he is a tenant in common, and set up that he is a sole owner: *Bollo v. Navarro*, 33 Cal. 467; *Hancock*

*v. Lopez*, 53 Cal. 362. A judgment for the defendant upon such an answer is evidence in an action of ejectment between parties to the partition suit: *Id.*

An answer simply denying that the shares or interests of the parties are correctly stated in the complaint raises no issue: *Nolan v. Skelly*, 62 How. Pr. 102.

*All rights may be tried.*

§ 583. [558.] The rights of the several parties, plaintiffs as well as defendants, may be put in issue, tried, and determined in such suit, and where a defendant fails to answer, or where a sale of the property is necessary, the title shall be ascertained by proof, to the satisfaction of the court, before the decree for partition or sale is given.

**Trial.** — If the title to the property sought to be partitioned is put in issue, a jury trial may be demanded: *Cassedy v. Wallace*, 61 How. Pr. 240.

Under the old system, if defendant set up that he was the sole owner of the property, an issue was directed to try the question; but under our system there is no necessity for this. The one court can try all questions: *Bollo v. Navarro*, 33 Cal. 467.

**Title.** — Though in most states the rule is otherwise, in states having statutes similar to those existing in Washington, it is competent to try title in an action for partition of lands:

*De Uprey v. De Uprey*, 27 Cal. 329; *Morenhout v. Higuera*, 32 Cal. 289; *Bollo v. Navarro*, 33 Cal. 459; *Gates v. Salmon*, 35 Cal. 597; *Hancock v. Lopez*, 53 Cal. 362; *Martin v. Walker*, 58 Cal. 590. It was determined in the case last cited that a co-tenant out of possession might bring partition suit and settle the adverse possession of the co-tenant in occupancy.

**Tenant in common must account.** — If one tenant in common has received and appropriated to his own use profits from the common property, the court may require an accounting thereof in the action for partition: *McCabe v. McCabe*, 18 Hun, 153.

*When partition impracticable, sale will be ordered.*

§ 584. [559.] If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the

complaint, to the satisfaction of the court, that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof, and for that purpose may appoint one or more referees. Otherwise, upon the requisite proofs being made, it shall decree a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees therefor, and shall designate the portion to remain undivided for the owners whose interests remain unknown or are not ascertained.

**Sale instead of partition.** — Laws authorizing a sale instead of partition, without the owner's consent, are constitutional: *Richardson v. Mason*, 23 Conn. 97; *Metcalf v. Hoopingardner*, 45 Iowa, 510. A sale is never ordered in this proceeding when the party is not entitled to partition: See *Parkey v. Howard*, 47 Miss. 87. A sale is a matter of right if the facts authorizing it exist: *Johnson v. Olmstead*, 49

Conn. 517; but this question the court is to determine: *McCann v. Brown*, 43 Ga. 386; see § 586, *post*.

Allotment between all the plaintiffs on the one hand, and all the defendants on the other, instead of allotting to each individual his portion, may be ordered when equity can be better done in that way than by a sale: *Walter v. Walter*, 3 Abb. N. C. 12.

### *Partition, how made.*

§ 585. [560.] In making the partition, the referees shall divide the property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, designating the several portions by proper landmarks, and may employ a surveyor, with the necessary assistants, to aid them therein. The referees shall make a report of their proceedings, specifying therein the manner of executing their trust, describing the property divided and the shares allotted to each party, with a particular description of each share.

### *Decree in partition — Effect of the decree.*

§ 586. [561.] The court may confirm or set aside the report in whole or in part, and if necessary, appoint new referees. Upon the report being confirmed, a decree shall be entered that such partition be effectual forever, which decree shall be binding and conclusive, —

1. On all parties named therein, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee, or as tenants for life or for years, or as entitled to the reversion, remainder, or inheritance of such property, or any part thereof, after the termination of a particular estate therein, or who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life;

2. On all persons interested in the property, to whom notice shall have been given by publication;

3. On all other persons claiming from or through such parties or persons, or either of them.

**Interlocutory decree defining rights of parties.** — It is indispensable that a decree interlocutory in its character be first entered, definitely determining the rights of the parties, before a partition or sale be directed: *Lorenz v. Jacobs*, 53 Cal. 24; *Emeric v. Alvarado*, 1 West Coast Rep. 708. Such interlocutory decree is not reviewable on appeal from the final judgment: *Barry v. Barry*, 56 Cal. 10. The entire judgment roll need not be brought up on an appeal from the interlocutory judgment: *Emeric v. Alvarado*, 1 West Coast Rep. 708.

**Modifying decree.** — After the filing of the finding and decree, the court may correct, amend, or modify it; pending such action the rights of the parties have not been definitely determined, and there is no appealable interlocutory decree: *Bixby v. Bent*, 59 Cal. 522.

**Judgment, effect of.** — The effect of the

judgment in this action is determined by the code, not by the common law. It is binding and conclusive upon all parties properly before the court: *Morenhout v. Higueria*, 32 Cal. 289; see also *Gates v. Salmon*, 35 Cal. 576; and conclusive on them, their legal representatives, and successors in interest: *Carry v. Rae*, 58 Cal. 159. Whether guardian's consent to judgment binds infants, see *San Fernando H. Association v. Porter*, 58 Cal. 81.

Judgment may be entered that one of the defendants is the owner in fee of all the land in question: *Hancock v. Lopez*, 53 Cal. 362; *Livermore v. Webb*, 56 Cal. 489; or for the defendants on the ground that they are in the adverse possession of the land: *Martin v. Walker*, 59 Cal. 94. The judgment merely severs the unity of possession, but does not vest in either co-tenant any new or additional title: *Wade v. Deray*, 50 Cal. 376.

*Decree does not affect right of tenants, nor determine title, except between the parties.*

§ 587. [562.] Such decree and partition shall not affect any tenants for years or for life of the whole of the property which is the subject of partition, nor shall such decree and partition preclude any persons, except such as are specified in the last section, from claiming title to the property in question, or from controverting the title of the parties between whom the partition shall have been made.

One who is stated in the complaint to claim an interest in the property sought to be partitioned, and who is made a party and served with summons, is concluded by the judgment,

notwithstanding he did not appear in the action, and no provision was made for him in the judgment: *Jordan v. Van Epps*, 85 N. Y. 427.

*Expenses are part of the costs.*

§ 588. [563.] The expenses of the referees, including those of a surveyor and his assistants, when employed, shall be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by law to the referees, shall be paid by the plaintiff, and may be allowed as costs.

*Decree of sale on referee's report.*

§ 589. [564.] If the referees report to the court that the property of which partition shall have been decreed, or any separate portion thereof, is so situated that a partition thereof cannot be made without great prejudice to the owners, and the court is satisfied that such report is correct, it may thereupon, by an order, direct the referees to sell the property, or separate portion thereof.

**Sale on report of referees.** — The court has power, when the parties are tenants in common of both real and personal property, to direct the sale of the whole of the property in one parcel: *Prentice v. Janssen*, 79 N. Y. 478.

The lands of infants cannot be sold under a judgment in partition, when such a sale would be in contravention of the instrument under

which they derive their title: *Muller v. Struppmann*, 55 How. Pr. 521.

It is no objection to a sale that the property is encumbered by a prior mortgage. But a sale should not be directed when infants, or a trustee without power of purchase, are parties entitled, unless it appears that otherwise partition could not be made: *Walter v. Walter*, 3 Abb. N. C. 12.



*Estate for life, how protected.*

§ 590. [565.] When a part of the property only is ordered to be sold, if there be an estate for life or years in an undivided share of the property, the whole of such estate may be set off in any part of the property not ordered sold.

*Lien creditors must be brought in before sale is ordered.*

§ 591. [566.] Before making an order of sale, if lien creditors, other than those by judgment or decree, have not been made parties, the court, on motion of either party, shall order the plaintiff to file a supplemental complaint, making such creditors defendants.

*Liens must be satisfied before distribution will be ordered.*

§ 592. [567.] If an order of sale be made before the distribution of the proceeds thereof, the plaintiff shall produce to the court the certificate of the auditor of the county where the property is situated, showing the liens remaining unsatisfied, if any, by judgment or decree upon the property, or any portion thereof, and unless he do so, the court shall order a referee to ascertain them.

*Ascertainment of liens and their priority.*

§ 593. [568.] If it appear by such certificate, or reference in case the certificate is not produced, that any such liens exist, the court shall appoint a referee to ascertain what amount remains due thereon or secured thereby respectively, and the order of priority in which they are entitled to be paid out of the property.

*Notice to lien-holders.*

§ 594. [569.] The plaintiff must cause a notice to be served at least twenty days before the time for appearance on each person having such lien by judgment or decree, to appear before the referee at a specified time and place, to make proof, by his own affidavit or otherwise, of the true amount due or to become due, contingently or absolutely, on his judgment or decree.

*Proceedings of referee on ascertaining the liens.*

§ 595. [570.] The referee shall receive the evidence, and report the names of the creditors whose liens are established, the amounts due thereon, or secured thereby, and their priority respectively, and whether contingent or absolute. He shall attach to his report the proof of service of the notices and the evidence before him.

*Any party may except to referee's report—Notice to lien-holder by publication.*

§ 596. [571.] The report of the referee may be excepted to by either party to the suit, or to the proceedings before the referee, in

like manner and with like effect as in ordinary cases. If a lien creditor be absent from the state, or his residence therein be unknown, and that fact appear by affidavit, the court, or judge thereof, may by order direct that service of the notice may be made upon his agent or attorney of record, or by publication thereof, for such time and in such manner as the order may prescribe.

*Order confirming report, effect of.*

§ 597. [572.] If the report of the referee be confirmed, the order of confirmation is binding and conclusive upon all parties to the suit, and upon the lien creditors who have been duly served with the notice to appear before the referee, as provided in section five hundred and ninety-four.

*Distribution of proceeds of sale.*

§ 598. [573.] The proceeds of the sale of the encumbered property shall be distributed by the decree of the court, as follows:—

1. To pay its just proportion of the general costs of the suit;
2. To pay the costs of the reference;
3. To satisfy the several liens in their order of priority, by payment of the sums due and to become due, according to the decree;
4. The residue among the owners of the property sold, according to their respective shares.

*Court may order other securities to be first exhausted.*

§ 599. [574.] Whenever any party to the suit, who holds a lien upon the property, or any part thereof, has other securities for the payment of the amount of such lien, the court may, in its discretion, order such sureties to be exhausted before a distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property on account thereof.

*Proceedings to ascertain and adjust liens do not delay the sale.*

§ 600. [575.] The proceedings to ascertain the amount of the liens, and to determine their priority, as above provided, or those hereinafter authorized to determine the rights of parties to funds paid into court, shall not delay the sale, nor affect any other party whose rights are not involved in such proceedings.

*Proceeds of sale remain in court till order of distribution.*

§ 601. [576.] The proceeds of sale, and the securities taken by the referees, or any part thereof, shall be distributed by them to the persons entitled thereto, whenever the court so directs. But if no such direction be given, all such proceeds and securities shall be paid into court, or deposited as directed by the court.

*Continuance of action in order to determine rights of parties.*

§ 602. [577.] When the proceeds of sale of any shares or parcel belonging to persons who are parties to the suit, and who are known, are paid into court, the suit may be continued, as between such parties, for the determination of their respective claims thereto, which shall be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee, at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy by pleadings, as in an original suit.

*Sales by referees must be made by auction.*

§ 603. [578.] All sales of real property made by the referees shall be made by public auction, to the highest bidder, in the manner required for the sale of real property on execution. The notice shall state the terms of sale, and if the property, or any part of it, is to be sold subject to a prior estate, charge, or lien, that shall be stated in the notice.

*Terms of sale may be directed by the court.*

§ 604. [579.] The court shall, in the order of sale, direct the terms of credit which may be allowed for the purchase-money of any portion of the premises, of which it may direct a sale on credit; and for that portion of which the purchase-money is required by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants, or parties out of the state.

**Sale on credit by referees.** — Where the referee accepted a mortgage in lieu of cash, without authority from the court, and the parties took no proceedings to disaffirm the transaction for some years after they learned

the fact, it was held that they had ratified and affirmed the transaction, and a motion to compel the referee to pay the money was denied: *Wiggins v. Howard*, 22 Hun, 126.

*Securities to be taken by referee.*

§ 605. [580.] The referees may take separate mortgages and other securities for the whole or convenient portions of the purchase-money of such parts of the property as are directed by the court to be sold on credit, in the name of the clerk of the court and his successors in office; and for the shares of any known owner of full age, in the name of such owner.

*When estate of tenant for life or years may be sold.*

§ 606. [581.] When the estate of any tenant for life or years in any undivided part of the property in question shall have been admitted by the parties or ascertained by the court to be existing at the time of the order of sale, and the person entitled to such estate shall have been made a party to the suit, such estate may be first set off out of any part of the property, and a sale made of such parcel, subject to the prior unsold estate of such tenant therein; but if, in the judgment



of the court, a due regard to the interest of all the parties require that such estate be also sold, the sale may be so ordered.

*Tenant for life or years may be entitled to gross sum.*

§ 607. [582.] Any person entitled to an estate for life or years in any undivided part of the property, whose estate shall have been sold, shall be entitled to receive such sum in gross as may be deemed a reasonable satisfaction for such estate, and which the person so entitled shall consent to accept instead thereof, by an instrument duly acknowledged and filed with the clerk.

*Court to determine the sum, if consent not given.*

§ 608. [583.] If such consent be not given, as provided in the last section, before the report of sale, the court shall ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be invested for the benefit of the person entitled to such estate for life or years, and shall order the same to be deposited in court for that purpose.

*Provision for unknown tenants for life or years.*

§ 609. [584.] If the persons entitled to such estate for life or years be unknown, the court shall provide for the protection of their rights in the same manner, as far as may be, as if they were known and had appeared.

*Provision for persons having estates in futuro.*

§ 610. [585.] In all cases of sales in partition, when it appears that any person has a vested or contingent future right or estate therein, the court shall ascertain and settle the proportionate value of such contingent or vested right or estate, and shall direct such proportion of the proceeds of sale to be invested, secured, or paid over in such manner as to protect the rights and interests of the parties.

*Terms of sale must be made known.*

§ 611. [586.] In all cases of sales of property, the terms shall be made known at the time, and if the premises consist of distinct farms or lots, they shall be sold separately, or otherwise, if the court so directs.

*Referees or guardians must not be interested in purchase.*

§ 612. [587.] Neither of the referees, nor any person for the benefit of either of them, shall be interested in any purchase, nor shall the guardian of an infant be an interested party in the purchase of any real property being the subject of the suit, except for the benefit of the infant. All sales contrary to the provisions of this section shall be void.

*Report of referees, what it must show.*

§ 613. [588.] After completing the sale, the referees shall report the same to the court, with a description of the different parcels of land sold to each purchaser, the name of the purchaser, the price paid or secured, the terms and conditions of the sale, and the securities, if any, taken. The report shall be filed with the clerk.

*Report of sale may be excepted to — Conveyance by referees.*

§ 614. [589.] The report of sale may be excepted to in writing by any party entitled to a share of the proceeds. If the sale be confirmed, the order of confirmation shall direct the referees to execute conveyances and take securities pursuant to such sale.

*Proceedings when party is purchaser.*

§ 615. [590.] When a party entitled to a share of the property, or an encumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belong to him.

*When proceeds may be invested for person entitled.*

§ 616. [591.] When there are proceeds of sale belonging to an unknown owner, or to a person without the state who has no legal representative within it, or when there are proceeds arising from the sale of an estate subject to the prior estate of a tenant for life or years, which are paid into the court or otherwise deposited by order of the court, the same shall be invested in securities on interest for the benefit of the persons entitled thereto.

*Such investment to be in name of clerk and his successors.*

§ 617. [592.] When the security for the proceeds of sale is taken, or when an investment of any such proceeds is made, it shall be done, except as herein otherwise provided, in the name of the clerk of the court and his successors in office, who shall hold the same for the use and benefit of the parties interested, subject to the order of the court.

*Securities to be delivered to parties entitled on agreement or order.*

§ 618. [593.] When security is taken by the referees on a sale, and the parties interested in such security by an instrument in writing under their hands, delivered to the referees, agree upon the share and proportions to which they are respectively entitled, or when shares and proportions have been previously adjudged by the court, such securities shall be taken in the names of and payable to the parties respectively entitled thereto, and shall be delivered to such parties upon their receipt therefor. Such agreement and receipt shall be returned and filed with the clerk.

*Receipt and investment of interest on invested moneys.*

§ 619. [594.] The clerk in whose name a security is taken, or by whom an investment is made, and his successors in office, shall receive the interest and principal as it becomes due, and apply and invest the same as the court may direct, and shall file in his office all securities taken, and keep an account in a book provided and kept for that purpose in the clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof.

*Owerty, when may be adjudged.*

§ 620. [595.] When it appears that partition cannot be made equal between the parties according to their respective rights, without prejudice to the rights and interests of some of them, the court may adjudge compensation to be made by one party to another on account of the inequality of partition; but such compensation shall not be required to be made to others by owners unknown, nor by infants, unless in case of an infant it appear that he has personal property sufficient for that purpose, and that his interest will be promoted thereby.

And where there is inequality between one portion that cannot be divided, and another portion that can be, an allotment may be made of the several parcels, so as to produce equality, or owerty in money may be adjudged; but in the latter case not against an infant, unless it appears that he has personal property sufficient to pay it, and that his interests will be promoted thereby: *Waller v. Waller*, 3 Abb. N. C. 12.

*Infant's share of proceeds may be paid to guardian.*

§ 621. [596.] When the share of an infant is sold, the proceeds of the sale may be paid by the referees making the sale, to his general guardian, or the special guardian appointed for him in the suit, upon giving the security required by law, or directed by order of the court.

*Guardian of insane, idiotic, etc., may receive the share of his ward.*

§ 622. [597.] The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, whose interest in real property shall have been sold, may receive in behalf of such person his share of the proceeds of such real property from the referees, on executing a bond, with sufficient sureties, approved by the judge of the court, conditioned that he faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled, or to his legal representative.

*Guardian of infant may consent to partition.*

§ 623. [598.] The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his



own affairs, who is interested in real estate held in common or in any other manner, so as to authorize his being made a party to an action for the partition thereof, may consent to a partition without suit, and agree upon the share to be set off to such infant or other person entitled, and may execute a release in his behalf to the owners of the shares or parts to which they may respectively be entitled, and upon an order of the court.

*Costs, when made a lien on the lands, and when may not.*

§ 624. [599.] The costs of partition, including fees of referees and other disbursements, shall be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the decree. In that case there shall be a lien on the several shares, and the decree may be enforced by execution against the parties separately. When, however, a litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them.

## CHAPTER IV.

### OF FORECLOSURE OF MORTGAGES.

- § 625. Mortgage may be foreclosed upon default — *Venue of action.*
- § 626. Remedy confined to mortgaged property, unless agreement otherwise.
- § 627. Judgment — Order of sale.
- § 628. Decree for balance after exhausting mortgaged property.
- § 629. Form of judgments for deficiency.
- § 630. Execution to enforce decree, proceedings under.
- § 631. Only two weeks' notice required to sell for balance.
- § 632. Foreclosure and other remedy not to be prosecuted at same time.
- § 633. Proceeding as to undue installments of the debt.
- § 634. Property must be sold in parcels, if it can be without injury.
- § 635. Application of proceeds — Discount for interests on undue debts.
- § 636. How far this chapter applies to foreclosure of chattel mortgages.
- § 637. Mortgagee of personalty has same remedies as mortgagee of realty.

*Mortgage may be foreclosed upon default — Venue of action.*

§ 625. [609.] When default is made in the performance of any condition contained in a mortgage, the mortgagee or his assigns may proceed in the superior court of the county where the land, or some part thereof, lies, to foreclose the equity of redemption contained in the mortgage.

See § 539, *ante*.

**Mortgagor's right to redeem after foreclosure sale is statutory:** *Parker v. Dacres*, 130 U. S. 43, 48; and is provided for by statute in this state: See act of February 3, 1886, Laws of Wash. 1885-86, p. 116. See notes to § 512, *ante*. A mortgage of real estate simply creates a lien upon it to be enforced by proper judicial proceedings. In this state, there is no equity of redemption in

the mortgagor, because the legal title has not passed from him: *Parker v. Dacres*, 2 Wash. 439.

**Parties to foreclosure suits.**—The general rule is, that all persons beneficially interested in the estate mortgaged, or in the demand secured, should be made parties. It is not, however, absolutely essential; and where the value of the property is less than the mortgage, it may be unimportant to the first mort-

gages to make subsequent encumbrancers and grantees parties. The equity of redemption of a subsequent encumbrancer who has been made a party is by the decree taken away, leaving only the statutory right: *Montgomery v. Tutt*, 11 Cal. 307; *Gamble v. Voll*, 15 Cal. 510; *San Francisco v. Lawton*, 18 Cal. 473; *Burton v. Lies*, 21 Cal. 91; *Carpentier v. Williamson*, 25 Cal. 163; *Skinner v. Buck*, 29 Cal. 255; *Blodworth v. Lake No. 1*, 33 Cal. 264. An assignment of all his right, title, and interest in the land by the mortgagee passes nothing, unless the debt be assigned, the mortgage being a mere incident to the debt: *Peters v. Jamestown Bridge Co.*, 5 Cal. 335; *Nagle v. Macy*, 9 Cal. 428; *Jackson v. Bronson*, 19 Johns. 325; *Ellison v. Daniels*, 11 N. H. 274; *Bell v. Morse*, 6 N. H. 205. The assignee of the mortgagee's interest in the note and mortgage may be substituted for the original plaintiff after judgment by default, without notifying the defendants: *Farrell v. Jones*, 63 N. H. 194.

The owner of the legal title is a necessary party to the foreclosure of a mortgage: *Porter v. Muller*, 3 West Coast Rep. 619. So an owner of an undivided moiety of the premises is a necessary party: *Porter v. Muller*, 3 West Coast Rep. 619. An allegation that a party who is made a co-defendant with the mortga-

gor has or claims to have some interest in or claim upon the mortgaged premises is sufficient, without averring the character of the interest: *Poett v. Stearns*, 28 Cal. 226; *Anthony v. Nye*, 30 Cal. 401.

If the wife claims the premises sought to be foreclosed as her separate property, that justifies plaintiff in making her a defendant: *Kohner v. Ashenauer*, 17 Cal. 580; and unless this is done, she is not bound, though her husband be a party: *Fahie v. Pressey*, 2 Or. 23; 80 Am. Dec. 401. So on land claimed as a homestead: *Marbury v. Ruiz*, 58 Cal. 11; unless it was declared by the husband after and in subordination to a mortgage executed by him: *Graham v. Oviatt*, 58 Cal. 428.

One who holds a tax title is not considered as holding under, but adversely to, the mortgagor, and any decree against the latter must be without prejudice to the tax title: *San Francisco v. Santo*, 18 Cal. 465; 21 Cal. 590; *Elias v. Verdugo*, 27 Cal. 425; *Hibernia S. & L. Soc. v. Ordway*, 38 Cal. 681; *Odell v. Wilson*, 11 Pac. C. L. J. 98. Where a party made defendant in a foreclosure suit as claiming some interest in the land sets up as a full defense a tax title, he cannot object afterward that equity has no jurisdiction over tax titles: *Kelsey v. Abbott*, 13 Cal. 609.

### *Remedy confined to mortgaged property, unless agreement otherwise.*

§ 626. [610.] When there is no express agreement in the mortgage, nor any separate instrument given for the payment of the sum secured thereby, the remedy of the mortgagee shall be confined to the property mortgaged.

### *Judgment — Order of sale.*

§ 627. [611.] In rendering judgment of foreclosure, the court shall order the mortgaged premises, or so much thereof as may be necessary, to be sold to satisfy the mortgage and costs of the action. The payment of the mortgage debt, with interest and costs, at any time before sale, shall satisfy the judgment.

**Decree should direct sale only of mortgaged premises** as described in the mortgage; if the decree direct a sale of more or less, it is erroneous, and should be corrected on motion: *Schwartz v. Palm*, 1 West Coast Rep. 852; *Chase v. Christiansen*, 41 Cal. 256; so also *Marshall v. Livermore S. V. W. Co.*, 4 West Coast Rep. 631. The title ordered to be sold is only

the title which was held by the mortgagor, and that rule is applicable in all foreclosure cases, except, perhaps, when facts of an equitable character are stated which show that a title acquired by the vendee of the mortgagor should also be subject to the lien of the mortgage: *Kreichbaum v. Melton*, 49 Cal. 54.

### *Decree for balance after exhausting mortgaged property.*

§ 628. [612.] When there is an express agreement for the payment of the sum of money secured contained in the mortgage or any separate instrument, the court shall direct in the decree of foreclosure that the balance due on the mortgage, and costs, which may remain unsatisfied after the sale of the mortgaged premises, shall be satisfied from any property of the mortgage debtor.

*Form of judgments for deficiency.*

§ 629. [622.] Judgments over for any deficiency remaining unsatisfied after application of the proceeds of sale of mortgaged property, either real or personal, shall be similar in all respects to other judgments for the recovery of money, and may be made a lien upon the property of a judgment debtor, as other judgments, and the collections thereof enforced in the same manner.

*Execution to enforce decree — Proceedings under.*

§ 630. [613.] The decree may be enforced by execution, as an ordinary decree for the payment of money. The execution shall contain a description of the mortgaged property. The sheriff shall indorse upon the execution the time when he receives it, and he shall thereupon forthwith proceed to sell the mortgaged premises, or so much thereof as may be necessary to satisfy the judgment, interest, and costs, upon giving the notice prescribed in section five hundred, relating to sales of property under execution. And if any part of the judgment, interest, and costs remain unsatisfied, the sheriff shall forthwith proceed to levy upon any property of the defendant not exempt from execution, and all subsequent proceedings under said execution shall conform, except as herein provided, to the provisions regulating sales of property upon executions.

**Confirmation of sale under decree of foreclosure concludes inquiry as to mere irregularities, provided they are not of such a nature as to oust the court of jurisdiction:** *Parker v. Dacres*, 24 Pac. Rep. 192 (Wash.).

*Only two weeks' notice required to sell for balance.*

§ 631. [621.] When sales of other property not embraced in the mortgage or decree of sale are made under the execution to satisfy any deficiency remaining due upon judgment, two weeks' publication of notice of such sale shall be sufficient. Such notice shall be published in a newspaper printed in the county where the property is situated, and if there be no newspaper published therein, then in the most convenient newspaper having a circulation in said county.

"District" omitted, in view of its abolishment by the constitution.

**As to what is sufficient publication of notice in newspaper, see note to *Hoffman v. Anthony*, 75 Am. Dec. 704-713, discussing the general question as to what is proper and sufficient notice in judicial sales.**

*Foreclosure and other remedy not to be prosecuted at same time.*

§ 632. [614.] The plaintiff shall not proceed to foreclose his mortgage while he is prosecuting any other action for the same debt or matter which is secured by the mortgage, or while he is seeking to obtain execution of any judgment in such other action; nor shall he prosecute any other action for the same matter while he is foreclosing his mortgage or prosecuting a judgment of foreclosure.

**Concurrent remedy.** — The above section, forbidding a concurrent action for the recovery of the mortgage debt pending an action to foreclose, is in derogation of common law, and so far as it restricts the remedy, is to be strictly construed; its object was to avoid a multiplicity



of suits and save expenses, — to attain in one suit what formerly would take two: *Hays v. Miller*, 1 Wash. 143. When a written instrument constitutes both a note and a mortgage,

the payee may at his option recover a money judgment on it or foreclose: *Frank v. Pickle*, 2 Wash. 55.

*Proceeding as to undue installments of the debt.*

§ 633. [615.] Whenever a complaint is filed for the foreclosure of a mortgage upon which there shall be due any interest or installment of the principal, and there are other installments not due, if the defendant pay into the court the principal and interest due, with costs, at any time before the final judgment, proceedings thereon shall be stayed, subject to be enforced upon a subsequent default in the payment of any installment of the principal or interest thereafter becoming due. In the final judgment, the court shall direct at what time and upon what default any subsequent execution shall issue.

**Debt payable in installments.** — The mortgagee and those claiming under him have a clear right to bring an action to foreclose when any one installment falls due and is unpaid: *Grattan v. Wiggins*, 23 Cal. 28. A judgment enforcing the lien of the mortgage for one installment is not a bar to another action to enforce the lien of the mortgage for another installment subsequently falling due: *McDougal v. Downey*, 45 Cal. 165. Where property was mortgaged to secure two notes falling due at different periods, and the mortgage was foreclosed by suit upon the note first falling due, and then, after the period for redemption had passed, but before the sheriff had executed his deed, the judgment on the first note was paid, it was held that the payment of this note left the property subject to the mortgage to secure the second note, and that the lien of the mortgage for the latter could not be displaced by a sale under junior encumbrances in proceedings to which the holder of the second note

was not a party: *Hocker v. Reas*, 18 Cal. 650. Where the mortgage is given to secure more than one note, the indorsee of each note takes with it a *pro rata* portion of the security: *Phelan v. Olney*, 6 Cal. 483; *Keyes v. Wood*, 21 Vt. 331; *Pattison v. Hull*, 9 Cow. 751. A mortgagee can by agreement fix the rights of the several holders of several notes to the mortgage security, and such an agreement may be implied from the circumstances of the transfer: *Grattan v. Wiggins*, 23 Cal. 25; *Sherwood v. Dunbar*, 6 Cal. 53; *Keyes v. Wood*, 21 Vt. 331; *Langdon v. Keith*, 9 Vt. 299; *Wright v. Parker*, 2 Aiken, 212; *Pattison v. Hull*, 9 Cow. 752; *McVay v. Bloodgood*, 9 Port. 547; *Banks v. Tarleton*, 23 Miss. 173. And where several such notes have been given, and are assigned to different persons, and the assignee of one note, having the first right to the benefit of the mortgage security, forecloses, such foreclosure and sale operate as an extinguishment of the mortgage: *Grattan v. Wiggins*, 23 Cal. 16.

*Property must be sold in parcels, if it can be without injury.*

§ 634. [616.] In such cases, after final judgment, the court shall ascertain whether the property can be sold in parcels, and if it can be done without injury to the interests of the parties, the court shall direct so much only of the premises to be sold as will be sufficient to pay the amount then due on the mortgage, with costs, and the judgment shall remain and be enforced upon any subsequent default, unless the amount due shall be paid before execution of the judgment is perfected.

**Direction as to sale of parcels.** — It is proper to direct in the judgment the order in which different parcels of the premises must be

sold, according to the equitable rights of the parties: *Coles v. Appleby*, 87 N. Y. 114.

*Application of proceeds — Discount for interests on undue debts.*

§ 635. [617.] If the mortgaged premises cannot be sold in parcels, the court shall order the whole to be sold, and the proceeds of the sale shall be applied first to the payment of the principal due, interest, and costs, and then to the residue secured by the mortgage and not

due; and if the residue do not bear interest, a deduction shall be made therefrom by discounting the legal interest; and in all cases where the proceeds of the sale shall be more than sufficient to pay the amount due and costs, the surplus shall be paid to the mortgage debtor, his heirs and assigns.

**Disposition of surplus.** — In an action to foreclose a mortgage, a subsequent encumbrancer, if a proper party, is entitled to have an appropriate provision in the decree as to the disposition of the surplus, if any: *Ward v. McNaughton*, 43 Cal. 159.

*How far this chapter applies to foreclosure of chattel mortgages.*

§ 636. [618.] The provisions herein contained, so far as the same shall be applicable, shall govern in actions for the foreclosure of chattel mortgages or bills of sale creating liens on personal property.

**Chattel mortgages.** — In this state chattel mortgages constitute a mere security under which no title can pass except by foreclosure and sale: *Byrd v. Forbes*, 3 Wash. 318. A bill of sale absolute in its terms becomes a chattel mortgage upon proof by parol that it was made to secure a debt; at least between the parties, and as to third persons who are affected with notice: *Nicklin v. Betts Spring Co.*, 11 Or. 406.

A chattel mortgage, until it has been foreclosed, conveys no title or interest in the property covered by it, except a mere lien to the mortgagee: *Knowles v. Herbert*, 11 Or. 240.

The mortgagee of chattels, after condition broken, has more than a lien; he has a right to the thing, a qualified ownership, and may, if a delivery of it to him on demand is refused, maintain an action to recover the possession; and an action in the nature of trover will lie at the suit of the mortgagee for a wrongful interference with the property, by which he is deprived of the right of obtaining possession of it: *Chapman v. State*, 5 Or. 432, and *Knowles v. Herbert*, 11 Or. 240, distinguished; *Case T. M. Co. v. Campbell*, 14 Or. 460.

*Mortgagee of personalty has same remedies as mortgagee of realty.*

§ 637. [619.] The mortgagee or holder of the lien may proceed upon his mortgage or lien, [or] if there be a separate obligation in writing to pay the same secured by said mortgage or lien, he may bring suit upon such separate promise. When he proceeds on the mortgage, if there be a specific agreement therein contained for the payment of a certain sum, or there is a separate obligation for the said sum, in addition to a decree of sale of mortgaged property, judgment shall be rendered for the amount due upon said mortgage or other instrument, the payment of which is thereby secured. The decree shall direct the sale of the mortgaged property, and if the proceeds of said sale be insufficient under the execution, the sheriff is authorized to levy upon and sell other property of the mortgage debtor, not exempt from execution, for the sum remaining unsatisfied.

**Chattel mortgages.** — This section and that immediately preceding it provide for the foreclosure of chattel mortgages, and assimilate such foreclosure to that of mortgages on real property: *Byrd v. Forbes*, 3 Wash. 318; see § 627, *ante*.

**Election of remedy — Residue.** — The payee may, at his option, recover either a money judgment or proceed to foreclosure

upon a written instrument constituting not only a mortgage, but also a note and mortgage: *Frank v. Pickle*, 2 Wash. 55. When judgment is not satisfied by a sale of mortgaged premises under a decree of foreclosure, it is the duty of the sheriff to proceed at once to make the residue by levy upon and sale of other property: *Hays v. Miller*, 1 Wash. 143.

## CHAPTER V.

### OF THE APPROPRIATION OF LANDS AND OTHER PROPERTY FOR PUBLIC USE BY THE STATE.

- § 638. Petition to appropriate lands, etc. — Requisites of.
- § 639. Notice — What to contain, and how to be served.
- § 640. Proceedings may be adjourned, and further notice given.
- § 641. Proof and proceedings upon hearing — Jury.
- § 642. Trial, conduct of — Damages, how assessed — Judgment for damages.
- § 643. Judgment of appropriation — Filing and recording thereof.
- § 644. Payment of damages by state, effect of — Appeal, effect of.
- § 645. Claimants, how to procure money — Conflicting claims, how to be determined.
- § 646. Appeal, time for, waiver of, and effect of.
- § 647. Duties of attorney-general and auditor as to award.

#### *Petition to appropriate lands, etc. — Requisites of.*

§ 638. Whenever the legislature of this state shall deem it necessary for the public uses of the state to acquire or appropriate land, real estate, premises, or other property, and shall by act set forth and describe such land, real estate, premises, or other property, it shall be the duty of the attorney-general to present to the superior court of the county in which said land, real estate, premises, or other property so sought to be acquired or appropriated shall be situated, a petition in which the land, real estate, premises, or other property sought to be appropriated shall be described with reasonable certainty, and setting forth the name of each and every owner, encumbrancer, or other person or party interested in the same, or any part thereof, so far as the same can be ascertained from the public records, the object for which the land is sought to be appropriated, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money to such owner or owners, respectively, and to all tenants, encumbrancers, and others interested, for taking such lands, real estate, premises, or other property, or in case a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law, then that the compensation to be made as aforesaid be ascertained and determined by the court or judge thereof. [*March 3, 1891, § 1. In effect immediately.*]

#### *Notice — What to contain, and how to be served.*

§ 639. A notice stating briefly the objects of the petition, and containing a description of the land, real estate, premises, or property sought to be acquired and appropriated, and stating the time and place when and where the same will be presented to the court or the judge thereof, shall be served on each and every person named therein as owner, encumbrancer, tenant, or otherwise interested therein at least



ten days previous to the time designated in such notice for the presentation of such petition. Such service shall be made by delivering a copy of such notice to each of the persons or parties so named therein, if a resident of the state; or in case of the absence of such person or party from his or her usual place of abode, by leaving a copy of such notice at his or her usual place of abode; or in case of a foreign corporation, at its principal place of business in this state, with some person of more than sixteen years of age. In case of domestic corporations, such service shall be made upon the president, secretary, or other director or trustee of such corporation. In case of minors, on their guardians, or in case no guardian shall have been appointed, then on the person who has the care and custody of such minor; in case of idiots, lunatics, or distracted persons, on their guardians, or in case no guardian shall have been appointed, then on the person in whose care or charge they are found. In case the land, real estate, premises, or other property sought to be appropriated is school or county land, the notice shall be served on the auditor of the county in which the land, real estate, premises, or other property sought to be acquired and appropriated is situated. In all cases where the owner or person claiming an interest in such real estate or other property is a non-resident of this state, or where the residence of such owner or person is unknown, and an affidavit of the attorney-general shall be filed that such owner or person is a non-resident of this state, or that after diligent inquiry his residence is unknown or cannot be ascertained, service may be made by publication thereof in any newspaper published in the county where such lands are situated, once a week for two successive weeks; and in case no newspaper is published in said county, then such publication may be had in a newspaper published in the county nearest the county in which lies the land sought to be acquired and appropriated. And such publication shall be deemed service upon each of such non-resident person or persons whose residence is unknown. Such notice shall be signed by the attorney-general of the state of Washington. Such notice may be served by any competent person over twenty-one years of age. Due proof of the service of such notice by affidavit of the person serving the same, or by the printer's affidavit of publication, shall be filed with the clerk of such superior court before or at the time of the presentation of such petition. Want of service of such notice shall render the subsequent proceedings void as to the person not served, but all persons or parties having been served with notice as herein provided, either by publication or otherwise, shall be bound by the subsequent proceedings. In all other cases not otherwise provided for, service of notices, order, and other papers in the proceedings authorized by this act, may be

made as the superior court or judge thereof may direct. [*March 3, 1891, § 2. In effect immediately.*]

"**This act.**"—This chapter, down to and including § 647, embraces the entire act of March 3, 1891.

*Proceedings may be adjourned, and further notice given.*

§ 640. The court or judge may, upon application of the said attorney-general or any owner or party interested, for reasonable cause, adjourn the proceedings from time to time, and may order new or further notice to be given to any party whose interest may be affected. [*March 3, 1891, § 3. In effect immediately.*]

*Proof and proceedings upon hearing—Jury.*

§ 641. At the time and place appointed for hearing said petition, or to which the same may have been adjourned, if the court or judge thereof shall have satisfactory proof that all parties interested in the land, real estate, premises, or other property described in said petition have been duly served with said notice as above prescribed, and shall be further satisfied by competent proof that the contemplated use for which the land, real estate, premises or other property sought to be appropriated is really necessary for the public use of the state of Washington, the court or judge thereof may make an order, to be recorded in the minutes of said court, directing the sheriff to summons from the citizens of the county in which such land, real estate, premises, or other property sought to be acquired or appropriated shall be situated, as many qualified persons as may be necessary in order to form a jury of twelve persons, unless the parties to the proceedings consent to a less number (such number to be not less than three), and such consent shall be entered by the clerk in the minutes of the trial. If necessary to complete the jury, the sheriff, under the direction of the court or judge thereof, shall summon as many qualified persons as may be required to complete the jury from the by-standers, citizens of the county where the land, real estate, premises, or other property is situated. [*March 3, 1891, § 4. In effect immediately.*]

*Trial, conduct of—Damages, how assessed—Judgment for damages.*

§ 642. A judge of the superior court shall preside at the trial, which shall be held at such time as the court or the judge thereof may direct, at the court-house in the county where the land, real estate, premises, or other property sought to be appropriated or acquired is situated, and the jurors at such trial shall make in each case a separate assessment of damages which shall result to any person, corporation, or company, or to any county, by reason of the appropriation and use of such land, real estate, premises, or other property, and shall ascertain, determine, and award the amount of damage to be paid said

owner or owners respectively, and to all tenants, encumbrancers, and others interested for taking such land, real estate, premises, or other property so taken. Upon the trial, witnesses may be examined in behalf of either party to the proceedings as in civil actions; and a witness served with a subpoena in such proceedings shall be punished for failure to appear at such trial, or for perjury, as upon a trial of a civil action. Upon the verdict of the jury, judgment shall be entered for the amount of the damages awarded to such owner or owners, respectively, and to all tenants, encumbrancers, and others interested, for taking such land, real estate, or premises. In case a jury is waived, as in civil cases in courts of record, in the manner prescribed by law, the compensation to be paid for the property sought to be appropriated shall be ascertained and determined by the court or the judge thereof, and the proceedings shall be the same as in trials of an issue of fact by the court. [March 3, 1891, § 5. In effect immediately.]

*Judgment of appropriation—Filing and recording thereof.*

§ 643. At the time of rendering judgment for damages, whether upon default or trial, the court or judge thereof shall also enter a judgment or decree of appropriation of the land, real estate, or premises sought to be appropriated, thereby vesting the legal title to the same in the state of Washington. Whenever said judgment or decree of appropriation is made, a certified copy of such judgment or decree of appropriation may be filed for record in the office of the auditor of the county where the said land, real estate, or other premises are situated, and shall be recorded by said auditor like a deed of real estate, and with like effect. [March 3, 1891, § 6. In effect immediately.]

*Payment of damages by state, effect of—Appeal, effect of.*

§ 644. Upon the entry of judgment upon the verdict of the jury or the decision of the court or judge thereof, awarding damages as hereinbefore prescribed, the state of Washington may make payment of the damages assessed to the parties entitled to the same, and of the costs of the proceedings, by depositing the same with the clerk of said superior court, to be paid out under the direction of the court or the judge thereof; and upon making such payment into the court of the damages assessed and allowed, and of the costs to any land, real estate, premises or other property mentioned in said petition, said state of Washington shall be released and discharged from any and all further liability therefor, unless upon appeal the owner or party interested shall recover a greater amount of damages; and in that case only for the amount in excess of the sum paid into said court and the costs of appeal; provided, that in case of an appeal to the supreme court of the



state by any party to the proceedings, the money so paid into the superior court by the state as aforesaid shall remain in the custody of said court until the final determination of the proceedings by the said supreme court. [*March 3, 1891, § 7. In effect immediately.*]

*Claimants, how to procure money — Conflicting claims, how to be determined.*

§ 645. Any person, corporation, or county claiming to be entitled to any money paid into court, as provided in this act, may apply to the court therefor, and upon furnishing evidence satisfactory to the court that he or it is entitled to the same, the court shall make an order directing the payment to such claimant the portion of such money as he or it shall be found entitled to; but if, upon application, the court or judge thereof should decide that the title to the land, real estate, or premises specified in the application of such claimant was in such condition as to require that an action be commenced to determine the conflicting claims thereto, he shall refuse such order until such action is commenced, and the conflicting claims to such land, real estate, or premises be determined according to law. [*March 3, 1891, § 8. In effect immediately.*]

See note to § 639.

*Appeal, time for, waiver of, and effect of.*

§ 646. Either party may appeal from the judgment for damages entered in the superior court to the supreme court of the state, within thirty days after the entry of judgment as aforesaid, and such appeal shall bring before the supreme court the propriety and justness of the amount of damage in respect to the parties to the appeal; *provided, however,* that upon such appeal no bond shall be required; *and provided further,* that if the owner of land, the real estate, or premises accepts the sum awarded by the jury, the court, or the judge thereof, he shall be deemed thereby to have waived conclusively an appeal to the supreme court, and final judgment by default may be rendered in the superior court as in other cases; *provided further,* that no appeal shall operate so as to prevent the said state of Washington from taking possession of such property pending such appeal, after the amount of said award shall have been paid into court. [*March 3, 1891, § 9. In effect immediately.*]

*Duties of attorney-general and auditor as to award.*

§ 647. Whenever the attorney-general shall file with the auditor of this state a certificate setting forth the amount of any award found against the state of Washington under the provisions of this act, together with the costs of said proceeding, and a description of the lands and premises sought to be appropriated and acquired, and the title of

the action or proceeding in which said award is rendered, it shall be the duty of the state auditor to forthwith issue a warrant upon the state treasury to the order of the attorney-general in a sum sufficient to make payment in money of said award and the costs of said proceeding, and thereupon it shall be the duty of said attorney-general to forthwith pay to the clerk of said court in money the amount of said award and costs. [*March 3, 1891, § 10. In effect immediately.*]

See note to § 639.

## CHAPTER VI.

## OF THE APPROPRIATION OF PRIVATE PROPERTY BY CORPORATIONS.

- § 648. Proceedings to appropriate land, how commenced.
- § 649. How parties brought into court.
- § 650. Proceedings may be adjourned from time to time.
- § 651. Court must be satisfied appropriation is necessary — Calling jury.
- § 652. Manner of conducting trial.
- § 653. What judgment shall be given.
- § 654. Payment of damages by petitioner — On appeal, money remains in court.
- § 655. Disposition of money paid in — Conflicting claims.
- § 656. Either party may appeal.
- § 657. Provision for proceeding with work pending appeal.
- § 658. Appropriation of right of way through defiles.

*Proceedings to appropriate land, how commenced.*

§ 648. Any corporation authorized by law to appropriate land, real estate, premises, or other property for right of way or any other corporate purposes, may present to the superior court of the county in which any land, real estate, premises, or other property sought to be appropriated shall be situated, or to the judge of such superior court in any county where he has jurisdiction or is holding court, a petition in which the land, real estate, premises, or other property sought to be appropriated shall be described with reasonable certainty, and setting forth the name of each and every owner, encumbrancer, or other person or party interested in the same, or any part thereof, so far as the same can be ascertained from the public records, the object for which the land is sought to be appropriated, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by such corporation, to such owner or owners, respectively, and to all tenants, encumbrancers, and others interested, for the taking or injuriously affecting such lands, real estate, premises, or other property, or in case a jury be waived, as in other civil cases in courts of record in the manner prescribed by law, then that the compensation to be made, as aforesaid, be ascertained and determined by the court, or judge thereof. [*March 21, 1890, § 1. In effect immediately.*]

**Eminent domain, generally.** — The state has a general right to condemn land to public use, and she may select her own agent to accomplish this public end: *Rogers v. Bradshaw*, 20 Johns. 735. It seems not to be important whether a corporation, through whose instrumentality the object is to be attained, be a domestic or foreign corporation: *Varrick v. Smith*, 5 Paige, 137; *R. R. Co. v. Davis*, 2 Dev. & B. 451; 2 Gibbs, 447; 2 Kent's Com. 339; *Morris C. & B. Co. v. Townsend*, 24 Barb. 665. Private property cannot be taken for a private use except as provided by the constitution, nor shall it be taken "or damaged" for public or private use without just compensation having

been first made, etc.: See § 16, art. 1, of the constitution. This is an extension of the common provision for the protection of private property: *Transportation Co. v. Chicago*, 99 U. S. 635. The meaning of this extension of the words "or damaged" is very carefully considered in *Denver v. Bayer*, 1 West Coast Rep. 505 (Col.), and many cases construing the expression are there cited and commented upon. It is within the power of the legislature to authorize the straightening, etc., of the channel of a river to protect a populous and important district of the state from threatened inundation and apprehended destruction: *Green v. Swift*, 47 Cal. 539.



Under the provisions of eminent domain, lands and property have been condemned and taken for a United States fort: *Gilmer v. Lime Point*, 19 Cal. 47; and other military purposes: *Gilmer v. Lime Point*, 18 Cal. 229; for municipal purposes, such as roads or streets: *Hidden v. Davison*, 51 Cal. 138; *Ventura County v. Thompson*, 51 Cal. 577; *Weber v. Supervisors*, 59 Cal. 265; *Trahern v. Supervisors*, 59 Cal. 320; *In re Grove Street*, 61 Cal. 438; *Los Angeles v. Waldron*, 65 Cal. 283; water-works: *Mahoney v. Supervisors*, 53 Cal. 383; water-works for the benefit of the University of California: *People v. Pfeiffer*, 59 Cal. 89; supplying the inhabitants of a town with water: *St. Helena Water Co. v. Forbes*, 62 Cal. 182. See *S. V. W. W. v. San Mateo W. W.*, 64 Cal. 123, holding that plaintiffs could not condemn defendant's property, such not being "necessary" for the supplying of water by plaintiffs.

**Water ditches.** — As to these the statute must be strictly pursued: *Dalton v. Water Commissioners*, 49 Cal. 222; *Cummings v. Peters*, 56 Cal. 595; and see *Lorenz v. Jacobs*, 63 Cal. 73, where owners of mining claim were not allowed to condemn land to obtain water to work their claim, although they intended to supply water to others for mining and agricultural purposes.

**Easement may be taken.** — The right to condemn land includes the right to condemn any estate or interest therein which may be necessary for the purposes of the company. And even where the lands are in terms taken, it may be questioned whether the title passes absolutely to the corporation. The prevailing doctrine in such cases is, that the title vests only to the extent necessary for the purposes of the corporation. In regard to railways in particular, it has been repeatedly decided in different states that they take only an easement in land condemned for their use: *Hayne-man v. Blake*, 19 Cal. 596; *Hooker v. Utica and Minden Turnpike Co.*, 12 Wend. 371; *People v. White*, 11 Barb. 26; *Giesy v. Cincinnati etc. R'y Co.*, 4 Ohio, 308; *Barclay v. Howell's Lessee*, 6 Pet. 498.

The only right acquired by a city which condemns land for a public highway is an easement in the property for street purposes: *San José v. Freyschlag*, 56 Cal. 8.

**Water right.** — The right which a man has to the flow of water in its natural course may be condemned for public use: *St. Helena W. Co. v. Forbes*, 62 Cal. 182.

**Power of appropriation.** — The grant of power to appropriate to public use cannot be exercised in such a manner as would obstruct or subvert the public uses thereof: *Oregon R'y Co. v. Portland*, 9 Or. 231. A railroad company appropriating a levee for the purpose of constructing its road cannot erect thereon its buildings and other structures which would create obstructions defeating its public use as a road: *Oregon R'y Co. v. Portland*, 9 Or. 231. Land can only be taken for the particular use for which it is sought to be appropriated: *Oregonian R. & N. Co. v. Oregon R'y Co.*, 10 Or. 444.

### *How parties brought into court.*

§ 649. A notice, stating briefly the objects of the petition, and containing a description of the land, real estate, premises or property

**Proceedings to condemn land** should be brought and prosecuted in the county where the land lies: *Cal. S. R. R. Co. v. S. P. R. R. Co.*, 3 West Coast Rep. 301, 302, 357.

**Railroads.** — Railroads concern the public interest as a matter of legal judgment: *Napa Valley R. R. Co. v. Napa Co.*, 30 Cal. 437. The mere fact that a railroad is owned and operated by a private corporation and for private profit does not prevent it from being also of "public use": *S. & V. R. R. Co. v. City of Stockton*, 41 Cal. 148; *Contra Costa R. R. Co. v. Moss*, 23 Cal. 325. Whether workshops for repairing locomotives and cars are necessary appendages to a railroad, and whether land sought to be condemned for workshops is really needed, are questions for the jury to answer: *S. P. R. R. v. Raymond*, 53 Cal. 223.

The principles applicable to this subject are considered in *Beekman v. Saratoga etc. R. R. Co.*, 3 Paige, 45, 74; *S. F. A. & S. R. R. Co. v. Caldwell*, 31 Cal. 371.

If the court is imposed upon, and permits private land to be taken for a railroad which is used merely to carry coal of the petitioning corporation, it is competent for the court to interpose and to correct the abuse: *People v. Pittsburgh R. R. Co.*, 53 Cal. 695.

**Complaint and its contents.** — The complaint need not distinctly allege the value of the lands sought to be condemned: *United States v. Oregon R'y & N. Co.*, 9 Saw. 62.

For a complaint sufficient for the purpose of instituting proceedings to condemn land for a canal, see *Cummings v. Peters*, 56 Cal. 595. As to the necessity of alleging fruitless attempt to buy the land, see *Contra Costa R. R. Co. v. Moss*, 23 Cal. 323; *Lincoln v. Colusa County*, 28 Cal. 662. For example of a petition insufficient under a statute providing for the opening of streets: *In re Grove Street*, 61 Cal. 438. "That it is now necessary to condemn said land for public use, agreeably to said ordinance," is a sufficient allegation of the necessity of taking the land referred to for a public use, pursuant to a city ordinance, which is set forth: *Los Angeles v. Waldron*, 65 Cal. 283.

For allegations sufficiently complying with subdivision 2 of the above section, see *Cal. S. R. R. Co. v. Colton L. & W. Co.*, 1 West Coast Rep. 470. Sufficient description of property sought to be condemned: *Los Angeles v. Waldron*, 65 Cal. 283.

If two corporations each start proceedings against the same person for the condemnation of the same land, and neither becomes a party to the action brought by the other, the land will belong to the one over whose proceedings the court first acquired jurisdiction. It may be that either party might make the other a party defendant in its suit to condemn; or failing that, that either of the companies might intervene in the proceedings of the other: *Lake Merced Co. v. Cowles*, 31 Cal. 215; *Contra Costa R. R. Co. v. Moss*, 23 Cal. 323.

sought to be appropriated, and stating the time and place when and where the same will be presented to the court, or the judge thereof, shall be served on each and every person named therein as owner, encumbrancer, tenant, or otherwise interested therein, at least ten days previous to the time designated in such notice for the presentation of such petition. Such service shall be made by delivering a copy of such notice to each of the persons or parties so named therein, if a resident of the state; or in case of the absence of such person or party from his or her usual place of abode, by leaving a copy of such notice at his or her usual place of abode; or in case of a foreign corporation, at its principal place of business in this state, with some person of more than sixteen years of age. In case of domestic corporations, such service shall be made upon the president, secretary, or other director or trustee of such corporation. In case of minors or their guardians, or in case no guardian shall have been appointed, then on the person who has the care and custody of such minor. In case of idiots, lunatics, or distracted persons, on their guardian; or in case no guardian shall have been appointed, then on the person in whose care or charge they are found. In case the land, real estate, premises, or other property sought to be appropriated is state, school, or county land, the notice shall be served on the auditor of the county in which the land, real estate, premises, or other property sought to be appropriated is situated. In all cases where the owner or person claiming an interest in such real or other property is a non-resident of this state, or where the residence of such owner or person is unknown, and an affidavit of the agent or attorney of the corporation shall be filed that such owner or person is a non-resident of this state, or that, after diligent inquiry, his residence is unknown, or cannot be ascertained by such deponent, service may be made by publication thereof in any newspaper published in the county where such lands are situated, once a week for two successive weeks; and in case no newspaper is published in said county, then such publication may be had in a newspaper published in the county nearest to the county in which lies the land sought to be appropriated. And such publication shall be deemed service upon each of such non-resident person or persons whose residence is unknown. Such notice shall be signed by the president, manager, secretary, or attorney of the corporation; and in case the proceedings provided for in this chapter are instituted by the owner or any other person or party interested in the land, real estate, or other property sought to be appropriated, then such notice shall be signed by such owner, person, or party interested, or his, her, or its attorney. Such notice may be served by any competent person over twenty-one years of age. Due proof of the service of such notice, by affidavit of the person serving the same, or by the printer's affidavit



of publication, shall be filed with the clerk of such superior court before or at the time of the presentation of such petition. Want of service of such notice shall render the subsequent proceedings void as to the person not served; but all persons or parties having been served with notice as herein provided, either by publication or otherwise, shall be bound by the subsequent proceedings. In all other cases not otherwise provided for, service of notices, order, and other papers in the proceedings authorized by this chapter may be made as the superior court, or the judge thereof, may direct. [*March 21, 1890, § 2. In effect immediately.*]

“Chapter” substituted for “act,” being identical.

**Notice and parties.** — Appearance waives notice: *Kimball v. Supervisors*, 46 Cal. 23. In taking land for a public highway, one who has but an equitable interest therein is not a necessary party: *Hidden v. Davisson*, 51 Cal. 138.

*Proceedings may be adjourned from time to time.*

§ 650. The court or judge may, upon application of the petitioner or of any owner or party interested, for reasonable cause, adjourn the proceedings from time to time, and may order new or further notice to be given to any party whose interest may be affected. [*March 21, 1890, § 3. In effect immediately.*]

*Court must be satisfied appropriation is necessary — Calling jury.*

§ 651. At the time and place appointed for hearing said petition, or to which the same may have been adjourned, if the court, or judge thereof, shall have satisfactory proof that all parties interested in the land, real estate, premises, or other property described in said petition have been duly served with said notice as above prescribed, and shall be further satisfied, by competent proof, that the contemplated use for which the land, real estate, premises, or other property sought to be appropriated is really a public use, and that the public interest requires the prosecution of such enterprise, and that the land, real estate, premises, or other property so sought to be appropriated are required and necessary for the purposes of such enterprise, the court, or judge thereof, may make an order, to be recorded in the minutes of said court, directing the sheriff to summon from the citizens of the county in which any land, real estate, premises, or other property sought to be appropriated shall be situated as many qualified persons as may be necessary in order to form a jury of twelve persons, unless the parties to the proceedings consent to a less number (such number to be not less than three), and such consent shall be entered by the clerk in the minutes of the trial. If necessary to complete the jury, the sheriff, under direction of the court, or judge thereof, shall summon as many qualified persons as may be required to complete the jury from the by-standers, citizens of the county where the land, real estate, premises, or other property is situated. [*March 21, 1890, § 4. In effect immediately.*]



**Jury trial.** — The party whose land is to be taken is entitled to a jury trial to ascertain the amount of his damage: See art. 1, § 16, new constitution; and *Weber v. Santa Clara*, 59 Cal. 265; *Trahern v. Supervisors*, 59 Cal. 320.

**Orders vacating, etc.** — The general rule that an order incidental to proceedings in court and interlocutory in its character may, during the pendency of the proceedings, be modified or vacated altogether, as the circum-

stances appearing from time to time may seem to the court to require, applies to proceedings taken in the exercise of the power of eminent domain: *Templeton v. Twelfth District Court*, 47 Cal. 70.

**Removal of cause.** — The liability to removal to the federal courts is one of the incidents of an ordinary civil suit applicable to proceedings to condemn land: *Northern P. T. Co. v. Lowenberg*, 18 Fed. Rep. 339.

### *Manner of conducting trial.*

§ 652. A judge of the superior court shall preside at the trial, which shall be held at such time as the court, or the judge thereof, may direct, at the court-house in the county where the land, real estate, premises, or other property sought to be appropriated is situated, and the jurors at such trial shall make in each case a separate assessment of damages which shall result to any person, corporation, or company, or to the state, or to any county, by reason of the appropriation and use of such land, real estate, premises, or other property by such corporation, as aforesaid, for any and all corporate purposes, and shall ascertain, determine, and award the amount of damages to be paid to said owner or owners respectively, and to all tenants, encumbrancers, and others interested, for the taking or injuriously affecting such land, real estate, premises, or other property, for the purpose of such enterprise, irrespective of any benefit from any improvement proposed by such corporation. Upon the trial, witnesses may be examined in behalf of either party to the proceedings, as in civil actions; and a witness served with a subpoena in such proceedings shall be punished for failure to appear at such trial, or for perjury, as upon a trial of a civil action. Upon the verdict of the jury, judgment shall be entered for the amount of the damages awarded to such owner or owners respectively, and to all tenants, encumbrancers, and others interested, for the taking or injuriously affecting such land, real estate, premises, or other property. In case a jury is waived as in civil cases in courts of record in the manner prescribed by law, the compensation to be paid for the property sought to be appropriated shall be ascertained and determined by the court, or the judge thereof, and the proceedings shall be the same as in trials of an issue of fact by the court. [March 21, 1890, § 5. In effect immediately.]

**Jury, findings of.** — If the question whether the taking of the property is necessary is submitted to a jury, and they find on the issue, the court has no power to disregard the finding, and make findings of its own: *Wilmington C. Co. v. Dominguez*, 50 Cal. 505. Where there is not a general verdict, and jury trial is not waived, all the issues of fact must be submitted and passed. A new trial will be granted for omission to find on a material issue: *Cummings v. Peters*, 56 Cal. 595.

**Verdict is sufficient in form which finds, in**

effect, that the defendants are entitled to damages in the sum named therein: *Oregon R'y Co. v. Bridwell*, 11 Or. 282.

**Statute to be strictly construed.** — In *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306, 73 Am. Dec. 575, the court said: "All statutory modes of divesting titles are strictly construed, and to be strictly followed": *S. P. R. R. Co. v. Wilson*, 49 Cal. 298; *Oregonian R'y Co. v. Hill*, 9 Or. 377. He who relies for a title upon an extraordinary mode of acquisition, given him, not by the will of the owner, express or implied, but against his will, and by

the mandate of the law, must show for his warrant a strict compliance with those statutory rules from which his title accrues: *Stan-*

*ford v. Worn*, 27 Cal. 174; see *Curran v. Shattuck*, 24 Cal. 427; *Stockton v. Whitmore*, 50 Cal. 554; *Gilmer v. Lime Point*, 19 Cal. 58.

*What judgment shall be given.*

§ 653. At the time of rendering judgment for damages, whether upon default or trial, if the damages awarded be then paid, or upon their payment, if not paid at the time of rendering such judgment, the court, or judge thereof, shall also enter a judgment or decree of appropriation of the land, real estate, premises, right of way, or other property sought to be appropriated, thereby vesting the legal title to the same in the corporation seeking to appropriate such land, real estate, premises, right of way, or other property for corporate purposes. Whenever said judgment or decree of appropriation shall affect lands, real estate, or other premises, a certified copy of such judgment or decree of appropriation may be filed for record in the office of the auditor of the county where the said land, real estate, or other premises are situated, and shall be recorded by said auditor like a deed of real estate, and with like effect. If the title to said land, real estate, premises, or other property attempted to be acquired is found to be defective from any cause, the corporation may again institute proceedings to acquire the same, as in this chapter provided. [*Feb. 25, 1891, § 1.*]

**Assessment of damages, generally.** — If a railroad company, under proceedings of condemnation, enters on the land under section 657, and constructs its road across a tract of land in such manner that it is imbedded in the soil, and becomes part of the realty, and if the proceedings are dismissed, and new proceedings for the condemnation of the land are commenced, the owner is not entitled to have the value of the ties and iron, constituting the track, included in his damages upon final condemnation: *C. P. R. R. Co. v. Armstrong*, 46 Cal. 85. But if the government, through its agents, enters wrongfully on a tract of land, and erects a building thereon which becomes a part of the realty, and then seeks to condemn the land for a public use, the owner has a right to have the value of the structure allowed to him in the estimate of damages: *United States v. Land in Monterey County*, 47 Cal. 515.

Where the land was planted with vines, and cultivated and used as a vineyard, and during the progress of the testimony touching the value of this land a witness was allowed, against the objection of the petitioner, to give his estimate of "the average annual net profits per acre from the strip taken by the railroad company," the court held the evidence inadmissible. The fact to be ascertained was the value of the land at the time of the taking. It is not allowable to arrive at this fact by proof of the annual net profits derived from a particular use. The profit for any year would depend upon many and varying circumstances, such as the nature of the season, the price of labor, the condition of the market as to supply and demand in respect to the particular product, etc. A valuation derived from such evi-

dence would be conjectural and speculative, and would not form a proper basis for an estimate of damages: *S. & C. R. R. Co. v. Galjani*, 49 Cal. 140.

The plaintiffs, seeking to condemn land for a public street, cannot, for the purpose of reducing damage, give evidence that the defendants had dedicated the land to the public as a street. The plaintiffs had alleged defendants to be the owners, and the question of dedication was in no wise involved: *San José v. Reed*, 65 Cal. 243.

**Severance, etc.** — Each succeeding railroad track laid through a public street tends to obstruct in an additional degree ordinary travel through it; and if the whole street be occupied with railroad tracks, it would be comparatively useless for other purposes. A railroad company cannot escape its liability for the damage on the ground that as assignee of another railroad company it was authorized by the ordinance to lay its track through the street. The right to a just compensation for the injuries inflicted on private property by the appropriation of the street to a public use was not contemplated when it was opened and dedicated as a highway for ordinary travel, and is in no wise affected by the question whether the city authorities did or did not consent to such appropriation: *S. P. R. R. Co. v. Reed*, 41 Cal. 261.

If, by constructing the road through the inclosure of a farmer, it is made necessary to build fences on either side of the line in order to protect the crops, his land is injuriously affected to that extent; and the costs of such fences should be included in the report: *Sac. Val. R. R. Co. v. Moffatt*, 6 Cal. 75; *Butte County v. Boylston*, 64 Cal. 110. It would



seem that the quality of the fence must be judged by existing fencing laws: *Enright v. S. F. & S. J. R. R. Co.*, 33 Cal. 234.

Damages resulting to portion not taken, on account of the shape in which it will be left, or from cutting off the front from a county road, are not special damages, and may be proved without being set forth in the answer: *N. P. R. R. Co. v. Reynolds*, 50 Cal. 90. Damage to the portion not taken was expressly claimed and allowed in *San José v. Freyschlag*, 56 Cal. 8.

**Separately assessing compensation.** — Where it is claimed that the commissioners have not assessed "compensation for each piece of land taken, and for each source of damage, separately," an objection to the action of the commissioners on that ground must be taken before the commissioners themselves, to afford them an opportunity to obviate the objection; and if they refuse, an exception must be noted. If the party fails to make the objection before the commissioners, he cannot move to set aside the report on that ground: *Matter of the Clear Lake W. Co.*, 48 Cal. 586.

**Compensation.** — The payment or tender of the money awarded is a condition precedent to the right of the company to enter upon the land for the purposes of construction; and without compliance with the requirement, such entry may be enjoined by a court of equity or prosecuted for in trespass at law: *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306; 73 Am. Dec. 575; *San Francisco etc. R. R. Co. v. Mahoney*, 29 Cal. 112, 117, citing prior cases. There is no vested right to compensation until the property is taken; and there is no obligation to take the property until the terms are satisfactory: *Lamb v. Schottler*, 54 Cal. 319. The amount to be

paid for property appropriated under the law of eminent domain is its value at the time it is taken: *San Francisco etc. R. R. Co. v. Mahoney*, 29 Cal. 112; *California etc. R. R. Co. v. Kimball*, 61 Cal. 90; *Oregon etc. R. R. Co. v. Barlow*, 3 Or. 311. But in *Cal. S. R. R. v. Colton L. & W. Co.*, 1 West Coast Rep. 471, it was determined that the value of the land at the time of assessing the damages was the compensation to which the owner is entitled, as "up to the moment of making the assessment the land, or its equivalent in value, belongs to the owner." The judge at chambers has no power to make an order under this section: *Loomis v. Andreios*, 49 Cal. 239. Bond with sureties is not a certain and adequate compensation: *Sanborn v. Belden*, 51 Cal. 266; see also *Vilhac v. S. & I. R. R. Co.*, 53 Cal. 208. An undertaking to answer for damages is not just compensation, and as a statutory obligation is void: *Id.* So a county cannot condemn land for a road, and undertake to set apart a fund to pay for the same where there is no such fund: *Murphy v. De Groot*, 44 Cal. 52.

**Judgment, form of.** — The court, upon payment of the damages assessed into court, is authorized to render judgment appropriating the lands, nor can the court render any other judgment than the particular kind which the statute authorizes: *Oregonian R'y Co. v. Hill*, 9 Or. 378. Thus no form of judgment *in personam* can be rendered: *Oregon R'y Co. v. Bridwell*, 11 Or. 282.

The only judgment the court is authorized to render is one appropriating the right of way to the appellant's use after payment of the damages assessed by the jury: *Oregonian R'y Co. v. Bridwell*, 11 Or. 282; *Oregonian R'y Co. v. Hill*, 9 Or. 377.

*Payment of damages by petitioner* — *On appeal, money remains in court.*

§ 654. Upon the entry of judgment upon the verdict of the jury, or the decision of the court, or judge thereof, awarding damages, as hereinbefore prescribed, the petitioner, or any officer of or other person duly appointed by said corporation, may make payment of the damages assessed to the parties entitled to the same, and of the costs of the proceedings, by depositing the same with the clerk of said superior court, to be paid out under the direction of the court, or judge thereof; and upon making such payment into the court of the damages assessed and allowed, and of the costs to any land, real estate, premises, or other property mentioned in said petition, such corporation shall be released and discharged from any and all further liability therefor, unless upon appeal the owner, or other person or party interested, shall recover a greater amount of damages; and in that case, only for the amount in excess of the sum paid into said court, and the costs of appeal; *provided*, that in case of an appeal to the supreme court of the state by any party to the proceedings, the money so paid into the superior court by such corporation as aforesaid shall remain in the custody of said court until the final determination of the proceedings by the said supreme court. [March 21, 1890, § 7. *In effect immediately.*]



**Payment, to whom to be made.** — The money must not be paid to mere trespassers, when the true owner obtains possession before the payment: *Rooney v. S. V. R. R. Co.*, 6 Cal. 640.

*Disposition of money paid in—Conflicting claims.*

§ 655. Any person, corporation, state, or county claiming to be entitled to any money paid into court, as provided in this chapter may apply to the court therefor, and upon furnishing evidence satisfactory to the court that he or it is entitled to the same, the court shall make an order directing the payment to such claimant the portion of such money as he or it shall be found entitled to; but if, upon application, the court, or judge thereof, shall decide that the title to the land, real estate, premises, or other property specified in the application of such claimant was in such condition as to require that an action be commenced to determine the conflicting claims thereto, he shall refuse such order until such action is commenced, and the conflicting claims to such land, real estate, premises, or other property be determined according to law. [March 21, 1890, § 8. In effect immediately.]

See note to § 649.

*Either party may appeal.*

§ 656. Either party may appeal from the judgment for damages entered in the superior court to the supreme court of the state within thirty days after the entry of judgment as aforesaid, and such appeal shall bring before the supreme court the propriety and justness of the amount of damages in respect to the parties to the appeal; *provided, however,* that no bond shall be required of any person interested in the property sought to be appropriated by such corporation, but in case the corporation appropriating such land, real estate, premises, or other property is appellant, it shall give a bond like that prescribed in the next following section, to be executed, filed, and approved in the same manner; *and provided further,* that if the owner of the land, real estate, premises, or other property accepts the sum awarded by the jury, the court, or the judge thereof, he shall be deemed thereby to have waived conclusively an appeal to the supreme court, and final judgment by default may be rendered in the superior court as in other cases. [March 21, 1890, § 9. In effect immediately.]

*Provision for proceeding with work pending appeal.*

§ 657. The construction of any railway or canal, or the prosecution of any works or improvements, by any corporation, as aforesaid, shall not be hindered, delayed, or prevented by the prosecution of the appeal of any party to the proceedings; *provided,* the corporation aforesaid shall execute and file with the clerk of the court in which the appeal is pending a bond, to be approved by said clerk, with sufficient sureties, conditioned that the persons executing the same shall

pay whatever amount may be required by the judgment of the court therein, and abide any rule or order of the court in relation to the matter in controversy. [*March 21, 1890, § 10. In effect immediately.*]

*Appropriation of right of way through defiles.*

§ 658. Any railroad company whose right of way passes through any cañon, pass, or defile shall not prevent any other railroad company from the use and occupancy of said cañon, pass, or defile for the purpose of its road in common with the road first located or the crossing of other railroads at grade, and any railroad company authorized by law to appropriate land, real estate, premises, or other property for right of way, or any other corporate purpose, may present a petition in the manner and form hereinbefore provided for the appropriation of a right of way through any cañon, pass, or defile for the purpose of its road, where right of way has already been located, condemned, or occupied by some other railroad company through such cañon, pass, or defile for the purpose of its road, and thereupon like proceedings shall be had upon such petition as herein provided in other cases; and at the time of rendering judgment for damages, whether upon default or trial, the court, or judge thereof, shall enter a judgment or decree authorizing said railroad company to occupy and use said right of way, road-bed, and track, if necessary, in common with the railroad company or companies already occupying the same, and defining the terms and conditions upon which the same shall be so occupied and used in common. [*March 21, 1890, § 12. In effect immediately.*]

Section 11 of the act of March 21, 1890, expressly repeals all previous statutes for appropriation of private property by corporations, saving only such rights as might be necessary to perfect proceedings then pending.

## CHAPTER VII.

### OF ACTIONS FOR WASTE, TRESPASS, AND NUISANCE.

- § 659. Waste is the subject of an action, as other wrongs.
- § 660. Action for waste maintainable — Treble damages and forfeiture.
- § 661. Action for willful trespass — Treble damages.
- § 662. Involuntary trespass shown at trial.
- § 663. Injunction to prevent trespass.
- § 664. What are actionable nuisances.
- § 665. Who may have action for nuisance — Proceedings therein.
- § 666. Warrant for abatement of nuisance.
- § 667. Stay of warrant to allow defendant to abate nuisance.

*Waste is the subject of an action, as other wrongs.*

§ 659. [600.] Wrongs heretofore remediable by action of waste shall be subjects of actions, as other wrongs.

*Action for waste maintainable — Treble damages and forfeiture.*

§ 660. [601.] If a guardian, tenant in severalty or in common,

for life or for years, of real property, commit waste thereon, any person injured thereby may maintain an action at law for damages therefor against such guardian or tenant; in which action there may be judgment for treble damages, forfeiture of the estate of the party committing or permitting the waste, and of eviction from the property. But judgment of forfeiture and eviction shall only be given in favor of the person entitled to the reversion against the tenant in possession, when the injury to the estate in reversion is determined in the action to be equal to the value of the tenant's estate or unexpired term, or to have been done or suffered in malice.

See note to next section.

*Action for willful trespass — Treble damages.*

§ 661. [602.] Whenever any person shall cut down, girdle, or otherwise injure or carry off any tree, timber, or shrub on the land of another person, or on the street or highway in front of any person's house, village, town, or city lot, or cultivated grounds, or on the commons or public grounds of any village, town, or city, or on the street or highway in front thereof, without lawful authority, in an action by such person, village, town, or city, against the person committing such trespasses, or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefor, as the case may be.

**Trespass for cutting trees, etc.** — This section was not intended to apply to cases in which the trespass was committed through an innocent mistake as to the boundary or location of a tract of land claimed by the defendant: See the next section; *Barnes v. Jones*, 51 Cal. 303; *Batchelder v. Kelly*, 10 N. H. 436; 34 Am. Dec. 174; *Russell v. Irby*, 13 Ala. 131; *Perkins v. Hackelman*, 26 Miss. 41; 59 Am. Dec. 243; *Whitecraft v. Vanderver*, 12 Ill. 235.

damages under this section in an action, he should so state in his complaint and demand judgment therefor, so that defendant may be apprised of the claim; and the facts stated must bring the claim within the statute: *Neff v. Pennoyer*, 3 Saw. 495. Defendant may then defend by specially pleading any of the causes mentioned in the next section: *Neff v. Pennoyer*, 3 Saw. 495.

**Involuntary trespass:** See next section.

When the plaintiff seeks to recover treble

*Involuntary trespass shown at trial.*

§ 662. [603.] If upon trial of such action it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose direction the act was done, or that such tree or timber was taken from uninclosed woodlands, for the purpose of repairing any public highway or bridge upon the land, or adjoining it, judgment shall only be given for single damages.

See note to last preceding section.

*Injunction to prevent trespass.*

§ 663. [604.] When any two or more persons are opposing claimants under the laws of the United States to any land in this state, and



one is threatening to commit upon such land waste which tends materially to lessen the value of the inheritance, and which cannot be compensated by damages, and there is imminent danger that unless restrained such waste will be committed, the party, on filing his complaint and satisfying the court or judge of the existence of the facts, may have an injunction to restrain the adverse party. In all cases he shall give notice and bond as is provided in other cases where injunction is granted, and the injunction when granted shall be set aside or modified as is provided generally for injunction and restraining orders.

*What are actionable nuisances.*

§ 664. [605.] The obstruction of any highway, or the closing of the channel of any stream used for boating or rafting logs, lumber, or timber, or whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance, and the subject of an action for damages and other and further relief.

**Nuisance defined.** — It will be noticed that this section provides only for recovery of damages for and abatement of a *private* nuisance. A nuisance is said to be anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstruct the free passage or use in the customary manner of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway. A public nuisance is one which affects, at the same time, an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. Every nuisance not included in this definition is private: See Wood on Nuisances, sec. 1.

A private nuisance results from the violation of private rights, and produces damage to but one or a few persons. A leaning brick wall projecting over the house of an adjoining proprietor so as to prevent the raising and repairing of the house is a nuisance, although the wall is safe and secure: *Meyer v. Metzler*, 51 Cal. 142. So with a house the eaves of which project over the lands of another: *Penruddock's Case*, 5 Coke, 100. The principle is, that a person cannot use his property, even in a lawful business, so as seriously to interfere with another in the enjoyment of his property: *Tuebner v. Cal. St. R. R. Co.*, 52 Cal. 529, a case where the defendant was compelled to build a higher smoke-stack so as to carry off the soot.

In an action to abate as a nuisance a boom across a navigable river, made to intercept saw-logs, floated down in time of high water, and for damages, the plaintiff must show that the obstruction was unreasonable: *Brown v. Kentfield*, 50 Cal. 129. A railroad company is not responsible for the acts of its employees in

creating a nuisance by using a culvert under the railroad near plaintiff's residence as a privy, *Hopkins v. W. P. R. R. Co.*, 50 Cal. 191. Actions for diversion of the water of ditches are in the nature of actions for the abatement of nuisances, and may be maintained by tenants in common in a joint action. A ditch to carry off water rightfully flowing to a mining claim is as much a nuisance as a dam to flood it: *Parke v. Kitham*, 8 Cal. 77. In obstructing a highway, whether it is a highway by water or by land, the rights of the person whose use of it is obstructed are the same: *Blanc v. Klumpke*, 29 Cal. 158. But the highway must be improved, capable of being used as a street by the public, before a party can complain that an obstruction is a nuisance: *George v. N. P. T. Co.*, 50 Cal. 589; *Schulte v. N. P. T. Co.*, 50 Cal. 592.

**Damages for nuisance.** — A public nuisance may be a private nuisance, and a person injured thereby may have his action: *Yolo Co. v. Sacramento*, 36 Cal. 195; *Blanc v. Klumpke*, 29 Cal. 156. But he can only recover if he has suffered damage peculiar to himself, and differing in kind from the public injury: *Jarris v. S. C. V. Co.*, 52 Cal. 438; *Payne v. McKinley*, 54 Cal. 532; *Severy v. U. P. R. R.*, 51 Cal. 194. And a complaint which does not show the fact of special or extraordinary damage in such a case is insufficient: *Roseburg v. Abraham*, 8 Or. 509. The facts that the parties who bring an action to abate a nuisance caused by obstructing a public road own land fronting on the road, and have no other means of access, do not show such special damage to the plaintiffs in addition to that sustained by the public as enables them to maintain the action: *Aram v. Schottenberger*, 41 Cal. 449. The special damage must be such as might legitimately flow from the nuisance, and must, of course, be specially pleaded: *L. T. Co. v. S. W. W. R. Co.*, 41 Cal. 564.

*Who may have action for nuisance — Proceedings therein.*

§ 665. Such action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance. If judgment be given for the plaintiff in such action, he may, in addition to the execution to enforce the same, on motion, have an order allowing a warrant to issue to the sheriff to abate such nuisance. Such motion shall be allowed, of course, unless it appear on the hearing that the nuisance has ceased, or that such remedy is inadequate to abate or prevent the continuance of the nuisance, in which latter case the plaintiff may have the defendant enjoined. [February 25, 1891, § 1.]

**Abatement of nuisance — Injunction.**

— While a party who recovers damages may have the nuisance abated (*Trullinger v. Marsh*, 6 Or. 356), an action cannot be maintained to abate a nuisance till it actually become such: *Bear River etc Co. v. Boles*, 24 Cal. 362. The party may, however, have an injunction to stay the threatened injury to his property: *Parrish v. Stephens*, 1 Or. 73. This the only remedy adequate to his case: *Tuolumne W. Co. v. Chapman*, 8 Cal. 392; *Buckalew v. Estell*, 5 Cal. 108; *Ramsay v. Chandler*, 3 Cal. 90; *Kittle v. Pfeiffer*, 22 Cal. 491. But an injunction will not lie to restrain the sale of intoxicating liquors to plaintiff's employees, on the ground that some of such employees become intoxicated, and are disqualified from rendering service to their employer: *Northern Pacific R. R. Co. v. Whalen*, 3 Wash. 452.

Unless on the hearing (after recovery of damages) of the motion to abate the nuisance it appears that it has ceased, or that the remedy would be inadequate, the court must order the warrant provided by this section to issue. The court cannot direct defendant to abate the nuisance established on the trial, nor prescribe the mode in which it is to be done. Its jurisdiction extends to making the order allowing the warrant, leaving to the sheriff the duty to properly execute it; and the sheriff's duty is to abate the nuisance with as little injury to defendant as possible; and for any unnecessary damage he is liable to the injured party: *Ankeny v. Fairview Milling Co.*, 10 Or. 300.

In an action for damages for a private nuisance,

where the plaintiff recovers a verdict, and judgment is entered thereon in his favor, and the record does not show on its face the particular nuisance established by the verdict, it is competent for the court in which the trial was had, in making the order allowing the warrant to issue for its abatement, to identify such nuisance by means of its own knowledge from the evidence introduced on the trial and applicable to the issues made in the pleadings: *Ankeny v. Fairview Milling Co.*, 10 Or. 300.

Affidavits or other documents, properly filed and considered by the court below, on the hearing of the motion for an order allowing a warrant to issue to the sheriff for the abatement of a private nuisance, constitute parts of the record of such proceeding without being made such by a bill of exceptions. There is no technical record or "judgment roll" in such cases, the statute not having prescribed of what it shall consist; therefore it includes all papers properly filed in the court below: *Ankeny v. Fairview Milling Co.*, 10 Or. 300.

If the case is tried with a jury, a verdict for damages includes a finding for the plaintiff on all the issues, and entitles him to an order abating the nuisance: *Learned v. Castle*, 67 Cal. 41.

**Parties.** — Joining as co-defendants parties who contribute to the nuisance: *Woodruff v. N. B. Gravel Mining Co.*, 16 Fed. Rep. 25. Neither the county nor the supervisors are necessary parties to an action to abate a nuisance caused by the interference of private individuals in a public road: *Learned v. Castle*, 67 Cal. 41.

*Warrant for abatement of nuisance.*

§ 666. [607.] If the order be made, the clerk shall thereafter, at any time within six months, when requested by the plaintiff, issue such warrant directed to the sheriff, requiring him forthwith to abate the nuisance at the expense of the defendant, and return the warrant as soon thereafter as may be, with his proceedings indorsed thereon. The expenses of abating the nuisance may be levied by the sheriff on the property of the defendant, and in this respect the warrant is to be deemed an execution against property.



*Stay of warrant to allow defendant to abate nuisance.*

§ 667. [608.] At any time before the order is made or the warrant issues, the defendant may, on motion to the court, or judge thereof, have an order to stay the issue of such warrant for such period as may be necessary, not exceeding six months, to allow the defendant to abate the nuisance himself, upon his giving bond to the plaintiff, in a sufficient amount, with one or more sureties, to the satisfaction of the court, or judge thereof, that he will abate it within the time and in the manner specified in such order. The sureties shall justify as bail upon arrest. If the defendant fails to abate such nuisance within the time specified, the warrant for the abatement of the nuisance may issue as if the same had not been stayed.

## CHAPTER VIII.

### OF ACTIONS TO ESTABLISH BOUNDARIES OF LAND.

§ 668. Lost and obscured boundary lines may be established by action.

§ 669. Commissioners may be appointed — Their duties.

§ 670. Such actions conducted as other equitable actions.

*Lost and obscured boundary lines may be established by action.*

§ 668. Whenever the boundaries of lands between two or more adjoining proprietors shall have been lost, or by time, accident, or any other cause shall have become obscure or uncertain, and the adjoining proprietors cannot agree to establish the same, one or more of said adjoining proprietors may bring his civil action in equity, in the superior court for the county in which such lands, or part of them, are situated, and such superior court, as a court of equity, may, upon such complaint, order such lost or uncertain boundaries to be erected and established and properly marked. [January 16, 1886, § 1. *In effect immediately.*]

*Commissioners may be appointed — Their duties.*

§ 669. Said court may, in its discretion, appoint commissioners, not exceeding three competent and disinterested persons, one or more of whom shall be practical surveyors, residents of the state, which commissioners shall be, before entering upon their duties, duly sworn to perform their said duties faithfully, and the said commissioners shall thereupon survey, erect, establish, and properly mark said boundaries, and return to the court a plat of said survey, and the field-notes thereof, together with their report. Said report shall be advisory, and either party may except thereto, in the same manner as to a report of referees. [January 16, 1886, § 2. *In effect immediately.*]



*Such actions conducted as other equitable actions.*

§ 670. The proceedings shall be conducted as other civil actions, and the court, on final decree, shall apportion the costs of the proceedings equitably, and the costs so apportioned shall be a lien upon the said lands, severally, as against any transfer or encumbrance made of or attaching to said lands, from the time of the filing of the complaint; *provided*, a notice of *lis pendens* is filed in the auditor's office of the proper county, in accordance with law. [January 16, 1886, § 3. *In effect immediately.*]

## CHAPTER IX.

### OF ACTIONS BY AND AGAINST PUBLIC CORPORATIONS.

- § 671. Actions maintainable by such corporation.
- § 672. In what cases actions may be maintained against such corporations.
- § 673. Verification of pleadings by such corporations.
- § 674. Manner of enforcing judgment against such corporations.
- § 675. Officers refusing to satisfy may be attached.
- § 676. No action to enjoin collection of taxes without payment of taxes justly due.
- § 677. What complaint must state in such actions.
- § 678. Construction of these provisions.

*Actions maintainable by such corporation.*

§ 671. [661.] An action at law may be maintained by any county, incorporated town, school district, or other public corporation of like character in this state, in its corporate name, and upon a cause of action accruing to it, in its corporate character, and not otherwise, in either of the following cases:—

1. Upon a contract made with such public corporation;
2. Upon a liability prescribed by law in favor of such public corporation;
3. To recover a penalty or forfeiture given to such public corporation;
4. To recover damages for an injury to the corporate rights or property of such public corporation.

**Action by county.** — Counties are corporations, and can sue and be sued: *Price v. County of Sacramento*, 6 Cal. 254. A county is the proper party plaintiff to object to a contract made by the board of county commissioners for building a jail: *Smith v. Myers*, 15 Cal. 33; and an action may be brought in its name to recover money belonging to the general fund of the county: *Solano Co. v. Neville*, 27 Cal. 465; *Sharp v. Contra Costa Co.*, 34 Cal. 284.

*For what causes actions may be maintained against such corporations.*

§ 672. [662.] An action may be maintained against a county, or other of the public corporations mentioned or described in the preceding section, either upon a contract made by such county or other public corporation in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation.

**Action against county.** — The right to sue a county is not limited to cases of tort, malfeasance, etc., but is given in every case of account after presentation to and rejection by the board of supervisors: *Price v. County of Sacramento*, 6 Cal. 254. A county is not liable for purchase-money paid at a void tax sale: *Loomis v. Los Angeles Co.*, 59 Cal. 456. A claim for actionable damages arising from the failure of the city or county to abate a nuisance need not be presented for payment before an action can be maintained: *Bloom v. City and County of San Francisco*, 64 Cal. 503. A county is not liable for a failure of the board of commissioners to issue bonds required by law: *Santa Cruz B. R. Co. v. County of Santa Clara*, 62 Cal. 180.

**Action against municipalities, etc.** — Incorporated cities are not liable for injuries to private individuals caused by the neglect of the city officers in keeping its streets in repair, unless made so liable by the acts under which they are incorporated: *Winbigler v. Los An-*

*geles*, 45 Cal. 36; *Tranter v. City of Sacramento*, 61 Cal. 271. In this respect they are not distinguishable in principle from counties: See case last cited. But in *Sheridan v. City of Salem*, 14 Or. 328, it was held that a municipal or other public corporation is liable for damages occasioned to passengers in consequence of the neglect of its officers to keep its streets and highways in repair, unless exempted from such liability by express provision of the charter. Under some circumstances a municipal corporation may become liable by implication; a corporate act, as the passing of an ordinance, not being in all cases essential to fasten a liability: *Gas Co. v. San Francisco*, 9 Cal. 453. As a general rule, however, a city is only liable upon express contracts authorized by ordinance. The exceptions relate to liabilities from the use of money or other property, which does not belong to it, and to liabilities springing from neglect of duties imposed by its charter: *Argenti v. City of San Francisco*, 16 Cal. 256.

### *Verification of pleadings by such corporations.*

§ 673. [663.] In such actions, the pleadings of the public corporation shall be verified by any of the officers representing it in its corporate capacity, in the same manner as if such officer was a defendant in the action, or by the agent or attorney thereof, as in ordinary actions.

### *Manner of enforcing judgment against such corporations.*

§ 674. [664.] If judgment be given for the recovery of money or damages against such county or other public corporation, no execution shall issue thereon for the collection of such money or damages, but such judgment in such respect shall be satisfied as follows: —

1. The party in whose favor such judgment is given may, at any time thereafter, when execution might issue on a like judgment against a private person, present a certified transcript of the docket thereof to the officer of such county or other public corporation who is authorized to draw orders on the treasury thereof.

2. On the presentation of such transcript, such officer shall draw an order on such treasurer for the amount of the judgment, in favor of the party for whom the same was given. Thereafter such order shall be presented for payment and paid with like effect and in like manner as other orders upon the treasurer of such county or other public corporation.

3. The certified transcript herein provided for shall not be furnished by the clerk, unless at the time an execution might issue on such judgment if the same were against a private person, nor until satisfaction of the same judgment in respect to such money or damages be acknowledged as in ordinary cases. The clerk shall include in the transcript the memorandum of such acknowledgment of satisfaction and the entry thereof. Unless the transcript contain such memorandum, no order upon the treasurer shall issue thereon.

*Officer refusing to satisfy may be attached.*

§ 675. [665.] Should the proper officer of said corporation fail or refuse to satisfy said judgment, as in the preceding section provided, an attachment may be issued to compel his performance of said duty.

*No action to enjoin collection of taxes without payment of taxes justly due.*

§ 676. Hereafter no action or proceeding shall be commenced or instituted in any court of this state to enjoin the sale of any property for taxes, or to enjoin the collection of any taxes, or for the recovery of any property sold for taxes, unless the person or corporation desiring to commence or institute such action or proceeding shall first pay, or cause to be paid, or shall tender to the officer entitled under the law to receive the same, all taxes, penalties, interest, and costs justly due and unpaid from such person or corporation on the property sought to be sold or recovered. [February 2, 1888, § 1. In effect immediately.]

*What complaint must state in such actions.*

§ 677. In all actions to enjoin the sale of any property for taxes, in all actions to enjoin the collection of any tax, and in all actions for the recovery of any property sold for taxes, the complainant must state and set forth specially in his complaint the tax that is justly due, with penalties, interest, and costs, the tax alleged to be illegal, and point out the illegality thereof; that the taxes for that and previous years have been paid; and when the action is for the recovery of lands or other property sold for taxes against the person or corporation in possession thereof, that all taxes, penalties, interest, and costs paid by the purchaser at tax sale, his assignees or grantees, have been fully paid or tendered, and payment refused. [February 2, 1888, § 2. In effect immediately.]

*Construction of these provisions.*

§ 678. The provisions of sections six hundred and seventy-six and six hundred and seventy-seven shall be construed as imposing additional conditions upon the power of the court or judge in granting injunctions to those already imposed, and of imposing additional conditions upon the complaint in actions for the recovery of property sold for taxes. [February 2, 1888, § 3. In effect immediately.]

Instead of the numbers given in this section, the original act has the words "this act." The act consisted of these three sections only.



## CHAPTER X.

## OF ACTIONS TO PREVENT USURPATIONS OF OFFICE OR FRANCHISE, AND TO AVOID CHARTERS AND LETTERS PATENT.

- § 679. Against whom, and in what cases, action may be commenced by information.
- § 680. Information to be filed by prosecuting attorney.
- § 681. Of what the information consists.
- § 682. Name of person entitled to office must be stated.
- § 683. Appearance and pleading same as in other actions.
- § 684. Judgment in cases to try title to office.
- § 685. Relator takes office under the judgment.
- § 686. Defendant may be attached for refusing to obey judgment.
- § 687. Judgment not a bar to action for damages.
- § 688. Consequences of judgment against usurper.
- § 689. Proceedings against corporations.
- § 690. Action to recover forfeited property.
- § 691. Prosecuting attorney not liable for costs — Relator liable.
- § 692. Information for annulling of patent.
- § 693. Action may be on relation of prosecuting attorney or of private relator.

*Against whom, and in what cases, action may be commenced by information.*

§ 679. [702.] An information may be filed against any person or corporation in the following cases:—

1. When any person shall usurp, intrude upon, or unlawfully hold or exercise any public office or franchise within the state, or any office in any corporation created by the authority of the state;

2. When any public officer shall have done or suffered any act, which, by the provisions of law, shall work a forfeiture of his office;

3. When several persons claim to be entitled to the same office or franchise, one information may be filed against any or all such persons in order to try their respective rights to the office or franchise;

4. When any association or number of persons shall act within this state as a corporation, without being legally incorporated;

5. Or where any corporation do or omit acts which amount to a surrender or a forfeiture of their rights and privileges as a corporation, or where they exercise powers not conferred by law.

**Quo warranto and scire facias.** — The relief formerly had under the writ of *quo warranto*, and proceedings by information in the nature thereof, may now be obtained by civil action as herein provided: *People v. Hall*, 80 N. Y. 117; *State v. Douglas etc. Co.*, 10 Or. 199.

It is said that proceedings in the nature of a *quo warranto* are properly commenced in any county in the state, for the residence of the people as a party extends to every county: *People v. Cook*, 6 How. Pr. 448.

When under the following sections a district attorney files an information or commences a proceeding in the nature of a *quo warranto*, he has as much sole control over it as the attorney-general would have in a like case at common law. A private relator, though his name be

mentioned, in a *distinctly state action* under these sections, is a mere stranger, and has no control of the proceedings, and his name may be stricken out as surplusage: *State v. Douglas Co. Road Co.*, 10 Or. 198; *People v. Trustees*, 5 Wend. 219.

**Action to annul existence of corporation.** — The statute in this proceeding must be strictly pursued: *In re Dubois*, 15 How. Pr. 7. To form foundation for a judgment for forfeiture of a franchise not originally usurped, the verdict should find not only the fact of breach of the condition of its existence, but should find the facts amounting to a breach: *People v. W. T. & B. Co.*, 47 N. Y. 586.

The district attorney has full control of the proceeding: *State v. Douglas Co. Road Co.*, 10

Or. 201; *State v. Brown*, 5 R. I. 6; and he may in his discretion discontinue the proceeding: *People v. Tobacco Mfg. Co.*, 42 How. Pr. 162. The state may waive the forfeiture of the charter; and its power to do so, acting through

its attorney, cannot be controlled by the court: *People v. Tobacco Mfg. Co.*, 42 How. Pr. 162; *State v. Douglas Co. Road Co.*, 10 Or. 202; *People v. Fairchild*, 67 N. Y. 334; *State v. McConnell*, 3 Lea, 339.

*Information to be filed by prosecuting attorney.*

§ 680. [703.] The information may be filed by the prosecuting attorney in the superior court of the proper county, upon his own relation, whenever he shall deem it his duty to do so, or shall be directed by the court or other competent authority, or by any other person on his own relation, whenever he claims an interest in the office, franchise, or corporation which is the subject of the information.

**Action for usurpation of office or franchise.** — The existence of the office claimed is necessarily involved in a proceeding of this kind, and may properly be raised: *People v. Carpenter*, 24 N. Y. 86. "Office" signifies a place of trust. In legal idea, an office is an entity, and may exist in fact, though it be without an incumbent. In this sense the word "office" is used in a number of instances in the constitution, and also in the statutes. An office is also defined to be a right to exercise a public function or employment, and to take the fees and emoluments belonging to it: *Miller v. Supervisors etc.*, 25 Cal. 98; *People v. Stratton*, 28 Cal. 382. The action does not lie against a mere employee or servant: *People v. Hills*, 1 Lans. 202.

It was held that an information in the nature of a *quo warranto* was the proper proceeding to try title to an office: *People v. Scannell*, 7 Cal. 432; *People v. Olds*, 3 Cal. 175; 58 Am. Dec. 398; *Satterlee v. San Francisco*, 23 Cal. 320; *People v. Sassorich*, 29 Cal. 420; *Hull v. Superior Court*, 63 Cal. 174, 179; *Buckner v. Veuve*, 63 Cal. 304. Neither *certiorari*: *Hull v. Superior Court*, 63 Cal. 174, 179; nor prohibition, *Buckner v. Veuve*, 63 Cal. 304; nor writ of mandate: *Kelly v. Edwards*, 69 Cal. 460; nor injunction to restrain usurpation: *Palmer v. Foley*, 44 How. Pr. 308; 45 How. Pr. 110, affirmed, — is the proper remedy. Office of pilot was held to fall within the definition of "office": *Palmer v. Woodbury*, 14 Cal. 44. A certificate of election is only *prima facie* evidence of right to an office, and one who enters under such a certificate may be an "intruder" and "usurper." If he has not the right and the real title, he holds unlawfully: *People v. Jones*, 20 Cal. 53; *Magee v. Calaveras*, 10 Cal. 376. But one who is the actual incumbent of the office — whose right is questioned solely on the ground of the sufficiency of his bonds — is in possession by color of right, and entitled to act as officer until his right is properly questioned by information in the nature of *quo warranto*: *Hull v. Superior Court*, 63 Cal. 174.

A provision for proceedings for contesting elections does not take away the right of the people in their sovereign capacity to inquire into the authority by which any person assumes

to exercise the functions of a public office or franchise. The remedies are distinct: *People v. Holden*, 28 Cal. 129. The jurisdiction vested in a board of trustees of a municipality to "judge of the qualifications and election of their own members" does not oust the jurisdiction of a court to try the question of usurpation of such offices: *State v. McKinnon*, 8 Or. 493; see *Robertson v. Groves*, 4 Or. 214. But see *People v. Metzker*, 47 Cal. 524, where it was held that where the charter of a city provides that the common council shall "judge of the qualifications, elections, and returns of their own members," the council possesses exclusive authority, and the courts have no jurisdiction in the premises. This, however, is probably because the statute makes the decision of the board final: See *People v. Collins*, 34 How. Pr. 336.

The right to take and hold office cannot be inquired into in a collateral action or proceeding: *Turner v. Maloney*, 13 Cal. 621; *People v. Olds*, 3 Cal. 174, 175; 58 Am. Dec. 398; *People v. Collins*, 7 Johns. 549; *Wilcox v. Smith*, 5 Wend. 231; 21 Am. Dec. 213; *Hall v. Luther*, 13 Wend. 491; *Shores v. Scott R. W. Co.*, 17 Cal. 626; *Satterlee v. San Francisco*, 23 Cal. 320. The use of an abbreviated corporate name by the officers is not a usurpation, nor will it support a *quo warranto*: *People v. Bogart*, 45 Cal. 78. In a proceeding to remove an officer for promises to reward a voter, the complaint is insufficient unless it appears that the promise if performed would inure to the benefit of the voter: *State v. Church*, 5 Or. 375.

This section makes it discretionary with the attorney whether it is proper that an action to try the right to an office or franchise should be brought or not, and the exercise of his discretion here is a judicial act, from which there is no appeal, and over which courts have no control: *People v. Attorney-General*, 13 How. Pr. 179; 22 Barb. 114; *People v. Fairchild*, 8 Hun, 334.

This proceeding does not lie before the commencement of the term of office; for the court can only give judgment of ouster: *People v. McCullough*, 11 Abb. Pr., N. S., 129. An action to try title to office is strictly legal in its nature, and the issues are therefore triable by a jury: *People v. A. & S. R. R. Co.*, 57 N. Y. 161.

*Of what the information consists.*

§ 681. [704.] The information shall consist of a plain statement



of the facts which constitute the grounds of the proceedings, addressed to the court.

**Complaint for usurpation of office or franchise.** — A complaint in an action for the usurpation of the franchise of a municipal corporation which shows that the defendant is exercising the same without being incorporated according to law states facts sufficient to constitute a cause of action, which may be maintained against the defendant in its assumed corporate name without joining the trustees. Their liability is for a usurpation of office, and not of a franchise: *People v. City of Riverside*, 66 Cal. 288.

The court held a complaint sufficient when it showed that defendant was in possession of the place without lawful authority: *Palmer v. Woolbury*, 14 Cal. 44.

**Answer, and parties defendant.** — The defendant may set forth in his answer more

than one defense: *People v. Stratton*, 28 Cal. 382.

One who has unlawfully assumed and is exercising the public functions of an office, as the same were defined in a repealed statute, is estopped, in an action brought against him for the usurpation, to deny the existence of the office: *Ex parte Henshaw*, 73 Cal. 486.

In an action against certain persons for exercising the functions of a private corporation which never had an existence, the persons usurping the franchise are the only proper defendants. If the corporation be made a defendant as such, its corporate existence is admitted. A denial that the individual defendants are claiming or exercising the corporate franchise states a complete defense as to them: *People v. Stanford*, 77 Cal. 360.

*Name of person entitled to office must be stated.*

§ 682. [705.] Whenever an information shall be filed against a person for usurping an office by the prosecuting attorney, he shall also set forth therein the name of the person rightfully entitled to the office, with an averment of his right thereto; and when filed by any other person, he shall show his interest in the matter, and he may claim the damages he has sustained.

*Appearance and pleading same as in other actions.*

§ 683. [706.] Whenever an information is filed, a notice signed by the relator shall be served and returned, as in other actions. The defendant shall appear and answer, or suffer default, and subsequent proceeding be had as in other cases.

*Judgment in case to try title to office.*

§ 684. [707.] In every case wherein the right to an office is contested, judgment shall be rendered upon the rights of the parties, and for the damages the relator may show himself entitled to, if any, at the time of the judgment.

**Judgment:** See notes to § 687. The court may determine the right of the relator, as well as of the defendant: *People v. Banvard*, 27 Cal. 475. Contestant cannot take judgment by default: *Keller v. Chapman*, 34 Cal. 635. In regard to holding two or more offices at the same time, see *People v. Keller*, 34 Cal. 520.

**New trial.** — It would seem that no new trial can be granted. The remedy is by appeal: *Dorsey v. Barry*, 24 Cal. 449; *Cosgrave v. Howland*, 24 Cal. 457; both of which cases related to contested elections.

**Proof:** See § 681. The fact of election may be established, not only without, but against, the evidence of the certificate of election: *Magee v. Calaveras Co.*, 10 Cal. 377.

*Relator takes office under the judgment.*

§ 685. [708.] If judgment be rendered in favor of the relator, he shall proceed to exercise the functions of the office, after he has been qualified as required by law, and the court shall order the defendant to deliver over all books and papers in his custody or within his power, belonging to the office from which he has been ousted.



*Defendant may be attached for refusing to obey judgment.*

§ 686. [709.] If the defendant shall refuse or neglect to deliver over the books and papers pursuant to the order, the court, or judge thereof, shall enforce the order by attachment and imprisonment.

*Judgment not a bar to action for damages.*

§ 687. [710.] When judgment is rendered in favor of the plaintiff, he may, if he has not claimed his damages in the information, have his action for the damages at any time within one year after the judgment.

**Salary and fees — Action against usurper.** — Where a party wrongfully claiming the right to an office, and performing its duties, exacts and receives the fees thereof, he is bound to return them to the party entitled to the office, and such party has a cause of action for their recovery: *Stoddard v. Williams*, 65 Cal. 472. The payment of the salary of an office to one in possession without title will not prevent the one having the title from recovering the salary: *People v. Smyth*, 28 Cal. 21; *Stratton v. Oulton*, 28 Cal. 45.

*Consequences of judgment against usurper.*

§ 688. [711.] Whenever any defendant shall be found guilty of any usurpation of or intrusion into or unlawfully exercising any office or franchise within this state, or any office in any corporation created by the authority of this state, or when any public officer thus charged shall be found guilty of having done or suffered any act which by the provisions of the law shall work a forfeiture of his office, or when any association or number of persons shall be found guilty of having acted as a corporation without having been legally incorporated, the court shall give judgment of ouster against the defendant or defendants, and exclude him or them from the office, franchise, or corporate rights, and in case of corporations, that the same shall be dissolved, and the court shall adjudge costs in favor of the plaintiff.

*Proceedings against corporations.*

§ 689. [712.] If judgment be rendered against any corporation, or against any persons claiming to be a corporation, the court may cause the costs to be collected by executions against the persons claiming to be a corporation, or by attachment against the directors or other officers of the corporation, and shall restrain the corporation, appoint a receiver of its property and effects, take an account and make a distribution thereof among the creditors. The prosecuting attorney shall immediately institute proceedings for that purpose.

*Action to recover forfeited property.*

§ 690. [713.] Whenever any property shall be forfeited to the state for its use, the legal title shall be deemed to be in the state from the time of the forfeiture, and an information may be filed by the prosecuting attorney in the superior court for the recovery of the property, alleging the ground on which the recovery is claimed, and

like proceedings and judgment shall be had as in civil action for the recovery of the property.

*Prosecuting attorney not liable for costs — Relator liable.*

§ 691. [714.] When an information is filed by the prosecuting attorney, he shall not be liable for the costs, but when it is filed upon the relation of a private person, such person shall be liable for costs unless the same are adjudged against the defendant.

*Information for annulling of patent.*

§ 692. [715.] An information may be prosecuted for the purpose of annulling or vacating any letters patent, certificate, or deed granted by the proper authorities of this state, when there is reason to believe that the same were obtained by fraud, or through mistake or ignorance of a material fact, or when the patentee or those claiming under him have done or omitted an act in violation of the terms on which the letters, deeds, or certificates were granted, or have by any other means forfeited the interests acquired under the same.

*Action may be on relation of prosecuting attorney or of private relator.*

§ 693. [716.] In such cases, the information may be filed by the prosecuting attorney upon his relation, or by any private person upon his relation, showing his interest in the subject-matter; and the subsequent proceedings, judgment of the court, and awarding of costs shall conform to the above provisions, and such letters patent, deed, or certificate shall be annulled or sustained, according to the right of the case.

## CHAPTER XI.

### OF ACTIONS ON OFFICIAL BONDS, FINES, AND FORFEITURES

- § 694. Official bond deemed security for all persons interested.
- § 695. Any person injured may maintain action on such bond.
- § 696. Action maintainable by private person only upon leave.
- § 697. Judgment for one delinquency no bar to action for others.
- § 698. Aggregate judgments against sureties must not exceed amount of bond
- § 699. Fines and forfeitures, by whom recoverable.
- § 700. Amount of judgment in action for penalty.
- § 701. Collusive judgment no bar to action by other person.
- § 702. Disposition of forfeitures — Venue of actions for.

*Official bond deemed security for all persons interested.*

§ 694. [652.] The official bond of a public officer to the state, or to any county, city, town, or other municipal or public corporation of like character therein, shall be deemed a security to the state, or to such county, city, town, or other municipal or public corporation, as the case may be, and also to all persons severally, for the official delinquencies against which it is intended to provide.

**Liability is several** when each surety amount: *City of Los Angeles v. Mellus*, 59 Cal. upon an official bond stipulates in a several 444.

*Any person injured may maintain action on such bond.*

§ 695. [653.] When a public officer by official misconduct or neglect of duty shall forfeit his official bond, or render his sureties therein liable upon such bond, any person injured by such misconduct or neglect, or who is by law entitled to the benefit of the security, may maintain an action at law thereon in his own name against the officer and his sureties to recover the amount to which he may by reason thereof be entitled.

*Action maintainable by private person only upon leave.*

§ 696. [654.] Before an action can be commenced by a plaintiff, other than the state, or the municipal or public corporation named in the bond, leave shall be obtained of the court, or judge thereof, where the action is triable. Such leave shall be granted upon the production of a certified copy of the bond, and an affidavit of the plaintiff, or some person in his behalf, showing the delinquency. But if the matter set forth in his affidavit be such that, if true, the party applying would clearly not be entitled to recover in the action, the leave shall not be granted. If it does not appear from the complaint that the leave herein provided for has been granted, the defendant, on motion, shall be entitled to judgment of nonsuit; if it does, the defendant may controvert the allegation, and if the issue be found in his favor, judgment shall be given accordingly.

*Judgment for one delinquency no bar to action for others.*

§ 697. [655.] A judgment in favor of a party for one delinquency shall not preclude the same or another party from maintaining another action on the same bond for another delinquency.

*Aggregate judgments against sureties must not exceed amount of bond.*

§ 698. [656.] In an action upon an official bond, if judgments have been recovered against the surety therein other than by confession, equal in the aggregate to the penalty, or any part thereof, of such bond, and if such recovery be established on the trial, judgment shall not be given against such surety for an amount exceeding such penalty, or such portion thereof as is not already recovered against him.

*Fines and forfeitures, by whom recoverable.*

§ 699. [647.] Fines and forfeitures may be recovered by an action at law in the name of the officer or person to whom they are by law given, or in the name of the officer or person who by law is authorized to prosecute for them.

*Amount of judgment in action for penalty.*

§ 700. [658.] When an action shall be commenced for a penalty which by law is not to exceed a certain amount, the action may be



commenced for that amount, and if judgment be given for the plaintiff, it may be for such amount or less, in the discretion of the court, in proportion to the offense.

Where penalty is fixed between certain limits, the jury or court trying the issues of fact may be governed by circumstances and the public necessity in fixing the amount: *Lammond v. Volans*, 14 Hun, 263.

*Collusive of judgment no bar to action by other person.*

§ 701. [659.] A recovery of a judgment for a penalty or forfeiture by collusion between the plaintiff and defendant, with intent to save the defendant wholly or partially from the consequences contemplated by law, in case when the penalty or forfeiture is given wholly or partly to the person who prosecutes, shall not bar the recovery of the same by another person.

*Disposition of forfeitures — Venue of actions for.*

§ 702. [660.] Fines and forfeitures not specially granted or otherwise appropriated by law, when recovered, shall be paid into the school fund of the proper county. Whenever, by the provisions of law, any property, real or personal, shall be forfeited to the state, or to any officer for its use, the action for the recovery of such property may be commenced in any county where the defendant may be found, or where such property may be.

## CHAPTER XII.

### OF ACTIONS BY AND AGAINST EXECUTORS AND ADMINISTRATORS.

- § 703. Action by executor or administrator for injury causing death.
- § 704. Executor or administrator may maintain all actions on causes which survive.
- § 705. Several executors and administrators treated as one person.
- § 706. Judgment not to be evidence of assets, unless assets alleged.
- § 707. How and in what cases inventory may be contradicted.
- § 708. No liability as executor *de son tort*.
- § 709. Executor of executor, limit of powers of.
- § 710. Arrest or attachment not allowed against executor or administrator.

*Action by executor or administrator for injury causing death.*

§ 703. [717.] When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury caused by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed five thousand dollars, and the amount recovered, if any, shall be administered as other personal property of the deceased person.

See § 138.

**Action for death from injury.** — Statutes like this are of very recent origin; and questions growing out of them are new, and many of them unsettled: *Dennick v. Railroad Co.*, 103 U. S. 11. The personal representatives, in an action to recover damages for death, cannot recover of a railway company on whose train decedent was injured, when it appears that his own act was the proximate cause of his death, as where he committed suicide some eight months after he was injured:

*Scheffer v. Washington R. R. Co.*, 105 U. S. 249.

All defenses which would have defeated the right of action of the deceased, had he lived, etc., will defeat that given by the statute: *Curey v. Berkshire R. R. Co.*, 48 Am. Dec. 634-641, showing the pleading and practice and rules governing the recovery of damages under statutes like the above. As to damages, see also *Taylor v. Western Pac. R. R. Co.*, 45 Cal. 323; *Cook v. Clay St. etc. R. R. Co.*, 60 Cal. 604.

*Executor or administrator may maintain all actions on causes which survive.*

§ 704. [718.] All other causes of action by one person against another, whether arising on contract or otherwise, survive to the personal representatives of the former and against the personal representatives of the latter. Where the cause of action survives, as herein provided, the executors or administrators may maintain an action at law thereon against the party against whom the cause of action accrued, or after his death, against his personal representatives.

*Several executors and administrators treated as one person.*

§ 705. [719.] In an action against several executors or administrators, they shall all be considered as one person representing their testator or intestate, and judgment may be given and execution issued against all of them who are defendants in the action, although the notice be served only on part of them, in the same manner and with like effect as if served on all, except as provided in the next section.

*Judgment not to be evidence of assets, unless assets alleged.*

§ 706. [720.] When a judgment is given against an executor or administrator for want of answer, such judgment is not to be deemed evidence of assets in his hands, unless it appear that the complaint alleged assets, and that the notice was served upon him.

*How and in what cases inventory may be contradicted.*

§ 707. [721.] In an action against executors and administrators, in which the fact of their having administered the estate of their testator or intestate, or any part thereof, is put in issue, and the inventory of the property of the deceased returned by them is given in evidence, the same may be contradicted or avoided by evidence,—

1. That any property has been omitted in such inventory, or was not returned therein at its full value, or that since the return thereof such property has increased in value;

2. That such property has perished or been lost without the fault of such executors or administrators, or that it has been fairly and duly sold by them at a less price than the value so returned, or that since the return of the inventory such property has deteriorated in

value. In such action the defendants cannot be charged for any things in action specified in their inventory, unless it appear that they have been collected, or with due diligence might have been.

*No liability as executor de son tort.*

§ 708. [722.] No person is liable to an action as executor of his own wrong for having taken, received, or interfered with the property of a deceased person, but is responsible to the executors or administrators of such deceased person for the value of all property so taken or received, and for all injury caused by his interference with the estate of the deceased.

**Remedy against executor de son tort.** —The effect of this section is, it seems, to abolish the common-law rule, and to take away the remedy which a creditor formerly had to charge an executor *de son tort* as such. His remedy now is to procure the appointment of an administrator and have a proceeding insti-

tuted in the name of the latter to recover the property misappropriated: *Rutherford v. Thompson*, 14 Or. 236. But the principles of law governing the rights of the administrator to recover are the same as those formerly applied in actions against an executor *de son tort*: *Rutherford v. Thompson*, 14 Or. 236.

*Executor of executor — Limit of powers of.*

§ 709. [723.] An executor of an executor has no authority as such to commence or maintain an action or proceeding relating to the estate of the testator of the first executor, or to take any charge or control thereof.

*Arrest and attachment not allowed against executor or administrator.*

§ 710. [724.] In an action against an executor or administrator as such, the remedies of arrest and attachment shall not be allowed on account of the acts of his testator or intestate; but for his own acts as such executor or administrator, such remedies shall be allowed for the same causes in the manner and with like effect as in actions at law generally.



## CHAPTER XIII.

## OF HABEAS CORPUS.

- § 711. Every person entitled to benefit of.
- § 712. How application made.
- § 713. Writ granted by supreme or superior court or judge.
- § 714. Writ, to whom directed — Substance of.
- § 715. Must be delivered to sheriff without delay.
- § 716. Must be served by sheriff without delay.
- § 717. Service when person not found.
- § 718. Immediate return required.
- § 719. Substance and form of return.
- § 720. Proceedings when return made.
- § 721. Proceeding is summary.
- § 722. Restrictions upon inquiry on *habeas corpus*.
- § 723. Admission to bail instead of discharge.
- § 724. Writ may be had for the purpose of giving bail.
- § 725. Compelling attendance of witnesses.
- § 726. Officer incurs no liability by obeying.
- § 727. In what case warrant may issue for immediate custody of person.
- § 728. Person causing restraint may be arrested.
- § 729. How writ executed in such case.
- § 730. Temporary orders during proceedings.
- § 731. Writs issued under this chapter may be served on Sunday.
- § 732. Service of all writs must be prompt — Amendments allowed.
- § 733. Writs granted parents, guardians, etc.

*Every person entitled to benefit of.*

§ 711. [666.] Every person restrained of his liberty, under any pretense whatever, may prosecute a writ of *habeas corpus* to inquire into the cause of the restraint, and shall be delivered therefrom when illegal.

*How application made.*

§ 712. [667.] Application for the writ shall be made by petition, signed and verified either by the plaintiff or by some person in his behalf, and shall specify,—

1. By whom the petitioner is restrained of his liberty, and the place where (naming the parties if they are known, or describing them if they are not known);

2. The cause or pretense of the restraint, according to the best of the knowledge and belief of the applicant;

3. If the restraint be alleged to be illegal, in what the illegality consists.

*Writ granted by supreme or superior court or judge.*

§ 713. [668.] Writs of *habeas corpus* may be granted by the supreme court or superior court, or by any judge of either court, and upon application the writ shall be granted without delay.

The words “whether in term or vacation,” after “either court,” are omitted, in view of the constitutional provision that the said courts shall always be open.

*Writ, to whom directed—Substance of.*

§ 714. [669.] The writ shall be directed to the officer or party having the person under restraint, commanding him to have such person before the court or judge at such time and place as the court or judge shall direct to do and receive what shall be ordered concerning him, and have then and there the writ.

*Must be delivered to sheriff without delay.*

§ 715. [670.] If the writ be directed to the sheriff, it shall be delivered by the clerk to him without delay.

*Must be served by sheriff without delay.*

§ 716. [671.] If the writ be directed to any other person, it shall be delivered to the sheriff, and shall be by him served by delivering the same to such person without delay.

*Service when person not found.*

§ 717. [672.] If the person to whom such writ is directed cannot be found or shall refuse admittance to the sheriff, the same may be served by leaving it at the residence of the person to whom it is directed, or by posting the same on some conspicuous place, either of his dwelling-house or where the party is confined or under restraint.

*Immediate return required.*

§ 718. [673.] The sheriff or other person to whom the writ is directed shall make immediate return thereof, and if he refuse after due service to make return, the court shall enforce obedience by attachment.

*Substance and form of return.*

§ 719. [674.] The return must be signed and verified by the person making it, who shall state, —

1. The authority or cause of the restraint of the party in his custody.
2. If the authority shall be in writing, he shall return a copy and produce the original on the hearing.
3. If he has had the party in his custody, or under his restraint, and has transferred him to another, he shall state to whom, the time, place, and cause of the transfer. He shall produce the party at the hearing, unless prevented by sickness or infirmity, which must be shown in the return.

*Proceedings when return made.*

§ 720. [675.] The court or judge, if satisfied of the truth of the allegation of sickness or infirmity, may proceed to decide on the return, or the hearing may be adjourned until the party can be produced, or for other good cause. The plaintiff may except to the sufficiency of

or controvert the return, or any part thereof, or allege any new matter in evidence. The new matter shall be verified, except in cases of commitment on a criminal charge. The return and pleadings may be amended without causing a delay.

*Proceeding is summary.*

§ 721. [676.] The court or judge shall thereupon proceed in a summary way to hear and determine the cause, and if no legal cause be shown for the restraint or for the continuation thereof, shall discharge the party.

*Restrictions upon inquiry on habeas corpus.*

§ 722. [677.] No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following:—

1. Upon any process issued on any final judgment of a court of competent jurisdiction.

2. For any contempt of any court, officer or body having authority in the premises to commit; but an order of commitment, as for a contempt upon proceedings to enforce the remedy of a party, is not included in any of the foregoing specifications.

3. Upon a warrant issued from the superior court upon an indictment or information. [February 25, 1891, § 1.]

**Want of jurisdiction, effect of.** — Sentence void for want of jurisdiction over offense may be successfully attacked on *habeas corpus*, and the relator discharged, as where the conviction was under an unconstitutional statute: See Church on Habeas Corpus, secs. 72, 304, 370; *Fisher v. McGirr*, 1 Gray, 1; 61 Am. Dec. 381; *Ex parte Shaw*, 7 Ohio St. 81; 70

Am. Dec. 55; Freeman on Judgments, sec. 624.

Judgments for contempt may be attacked on *habeas corpus* for want of jurisdiction, where the alleged act does not constitute a contempt: Church on Habeas Corpus, secs. 306-346; Rapalje on Contempts, secs. 155-159; *Williamson's Case*, 67 Cal. 374.

*Admission to bail instead of discharge.*

§ 723. [678.] No person shall be discharged from an order of commitment issued by any judicial or peace officer for want of bail, or in cases not bailable on account of any defect in the charge or process, or for alleged want of probable cause; but in all cases the court or judge shall summon the prosecuting witnesses, investigate the criminal charge, and discharge, admit to bail, or recommit the prisoner, as may be just and legal, and recognize witnesses when proper.

*Writ may be had for the purpose of giving bail.*

§ 724. [679.] The writ may be had for the purpose of admitting a prisoner to bail in civil and criminal actions. When any person has an interest in the detention, and the prisoner shall not be discharged until the person having such interest is notified.



*Compelling attendance of witnesses.*

§ 725. [680.] The court or judge shall have power to require and compel the attendance of witnesses, and to do all other acts necessary to determine the case.

*Officer incurs no liability by obeying.*

§ 726. [681.] No sheriff or other officer shall be liable to a civil action for obeying any writ of *habeas corpus*, or order of discharge made thereon.

*In what case warrant may issue for immediate custody of person.*

§ 727. [682.] Whenever it shall appear by affidavit that any one is illegally held in custody or restraint, and that there is good reason to believe that such person will be carried out of the jurisdiction of the court or judge before whom the application is made, or will suffer some irreparable injury before compliance with the writ can be enforced, such court or judge may cause a warrant to be issued reciting the facts, and directed to the sheriff or any constable of the county, commanding him to take the person thus held in custody or restraint, and forthwith bring him before the court or judge, to be dealt with according to the law.

*Person causing restraint may be arrested.*

§ 728. [683.] The court or judge may also, if the same be deemed necessary, insert in the warrant a command for the apprehension of the person charged with causing the illegal restraint.

*How writ executed in such case.*

§ 729. [684.] The officer shall execute the writ by bringing the person therein named before the court or judge, and the like return of proceedings shall be required and had as in case of writs of *habeas corpus*.

*Temporary orders during proceedings.*

§ 730. [685.] The court or judge may make any temporary orders in the cause or disposition of the party during the progress of the proceedings that justice may require. The custody of any party restrained may be changed from one person to another, by order of the court or judge.

*Writs issued under this chapter may be served on Sunday.*

§ 731. [686.] Any writ or process authorized by this chapter may be issued and served, in cases of emergency, on Sunday.

See § 44.

*Service of all writs must be prompt — Amendments allowed.*

§ 732. [687.] All writs and other process authorized by this chap-

ter shall be issued by the clerk of the court, and sealed with the seal of such court, and shall be served and returned forthwith, unless the court or judge shall specify a particular time for such return. And no writ or other process shall be disregarded for any defect therein, if enough is shown to notify the officer or person of the purport of the process. Amendments may be allowed and temporary commitments, when necessary.

**Custody of infants.** — The welfare of children is the paramount consideration of courts in determining their custody: See Church on Habeas Corpus, secs. 387, 426-454. This work also treats of the issuance of the writ to guardians, masters, husbands, etc. **Appeals lie from final order or judgment on habeas corpus:** See Appeals, *post*.

*Writs granted parents, guardians, etc.*

§ 733. [688.] Writs of *habeas corpus* shall be granted in favor of parents, guardians, masters, and husbands, and to enforce the rights and for the protection of infants and insane persons; and the proceedings shall in all cases conform to the provisions of this chapter.

## CHAPTER XIV.

### OF MANDATE AND PROHIBITION.

- § 734. By whom issued, and before whom returnable.
- § 735. How far superior court has exclusive jurisdiction.
- § 736. To whom issued — Scope of.
- § 737. On what application issued — How directed — Neglect to return.
- § 738. May be either peremptory or alternative.
- § 739. Trial of issues upon return.
- § 740. Judgment for plaintiff upon.
- § 741. General power of court over proceedings.
- § 742. How obedience enforced.
- § 743. What the writ of prohibition shall command.
- § 744. Writ shall prohibit or authorize further proceedings.
- § 745. Costs as in civil actions.
- § 746. Appeals may be taken to supreme court.

*By whom issued, and before whom returnable.*

§ 734. Writs of mandate and prohibition may issue from the supreme and superior courts of the state, but such writs shall issue from the supreme court only when necessary for the exercise of its functions and powers. In the superior court the writ may be made returnable either in court or before the judge at chambers, and may be tried before the court or judge. [February 24, 1891, § 1.]

*How far superior court has exclusive jurisdiction.*

§ 735. [690.] The superior court, or judge thereof, of the county wherein the defendant, if a public officer or body, exercise his or its functions, or if a private person or corporation, wherein such person resides or may be found, or such private corporation might be sued in an action, shall have exclusive jurisdiction of the proceeding, except

that the supreme court shall have jurisdiction in all cases where it may be necessary or proper to enable such court to maintain appellate jurisdiction.

*To whom issued — Scope of.*

§ 736. [691.] Writs of mandate may be issued to any inferior court, corporation, board, officer, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. But though the writ may require such court, corporation, board, officer, or person to exercise its or his judgment, or proceed to the discharge of any of its or his functions, it shall not control judicial discretion. The writ shall not be issued in any case where there is any other plain and adequate remedy.

**Mandamus, generally.** — *Mandamus* is a writ issued to compel the performance of a duty to prevent a failure of justice where no other clear and adequate remedy exists: *Arrington v. Van Houten*, 44 Ala. 284; *State v. Guerrero*, 12 Nev. 105. Where an adequate remedy at law exists, the writ will be denied: *Durham v. Monumental G. & S. M. Co.*, 9 Or. 41; *Bell v. Lappius*, 3 Or. 55. The writ simply commands the performance of duty; it does not control discretion: *Draper v. Noteware*, 7 Cal. 278; *Mayee v. Calaveras Co.*, 10 Cal. 376; *Harpending v. Haight*, 39 Cal. 208; *Berryman v. Perkins*, 55 Cal. 483; *Dunphy v. Belden*, 57 Cal. 427. The office of the writ is to compel the performance of a purely ministerial duty. "A ministerial duty is one in respect to which nothing is left to discretion": *Sullivan v. Shanklin*, 63 Cal. 247, 251. *Mandamus* does not lie to compel an inferior tribunal to act in a particular manner where it is invested with discretionary power: *Flayley v. Hubbard*, 22 Cal. 35; *People v. Weston*, 28 Cal. 640; *Commonwealth v. Common Pleas Phil. Co.*, 3 Binn. 273; *Ex parte Ostrander*, 1 Denio, 679; *People v. Judges Oneida Com. P.*, 18 Wend. 92; *People v. Judges of Dutchess C. P.*, 20 Wend. 659; *People v. Judges of Wayne Co.*, 1 Mich. 360; 3 Dall. 42; 9 Pet. 602; 1 Serg. & R. 187; 6 Pa. St. 470; note to *Fish v. Weatherwax*, 2 Johns. Cas. 217. It is the proper remedy to compel judges to hold their courts, and county officers to keep their offices, at a county seat: *Calaveras Co. v. Brockway*, 30 Cal. 336. It is necessary that the record should manifest the right claimed, as well as the unlawful exclusion of the petitioner from the enjoyment of that right: *Ward v. Flood*, 48 Cal. 47.

**What officers will be controlled by mandamus.** — No officer, however high, is above the law, and when duties are imposed upon him in regard to which he has no discretion, and in the execution of which individuals have a direct pecuniary interest, and there is no other plain, speedy, and adequate remedy, he can be required to perform those duties by compulsory process of *mandamus*. This is the settled doctrine, not only of the federal courts, but of the highest tribunal of nearly every state in the Union where the question has been raised: *McCauley v. Brooks*, 16 Cal. 40, citing *Marbury v. Madison*, 1 Cranch, 137;

*Kendall v. United States*, 12 Pet. 524; *State v. Governor of Ohio*, 5 Ohio, 534; *Page v. Hardin*, 8 B. Mon. 649; *Smith v. Controller*, 18 Wend. 659; *People v. Edmonds*, 15 Barb. 529; *People v. Flagg*, 16 Barb. 503; *People v. Edmonds*, 19 Barb. 468; *People v. Stout*, 23 Barb. 339. It may be directed to the governor: *Middleton v. Low*, 30 Cal. 601; *Harpending v. Haight*, 39 Cal. 212; *Berryman v. Perkins*, 55 Cal. 483; the state controller: *Fowler v. Peirce*, 2 Cal. 165; *Nougues v. Douglass*, 7 Cal. 65; the surveyor-general: *Laugenour v. Shanklin*, 57 Cal. 70; the judge of a lower court: *Russell v. Elliott*, 2 Cal. 245; *People v. De la Guerra*, 43 Cal. 225; to compel him to settle a bill of exceptions, where he has wrongfully refused to do so: *Sansome v. Myers*, 80 Cal. 483; *Landers v. Landers*, 82 Cal. 480; *Hyde v. Thornton*, 83 Cal. 83; *Poteet v. County Comm'rs*, 4 S. E. Rep. 97 (W. Va.); *Dillard v. Dunlap*, 3 S. E. Rep. 383 (W. Va.); a county judge: *Ex parte Spring V. W. W.*, 17 Cal. 132; *Lake Merced Co. v. Cowles*, 31 Cal. 215; a justice of the peace, to compel him to issue execution: *Hamilton v. Tutt*, 65 Cal. 57; a judge of the lower court, to compel him to transfer the hearing of a motion for change of venue on the ground of his disqualification: *Livermore v. Brundage*, 64 Cal. 299; the county clerk, though for a refusal to act, for which he might be criminally prosecuted, or for which an action on the case would lie: *Fremont v. Crippen*, 10 Cal. 215; 70 Am. Dec. 711; *People v. Loucks*, 28 Cal. 69; but see, *contra*, *Goodwin v. Glizer*, 10 Cal. 333; *Fulton v. Hanna*, 40 Cal. 281. It may issue to supervisors: *Emeric v. Gilman*, 10 Cal. 410; *San Francisco Gas Co. v. San Francisco*, 11 Cal. 47; *Frank v. San Francisco*, 21 Cal. 668; *Price v. Sacramento*, 6 Cal. 256; *People v. Supervisors*, 12 Cal. 300; *People v. Supervisors*, 28 Cal. 432; *Napa Valley R. R. v. Napa Co.*, 30 Cal. 435; *Alden v. Alameda Co.*, 43 Cal. 270; *Robinson v. Butte Co.*, 43 Cal. 355; *People v. Supervisors*, 50 Cal. 561; *S. V. W. W. v. San Francisco*, 61 Cal. 18; *Johnson v. Supervisors*, 65 Cal. 567; *Meyer v. Brown*, 65 Cal. 583, compelling authorities of the municipality to levy a tax; to a county auditor: *Sweeny v. Maynard*, 52 Cal. 468; *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641; though an action on his bond would lie: *Babcock v. Goodrich*, 47 Cal. 488; *People v. Ashbury*,



45 Cal. 616; 46 Cal. 523; to a county treasurer: *Day v. Callow*, 39 Cal. 596; *Bank of Cal. v. Shaber*, 55 Cal. 322; *Meyer v. Brown*, 65 Cal. 583; *Meyer v. Porter*, 65 Cal. 67; *Kennedy v. City of Sacramento*, 19 Fed. Rep. 580; *Hausmeister v. Porter*, 21 Fed. Rep. 355; to an assessor: *People v. Shearer*, 30 Cal. 645; *Hyatt v. Allen*, 54 Cal. 353; a superintendent of streets: *Himmelmann v. Cofran*, 36 Cal. 411; a tax collector: *Perry v. Washburn*, 20 Cal. 349; election commissioner: *Gibbs v. Bartlett*, 63 Cal. 117; and performance of duty cannot be excused on the ground of want of funds: *Gibbs v. Bartlett*, 63 Cal. 117.

In *Dunphy v. Belden*, 57 Cal. 427, the writ issued to compel the superior court to proceed with a cause, notwithstanding an appeal from that court in another action between the same parties. It is the proper remedy to compel a court to restore the name of an attorney which had been stricken from its rolls: *People v. Turner*, 1 Cal. 144; 52 Am. Dec. 295. It does not lie to compel a sheriff to execute a writ, especially where it does not appear that there is no adequate remedy against the sheriff: *Habersham v. Sears*, 11 Or. 431. As between conflicting claimants to stock of a corporation, *mandamus* does not lie by one to compel the other to transfer it: *Durham v. Monumental S. M. Co.*, 9 Or. 41. It does not lie to determine the right of a corporation to exercise a franchise: *W. & M. Wagon Road v. Supervisors*, 64 Cal. 69; nor will it lie where there is an appeal: *Fremont v. Merced Mining Co.*, 9 Cal. 18; *Peralta v. Adams*, 2 Cal. 595; *Ludlum v. Fourth Dist. Ct.*, 9 Cal. 13; *Early v. Mannix*, 15 Cal. 149; *People v. Sexton*, 24 Cal. 84; *Clark v. Minnis*, 50 Cal. 509; unless the appeal is an inadequate remedy: *Merced M. Co. v. Fremont*, 7 Cal. 130; Where a clerk refuses to issue execution, the remedy is by motion in the court, or by action against him, not by *mandamus*: *Fulton v. Hanna*, 49 Cal. 278. So it will not lie to compel a receiver to do certain acts; the remedy is ample in the court which appointed him: *People v. McLane*, 62 Cal. 616.

Where the judge below required a statement of the evidence, on the trial in a chancery case, to be submitted, and the attorney did not object, but failed to furnish it, and the court, on motion for judgment on the pleadings and verdict, refused to proceed until such statement was furnished, it was held that *mandamus* would not lie: *Purcell v. McKune*, 14 Cal. 230. Nor where a judge acts judicially can he be compelled by *mandamus* to reverse his decision and render a different one: *Chase v. Blackstone Canal Co.*, 10 Pick. 244; *Doughty v. Judges*, 20 Wend. 658; *People v. Pratt*, 28 Cal. 168; *Curiaga v. Dryden*, 29 Cal. 309; *Lewis v. Barclay*, 35 Cal. 213; *People v. Seaton*, 37 Cal. 534; *Beppel v. Swin*, 39 Cal. 411; *Ex parte Cage*, 45 Cal. 249. The supreme court has no jurisdiction to grant a writ of mandate to compel the judge of a superior court to proceed with the trial of an action in which an order has been made transferring the cause to the United States circuit court: *Francisco v. M. I. Co.*, 36 Cal. 283. A *mandamus* will not lie against a sheriff to compel him to make a deed of land to a purchaser at an execution sale, who refuses to pay the purchase-money for the reason that he is the oldest judgment execution creditor and entitled

to the money; especially where there is an unsettled contest as to the question of lien: *Williams v. Smith*, 6 Cal. 91; nor to compel the sheriff to execute a certificate and deed on a sale under an invalid assessment: *Rosworth v. Webster*, 64 Cal. 1; nor to compel him to execute a tax deed containing recitals contradicted by the return of the tax sale: *Howell v. Lane*, 53 Cal. 213. *Mandamus* is an appropriate remedy to compel a sheriff, after proper application, to remit a tax illegally assessed: *Smith v. King*, 14 Or. 10. But the remedy by *mandamus* will not lie where a county treasurer has no money applicable to the claim: *Cramer v. Sacramento*, 18 Cal. 384. Nor where he is bound to act on the auditor's warrants, but no such warrant has been presented: *People v. Fogg*, 11 Cal. 359; or if the warrant was not legally chargeable against the county: *Keller v. Hyde*, 20 Cal. 595.

If there is an ordinance of a city prohibiting the treasurer from paying claims against the city before they have been audited and approved by the common council, *mandamus* will not lie to compel him to pay such claims until thus audited and approved: *Dubordieu v. Butler*, 49 Cal. 512. But a provision in the city charter that suits on bonds issued by the city shall not be brought will not prevent *mandamus* to the treasurer from issuing: *Meyer v. Porter*, 65 Cal. 67. A party entitled to stock in a private corporation has an action for damages against the corporation for the refusal of its officers to transfer the stock to him on the company's books, and therefore *mandamus* will not lie, unless, perhaps, in cases where the stock is of a specific value over other stock of the corporation: *Kimball v. Union W. Co.*, 44 Cal. 175; *King v. Bank of England*, 2 Doug. 526; *Shipley v. Mechanics' Bank*, 10 Johns. 484; *Wilkinson v. Providence Bank*, 3 R. I. 22; *Ex parte Firemen's Insurance Co.*, 6 Hill, 243; *American Asylum etc. v. Phoenix Bank*, 4 Conn. 172; *Sargent v. Franklin Insurance Co.*, 8 Pick. 90; 19 Am. Dec. 306. Nor will it be issued when the vital merits of the motion are extinct at the time of the hearing: *Harrington v. Sawyer*, 36 Cal. 289. It is not the proceeding in which to try title to land: *Babcock v. Goodrich*, 47 Cal. 488.

The writ will not issue where the applicant has not complied with the conditions of the law upon which alone he is entitled to that which he seeks to obtain by *mandamus*: *Purdy v. Sinton*, 56 Cal. 133. Nor to compel the register of the land-office to issue a certificate to recover money paid to the state for lands it could not grant: *Sullivan v. Shanklin*, 63 Cal. 247.

Where relator conveyed to Y. one third of a certain real estate, in consideration that Y. should attend to a suit pending in the name of relator, for the recovery of the property, etc. Y. employed an attorney. Relator moved the court below to substitute another attorney in his place, but the court refused to grant the motion, the only reason urged for the substitution being that Y. had neglected to prosecute the suit. Relator applied to the supreme court for a *mandamus*, which was granted: *Doerner v. Norton*, 16 Cal. 436. It is no answer to proceedings by *mandamus* to a treasurer to pay coupons on bonds issued by a city, that the

charter under which the bonds were issued provided that no suit thereon should be commenced against the city: *Meyer v. Porter*, 65 Cal. 67.

Water companies charged with the public duty of supplying water may be compelled to perform the same through the medium of this writ: *Price v. R. L. & I. Co.*, 56 Cal. 431.

Where nothing will be gained, *mandamus* will not issue; as to compel a judge to settle a statement where the motion for the new trial was made too late: *Clark v. Crane*, 57 Cal. 629. Nor to compel the court below to allow the personal representative of a deceased plaintiff to be substituted, and to proceed to a new trial, if the judgment erroneously rendered against the deceased before knowledge of his death had been obtained by the court, is not set aside in that court: *Elliott v. Paterson*, 65 Cal. 109.

**Whom mandamus will not control.** — A writ of mandate will not lie against the mayor and clerk of a city to pay an attorney's lien which has been filed on a judgment obtained for a client against the city, which the client has assigned, and satisfaction of which has been entered of record, where no judicial proceedings have been had to determine the amount or validity of the lien, or to set the assignment or satisfaction aside: *Chambers v. Territory*, 3 Wash. 280. Nor will a writ of mandate issue to compel school directors to pay over to the county treasurer insurance money received on a loss by fire of a school building in their district to be divided between it and a new district recently formed out of it, where the money has been actually expended by the directors in the erection of a new school building, pursuant to the unanimous vote of the electors of the district: *Elder v. Territory*, 3 Wash. 438. Where courts have concurrent jurisdiction, there is neither the right

to command nor to prohibit nor the duty to obey; and it would be inconsistent with the relations which they hold towards each other that one should attempt to supervise or direct or restrain the action of another. *People v. Turner*, 1 Cal. 149. *Mandamus* will not lie to try title to an office filled *de facto*: *Meredith v. Supervisors*, 50 Cal. 433. The writ will not lie to try title to an office: *Warner v. Myers*, 4 Or. 72; 3 Or. 218; *People v. Scannell*, 7 Cal. 442; *People v. Olds*, 3 Cal. 175. But *mandamus* is proper to compel the incumbent of an office to deliver to his successors the appurtenances, etc.: *Warner v. Myers*, 4 Or. 72. The writ is not to be used to try the eligibility of defendant to an office: *Turner v. Meloney*, 13 Cal. 621. It is an imperative rule of the law of *mandamus* that, previously to the making of the application, an express and distinct demand or request to perform the act must have been made by the prosecutor to the defendant, who must have refused to comply with such demand, either in direct terms, or by conduct from which a refusal can be conclusively implied: *People v. Romero*, 18 Cal. 91; *Crandall v. Amador Co.*, 20 Cal. 72; though the rule may be otherwise where the relator or petitioner has no private interest in or claims the immediate benefit of the act or proceeding required to be done or taken, but it amounts to a mere public duty: *O. & V. R. R. Co. v. Plumas Co.*, 37 Cal. 362. But a public board is not in default so as to be subject to *mandamus* until after demand and refusal: *Talcott v. Harbor Commissioners*, 53 Cal. 199.

This demand must be definite and specific, "as certain as the subject-matter of the litigation which may follow a refusal will admit of." A failure to allege such demand may be taken advantage of by general demurrer: *Price v. R. L. & I. Co.*, 56 Cal. 431.

### *On what application issued—How directed—Neglect to return.*

§ 737. [692.] The writ shall be issued upon affidavit and motion, and shall be attested and sealed, and made returnable as the court shall direct; and the person, body, or tribunal to whom the same shall be directed and delivered shall make return, and for neglect to do so shall be proceeded against as for contempt.

**Who may apply for writ.** — To entitle one to the writ, it must appear that the defendant refuses to perform the duty: *People v. Supervisors*, 64 N. Y. 600; *People v. Collins*, 19 Wend. 65; and that plaintiff clearly has a right to have the act done: *Fitch v. McDiarmid*, 26

Ark. 482; *Draper v. Noteware*, 7 Cal. 276. A tax-payer is a party beneficially interested in having all the property in the district assessed, and is a proper party to make the affidavit for the writ to compel the assessor to assess property subject thereto: *Hyatt v. Allen*, 54 Cal. 353.

### *May be either peremptory or alternative.*

§ 738. [693.] The first writ shall be in the alternative or peremptory, as the court shall direct.

**Peremptory writ.** — When the relator proceeds for the peremptory writ, without procuring an alternative writ, the court may grant any relief consistent with the case made

by the petition, and embraced within the issues, although it may be only a part of that demanded in the prayer of the petition: *People v. Supervisors*, 27 Cal. 684.

### *Trial of issues upon return.*

§ 739. [694.] Whenever a return shall be made to any such writ,



issues of law and fact may be joined, and like proceedings shall be had for the trial of issues and rendering judgment as in civil actions.

**Answer.** — The rules of the code are as strictly applicable to the pleadings in *mandamus* as to those in any action; and under those rules no one may answer except those who are made or are by the court admitted as defendants. The remark found in the treatises on *mandamus*, that if two separate returns be made by different portions of the same corporation, the court will take that which appears to be made by the majority, means that, to have any standing, it must be made as the return of the whole corporation, or at least of a particular portion or branch of it, and then, if two returns are made in that capacity, the court will ascertain which is the true return: *People v. San Francisco*, 27 Cal. 670. The general rules as to denying allegation, on informa-

tion or belief, are also applicable, and the respondent cannot deny in this form facts whose existence or non existence must be known to him: *Forbes v. El Dorado*, 12 Pac. C. L. J. 341.

**Amending answer.** — The answer may be amended, and ought to be allowed to be amended, in a proper case: *Grady v. Bramlet*, 59 Cal. 105. In this case the supreme court reversed the action of the lower court in refusing to allow a supplemental answer to be filed.

**Demurrer to answer.** — A motion to strike out and disregard the answer as immaterial is in effect a general demurrer: *Middleton v. Low*, 30 Cal. 599. So is a motion that the writ issue notwithstanding the answer: *Ward v. Flood*, 48 Cal. 36.

### *Judgment for plaintiff upon.*

§ 740. [695.] In case a verdict shall be found for plaintiff when the writ is in the alternate [alternative], or if judgment be given for him, he shall recover damages as in an action for a false return, against the party making the return, and a peremptory writ shall be granted without delay.

**Judgment.** — If the court directs a writ of mandate to issue requiring the defendant as an auditor to issue a warrant for the treasurer to pay a sum of money to the petitioner, the clerk cannot enter a personal judgment against the auditor: *Sweeney v. Maynard*, 52 Cal. 468. In

*mandamus* against a board of supervisors on a judgment recovered against the county, the judgment should be to allow the judgment, not to pay it; the treasurer is the proper person to pay: *Johnson v. Supervisors*, 65 Cal. 481.

### *General power of court over proceedings.*

§ 741. [696.] The court shall have the same power to enlarge the time of making a return and pleading to such writ, and for filing any subsequent pleadings, and to continue such cause, as in civil actions.

### *How obedience enforced.*

§ 742. [697.] Obedience to such writ may be enforced by attachment and fine and imprisonment, or both.

### *What the writ of prohibition shall command.*

§ 743. [698.] The writ of prohibition shall command the court or party to whom it shall be directed to refrain from any further proceedings in the matter therein specified until the return of the writ and the further order of the court thereon, and upon the return, to show cause why they shall not be absolutely restrained from further proceeding in the matter.

**Writ of prohibition.** — The writ mentioned in the constitution is the common-law writ: *Maurer v. Mitchell*, 53 Cal. 291; *Camron v. Kenfield*, 57 Cal. 550; and the legislature cannot constitutionally extend the office of the writ beyond its scope at common law so as to include ministerial functions: *Camron v. Kenfield*, 57 Cal. 550; *Hobart v. Tilton*, 66 Cal. 201; *Farmers' Union v. Thresher*, 62 Cal. 407.

It extends only to inferior tribunals acting judicially: *Maurer v. Mitchell*, 53 Cal. 291; *Camron v. Kenfield*, 57 Cal. 550. It does not lie to restrain a board or body who do not act judicially: *People v. Election Commissioners*, 54 Cal. 404; as in the matter of fixing water rates: *Spring Valley etc. W. Co. v. Bartlett*, 63 Cal. 245. Prohibition does not lie to prevent judicial acts already done: *Hull v. Superior Ct.*



63 Cal. 179; nor to annul the same: *More v. Superior Ct.*, 64 Cal. 345.

**Excess of jurisdiction.** — There must be, to warrant the writ: *People v. Sup. Kern Co.*, 47 Cal. 81; *People v. Whitney*, 47 Cal. 584; *Kallock v. Superior Ct.*, 56 Cal. 229; but the writ is issuable only in cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law: *Levy v. Wilson*, 69 Cal. 105. See *Wiggin v. Superior Court*, 68 Cal. 399. If the matters complained of do not go to the jurisdiction, as that the committing magistrate did not examine the prosecutor on oath, the writ will not issue: *Murphy v. Superior Ct.*, 58 Cal. 520; *Spect v. Superior Ct.*, 59 Cal. 319. The trial of a criminal case will not be restrained by prohibition for mere irregularities and errors in law occurring before and after the finding and return of the indictment. Such matters are reviewable on appeal: *Levy v. Wilson*, 69 Cal. 105.

If the question of jurisdiction has been submitted to the lower court, and there remain undetermined, the writ will not issue pending the decision: *Chester v. Colby*, 52 Cal. 516. The writ will not lie to restrain a superior court from passing upon a motion to dismiss an information: *Wreden v. Superior Ct.*, 55 Cal. 504. It will not lie where a petition for removal of cause to United States court is denied: *S. P. R. R. v. Superior Ct.*, 63 Cal. 607; *Central Pac. etc. R. R. Co. v. Superior Ct.*, 62 Cal. 618. It will lie where a judge is disqualified: *N. B. G. M. Co. v. Keyser*, 58 Cal. 315. The superior court will be restrained from allowing appellant from a judgment by default in the justice's court to file an answer, and from proceeding with the trial of the case: *Rickey v. Superior Ct.*, 59 Cal. 661.

Errors in the exercise of jurisdiction do not furnish a case for this writ; so where the court, having allowed an intervention to be filed, proceeded with the trial before service of the bill on the adverse parties: *Ah Goon v. Superior Ct.*, 61 Cal. 555.

The governor has power to investigate conduct of prison directors, and cannot be restrained by prohibition: *Chapman v. Stoneman*, 63 Cal. 490.

**Attention of court must be called to.** — A writ of prohibition will not issue from the supreme court to restrain a superior court from proceeding in a matter alleged to be in excess of its jurisdiction, unless the attention of the superior court has first been called to the alleged excess of jurisdiction: *Baughman v. Superior Court*, 72 Cal. 572; *Southern Pacific etc. R. R. Co. v. Superior Ct.*, 59 Cal. 471.

**Ministerial functions.** — The writ is not available to prevent the acts of a *de facto* or *de jure* ministerial officer: *Hull v. Superior Ct.*, 63 Cal. 179; *People v. Board of Election*, 54 Cal. 404; *Le Conte v. Berkeley*, 57 Cal. 269; *Hobart v. Tillson*, 66 Cal. 210. A tax collector, being a ministerial officer, cannot be restrained by prohibition from performing the duties of his office: *Hobart v. Tillson*, 66 Cal. 210.

**Affidavits, what they must state.** — The affidavit to a petition for a writ of prohibition should state that the affiant has either knowledge or information concerning the matters stated in the petition. If the application for a writ of prohibition is submitted on the petition and answer, and the answer denies the material allegations of the petition, the petition will be dismissed: *Cariaga v. Dryden*, 30 Cal. 244.

**Plain, speedy, etc., remedy.** — Appeal from an order refusing to change the place of trial, where the motion is made on the ground of disqualification of the judge, is not a plain, speedy, or adequate remedy. This writ will issue: *North Bloomfield G. M. Co. v. Keyser*, 58 Cal. 315. Where the relief sought has been already granted on appeal, the writ will be denied: *People v. District Ct.*, 7 Cal. 462.

**Usurpation of office.** — *Quo warranto*, and not prohibition, is the remedy to prevent usurpation of an office: *Hull v. Superior Ct.*, 63 Cal. 179; *Buckner v. Veure*, 63 Cal. 304.

*Writ shall prohibit or authorize further proceedings.*

§ 744. [699.] The court shall render judgment either that a prohibition absolute, restraining the court and party proceeding in the matter, do issue, or authorizing the court and party to proceed in the matter in question.

*Costs as in civil actions.*

§ 745. [700.] Costs shall be awarded in these proceedings as in civil actions.

*Appeals may be taken to supreme court.*

§ 746. [701.] From the judgment of the superior court, or judge thereof, refusing or directing such writs, an appeal or writ of error may be taken to the supreme court in like manner and effect as in civil actions.

**Pending application for writ of mandate** to compel a trial judge to settle a statement, a motion to affirm judgment for a failure to file a transcript will be held over: *Norager v. Norwald*, 3 Wash. 246.

## CHAPTER XV.

## OF PROCEEDINGS IN THE NATURE OF NE EXEAT.

- § 747. Action in nature of, when may be commenced.
- § 748. Pleadings and proceedings as in other actions.
- § 749. Clerk to issue order of arrest.
- § 750. Sheriff's duties — Bail.
- § 751. Security for performance instead of bail.
- § 752. This proceeding may be had by sureties, etc.
- § 753. Defendant may have *habeas corpus*.
- § 754. Justice of the peace — Jurisdiction of, in such cases.
- § 755. Venue.

*Action in nature of, when may be commenced.*

§ 747. [636.] Action may be commenced upon any agreement in writing before the time for the performance of the contract expires, when the plaintiff or his agent shall make and file an affidavit with the clerk of the proper court that the defendant is about to leave the state without performing or making provisions for the performance of the contract, taking with him property, moneys, credits, or effects subject to execution, with intent to defraud plaintiff.

*Pleadings and proceedings as in other actions.*

§ 748. At the time of filing the affidavit the plaintiff shall also file his complaint in the action, and thenceforth the action shall proceed as other actions at law, except as otherwise provided in this chapter. [February 25, 1891, § 1.]

*Clerk to issue order of arrest.*

§ 749. Upon such affidavit and complaint being filed, the clerk shall issue an order of arrest and bail, directed to the sheriff, which shall be issued, served, and returned in all respects as such orders in other cases; before such order shall issue, the plaintiff shall file in the office of the clerk a bond, with sufficient surety, to be approved by the clerk, conditioned that the plaintiff will pay the defendant such damages and costs as he shall wrongfully sustain by reason of the action, which sureties shall justify as bail upon an arrest. [February 25, 1891, § 2.]

*Sheriff's duties — Bail.*

§ 750. The sheriff shall require the defendant to enter into a bond, with sufficient surety, personally to appear within the time allowed by law for answering the complaint, and to abide the order of the court; and in default thereof the defendant shall be committed to prison until discharged in due course of law; such special bail shall be liable for the principal, and shall have a right to arrest and deliver him up, as in other cases, and the defendant may give other bail. [Feb. 25, '91, § 3.]

*Security for performance instead of bail.*

§ 751. [639.] Instead of giving special bail, as above provided, the defendant shall be entitled to his discharge from custody if he will secure the performance of the contract to the satisfaction of the plaintiff.

*This proceeding may be had by sureties, etc.*

§ 752. [640.] This proceeding may be had in favor of any surety or other person jointly bound with the defendant. It may also be prosecuted by the person in whose favor the contract exists, against any one or more of the persons bound thereby, upon filing such affidavit, when the co-contractors are non-residents or probably insolvent, or at the request of any of them when they are residents and solvent.

*Defendant may have habeas corpus.*

§ 753. [641.] The defendant may have the same remedy by writ of *habeas corpus* as in other cases of arrest and bail.

*Justice of the peace — Jurisdiction of, in such cases.*

§ 754. The proceedings provided for in this chapter may be had before justices of the peace in all cases within their jurisdiction. [February 25, 1891, § 4.]

*Venue.*

§ 755. [643.] The affidavit and bond may be filed and proceedings had in any county where the defendants may be found.

“County” substituted for “district,” in view of the change worked by the constitution.

## CHAPTER XVI.

## OF THE PROTECTION OF SURETIES.

§ 756. Surety may require action instituted.

§ 757. If creditor refuse, surety discharged.

§ 758. Surety may have suretyship tried.

§ 759. Order to levy first on principal's property.

§ 760. Surety to have benefit of judgment to protect himself.

§ 761. Contribution among sureties.

§ 762. When surety must defend action.

§ 763. Heirs, executors, etc., entitled to benefits of this chapter.

*Surety may require action instituted.*

§ 756. [644.] Any person bound as surety upon any contract in writing for the payment of money or the performance of any act, when the right of action has accrued, may require, by notice in writing, the creditor or obligee forthwith to institute an action upon the contract.

*If creditor refuse, surety discharged.*

§ 757. [645.] If the creditor or obligee shall not proceed within a reasonable time to bring his action upon such contract, and prosecute



the same to judgment and execution, the surety shall be discharged from all liability thereon.

*Surety may have suretyship tried.*

§ 758. [646.] When any action is brought against two or more defendants upon a contract, any one or more of the defendants being surety for the others, the surety may, upon a written complaint to the court, cause the question of securityship to be tried and determined upon the issues made by the parties at the trial of the cause, or at any time before or after the trial, or at a subsequent term, but such proceedings shall not affect the proceedings of the plaintiff.

*Order to levy first on principal's property.*

§ 759. [647.] If the finding upon such issue be in favor of the surety, the court shall make an order directing the sheriff to levy the execution upon and first exhaust the property of the principal before a levy shall be made upon the property of the surety, and the clerk shall indorse a memorandum of the order upon the execution.

*Surety to have benefit of judgment to protect himself.*

§ 760. [648.] When any defendant surety in a judgment or special bail or replevin, or surety in a delivery bond or replevin bond, or any person being surety in any bond whatever, has been or shall be compelled to pay any judgment, or any part thereof, or shall make any payment which is applied upon such judgment by reason of such suretyship, or when any sheriff or other officer or other surety upon his official bond shall be compelled to pay any judgment, or any part thereof, by reason of any default of such officer, except for failing to pay over money collected, or for wasting property levied upon, the judgment shall not be discharged by such payment, but shall remain in force for the use of the bail, surety, officer, or other person making such payment, and after the plaintiff is paid, so much of the judgment as remains unsatisfied may be prosecuted to execution for his use.

**Surety entitled to reimbursement.** — A surety as between himself and his principal is equitably entitled to full indemnity against the consequences of the latter's default; and may call upon him for reimbursement, not only of what he has been obliged to pay to discharge the obligation, but of all reasonable expenses incurred by him, in consequence of the principal's default, or to protect himself. These include expenses in securing the application of the principal's property to payment of the debt in exoneration of the surety: *Thompson v. Taylor*, 72 N. Y. 32.

*Contribution among sureties.*

§ 761. [649.] Any one of several judgment defendants, and any one of several replevin bail having paid and satisfied the plaintiff, shall have the remedy provided in the last section against the co-defendants and co-sureties to collect of them the ratable proportion each is equitably bound to pay.

*When surety must defend action.*

§ 762. [650.] No surety or his representative shall confess judgment or suffer judgment by default in any case where he is notified that there is a valid defense, if the principal will enter himself defendant to the action and tender to the surety or his representatives good security to indemnify him, to be approved by the court.

*Heirs, executors, etc., entitled to benefits of this chapter.*

§ 763. [651.] The foregoing provisions of this chapter shall extend to heirs, executors, and administrators of deceased persons, but the provisions of section seven hundred and fifty-seven shall not operate against persons under legal disabilities.

## CHAPTER XVII.

### OF DIVORCE AND ALIMONY.

§ 764. Causes of divorce.

§ 765. Annulment of marriage.

§ 766. Who may sue for divorce.

§ 767. Proof required.

§ 768. Defendant may file cross-complaint.

§ 769. Both parties deemed applying.

§ 770. Court to make and enforce orders.

§ 771. What the decree shall contain.

§ 772. Both parties released.

§ 773. Name of female changed.

§ 774. Duties of prosecuting attorney in divorce.

§ 775. Trial — Appeal — Proceedings.

§ 776. No jury in divorce cases.

*Causes for divorce.*

§ 764. Divorces may be granted by the superior court on application of the party injured, for the following causes:—

1. When the consent to the marriage of the party applying for the divorce was obtained by force or fraud, and there has been no subsequent voluntary cohabitation;

2. For adultery on the part of the wife or of the husband, when unforgiven, and application is made within one year after it shall come to the knowledge of the party applying for divorce;

3. Impotency;

4. Abandonment for one year;

5. Cruel treatment of either party by the other, or personal indignities rendering life burdensome;

6. Habitual drunkenness of either party, or the neglect or refusal of the husband to make suitable provisions for his family;

7. The imprisonment of either party in the penitentiary, if complaint is filed during the term of such imprisonment. And a divorce may be granted upon application of either party for any other cause

deemed by the court sufficient, and the court shall be satisfied that the parties can no longer live together;

8. In case of incurable chronic mania or dementia of either party, having existed for ten years or more, the court may, in its discretion, grant a divorce. [*February 24, 1891, § 1.*]

**Incurable mania or dementia is cause for divorce**, where the affliction has existed for ten years or more; and the statute making it so is constitutional, not being void as against public policy: *Hickman v. Hickman*, 24 Pac. Rep. 445 (Wash.).  
**Legislature has no power to grant divorce:** See Const., art. 2, sec. 24.

*Annulment of marriage.*

§ 765. When there is any doubt as to the facts rendering a marriage void, either party may apply for, and on proof obtain, a decree of nullity of marriage. [*February 24, 1891, § 2.*]

*Who may sue for divorce.*

§ 766. [2002.] Any person who has been a resident of the state for one year may file his or her complaint for a divorce or decree of nullity of marriage, under oath, in the superior court of the county where he or she may reside, and like proceedings shall be had thereon as in civil cases.

*Proof required.*

§ 767. [2003.] When the defendant does not answer, or, answering, admits the allegations in the complaint, the court shall require proof before granting a divorce or a decree of nullity.

*Defendant may file cross-complaint.*

§ 768. [2004.] The defendant may, in addition to his or her answer, file cross-complaint for divorce, and the court may, in such case, grant a divorce, if any, in favor of either party, or as an application of both.

**Complaint and cross-complaint, requisites of.**—If the complaint in divorce sets up more than one cause of action, each count must contain all the facts necessary to constitute a cause of action, and this includes the allegations as to marriage and residence. Defects in one count cannot be supplied from statements in other counts, unless expressly referred to in it; and not then, if the matters referred to constitute the *gravamen* of the action: *Haskell v. Haskell*, 54 Cal. 262. The cross-complaint must contain within itself all the facts entitling defendant to relief, and cannot be helped out by averments of the complaint. It, too, must aver the marriage of the parties and the residence of the complainant: *Coulthurst v. Coulthurst*, 58 Cal. 239.

*Both parties deemed applying.*

§ 769. Both parties shall be considered as applying for a divorce when the complaints of both are filed in the same action, and when the defendant, by his or her cross-complaint, also applies for a divorce. [*February 24, 1891, § 3.*]

*Court to make and enforce orders.*

§ 770. Pending the action for divorce the court, or judge thereof, may make, and by attachment enforce, such orders for the disposition of the persons, property and children of the parties as may be deemed



right and proper, and such orders relative to the expenses of such action as will insure to the wife an efficient preparation of her case, and a fair and impartial trial thereof; and on decreeing or refusing to decree a divorce, the court may, in its discretion, require the husband to pay all reasonable expenses of the wife in the prosecution or defense of the action, when such divorce has been granted or refused, and give judgment therefor. [*February 24, 1891, § 4.*]

**Counsel fees are part of costs**, and the court below may allow them as such, and it may also allow other reasonable expenses incurred by the wife in preparing for the trial of a divorce suit: *Thorndyke v. Thorndyke*, 1 Wash. 175. Where the action has been dis-

missed without a trial, the appellate court will sometimes reduce the amount of counsel fees allowed by the lower court, but will not review other allowances of costs peculiarly within the knowledge of the lower court: *Thorndyke v. Thorndyke*, 1 Wash. 175.

*What the decree shall contain.*

§ 771. In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, and support and education of the minor children of such marriage. [*February 24, 1891, § 5.*]

**Court below in disposing of property** may require the husband to pay the wife's counsel fees, and decree that a certain sum of money shall be put into the hands of a trustee,

the interest to be paid to the defendant quarterly, during her natural life, and at her death the principal to revert to the husband: *Madison v. Madison*, 1 Wash. 60.

*Both parties released.*

§ 772. Whenever judgment of divorce from the bonds of matrimony is granted by the courts in this state, the court shall order a full and complete dissolution of the marriage as to both parties; *provided*, that neither party shall be capable of contracting marriage with a third person until the period in which an appeal may be taken has expired; and in case an appeal is taken, then neither party shall intermarry with a third person until the cause has been fully determined. [*February 24, 1891, § 6.*]

*Name of female changed.*

§ 773. In all actions for a divorce, if a divorce be granted, the court may, for just and reasonable cause, change the name of the female, who shall thereafter be known and called by such name as the court shall in its order or decree appoint. [*February 24, 1891, § 7.*]

*Duties of prosecuting attorney in divorce.*

§ 774. Whenever a complaint for divorce remains undefended, it shall be the duty of the prosecuting attorney to resist such complaint; but no prosecuting attorney shall be employed in or allowed to conduct any action for a divorce on the part of the plaintiff or applicant in the courts of this state; nor shall any prosecuting attorney be allowed

to resist a complaint for divorce in those cases where the defendant does not appear, or appearing admits the allegations of the complaint, if the attorney for the applicant is a partner of such prosecuting attorney in the practice of law, or keeps his office with such prosecuting attorney; but in all such cases the court or judge before whom the case is to be heard shall appoint an attorney to resist the complaint, who shall be entitled to the compensation allowed by law to prosecuting attorneys in such cases. [*February 24, 1891, § 8.*]

*Trial—Appeal—Proceedings.*

§ 775. [2011.] In all instances where the superior court shall grant a divorce, it shall be for cause distinctly stated in the complaint, and proved, and found by the court, and the court shall state the facts found upon which the decree is rendered; and when either party shall signify a desire to appeal from any of the orders of the court, in the disposition of the property or of the children, the court shall certify the evidence adduced on the trial, and the supreme court shall be possessed of the whole case as fully as the superior court was, and may reverse, modify, or affirm said judgment, according to the real merits of the case.

“The superior” substituted for “a district,” before “court,” in first line.

*No jury in divorce cases.*

§ 776. The practice in civil actions shall govern all proceedings in the trial of actions for divorce, except that trial by jury is dispensed with. [*February 24, 1891, § 9.*]

## CHAPTER XVIII.

### OF CHANGE OF PERSON'S NAME.

§ 777. Name changed upon petition.

*Name changed upon petition.*

§ 777. [635.] Any person desiring a change of his name or that of his child or ward may apply therefor to the superior court of the county in which he resides, by petition setting forth the reasons for such change; thereupon such court, in its discretion, may order a change of the name, and thenceforth the new name shall be in place of the former.

## CHAPTER XIX.

### OF CONTEMPTS AND THEIR PUNISHMENT.

- § 778. What are deemed contempts.
- § 779. Extent of power to punish for contempt.
- § 780. Contempt in court may be punished summarily.
- § 781. In other cases, order to show cause.
- § 782. Order to produce the person of the offender.
- § 783. How prosecuted.
- § 784. Warrant of arrest, contents and execution of.
- § 785. Return of warrant — Investigation of case.
- § 786. Judgment.
- § 787. Remedy of individual injured.
- § 788. Offender may be imprisoned to compel performance of duty.
- § 789. Offender also liable to indictment.
- § 790. *Alias* warrant — Prosecution of bond.
- § 791. Either party may appeal.

#### *What acts are deemed contempts.*

§ 778. [725.] The following acts or omissions, in respect to a court of justice or proceedings therein, are deemed to be contempts of court:—

1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the true course of a trial or other judicial proceedings.

2. A breach of the peace, boisterous conduct, or violent disturbance tending to interrupt the due course of a trial or other judicial proceeding.

3. Misbehavior in office, or other willful neglect or violation of duty by an attorney, clerk, sheriff, or other person appointed or selected to perform a judicial or ministerial service.

4. Deceit, abuse of the process, or proceedings of the court by a party to an action, suit, or special proceeding.

5. Disobedience of any lawful judgment, decree, order, or process of the court.

6. Assuming to be an attorney or other officer of the court, and acting as such without authority in a particular instance.

7. Rescuing any person or property in the lawful custody of an officer, held by such officer under an order or process of such court.

8. Unlawfully detaining a witness or party to an action, suit, or proceeding while going to, remaining at, or returning from the court where the same is for trial.

9. Any other unlawful interference with the process or proceedings of a court.

10. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness.

11. When summoned as a juror in a court, improperly conversing with a party to an action, suit, or proceeding to be tried at such court,



or with any other person in relation to the merits of such action, suit, or proceeding, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court.

12. Disobedience by an inferior tribunal, magistrate, or officer of the lawful judgment, decree, order, or process of a superior court, or proceeding in an action, suit, or proceeding contrary to law, after such action, suit, or proceeding shall have been removed from the jurisdiction of such inferior tribunal, magistrate, or officer.

This statute is a limitation upon the power formerly exercised by courts: *Galland v. Galland*, 44 Cal. 475; *Johnson v. Superior Court*, 63 Cal. 578. Judges are not civilly liable for committing a person for contempt: *Pickett v. Wallace*, 57 Cal. 555.

*Service of copy of the order* which the party refuses to obey need not be had on him if he was in court when it was made: *Ex parte Cottrell*, 59 Cal. 417. But as a general rule, before a party can be brought into contempt for not complying with an order of court, such order must be served on him; and a delivery to a person in another state of a certified copy of the order is not such a service: *Johnson v. Superior Court*, 63 Cal. 578. A party cannot be punished for a contempt in violating an order which the court had no jurisdiction to make: *People v. O'Neil*, 47 Cal. 109; *Ex parte Hollis*, 59 Cal. 405; *Brown v. Moore*, 61 Cal. 432.

It is essential to the validity of proceedings in contempt, subjecting a party to fine and imprisonment, that they show a case in point of jurisdiction within the provisions of the law by which such proceedings are authorized, for mere presumptions and intendments are not to be indulged in their support: *Batchelder v. Moore*, 42 Cal. 412.

An order committing a party for contempt, and ordering that he be imprisoned until he comply with a previous order commanding him to pay into court a certain sum of money, was held an excess of jurisdiction and void, where the party had made affidavit, which was uncontradicted, that the money had passed from his possession and control before the proceedings in contempt were commenced. Though courts are exclusive judges of their own contempts, a party cannot be imprisoned for neglecting or refusing to do what it appears is out of his power to perform: *Adams v. Haskell*, 6 Cal. 316; 65 Am. Dec. 517. Whether or not the petitioner could comply with the order here for alimony is one of the facts to be determined by the court making the order: *Ex parte Cottrell*, 59 Cal. 417; 59 Cal. 420. A husband who lives separate from his wife, and has been adjudged by a court of equity to pay her a certain sum monthly for her support

and that of her infant child, is not guilty of contempt for not paying the sum if he is unable to pay it, and has not voluntarily created the disability for the purpose of avoiding the payment. He may purge himself from contempt by showing that he is unable to pay it, and that this inability has not been voluntarily created by his own act: *Galland v. Galland*, 44 Cal. 475.

*Acts constituting contempt.* — Among the many instances of acts which constitute a contempt of court are the following: Openly insulting a judge on the bench: *Commonwealth v. Dandridge*, 2 Va. Cas. 413; employment in the supreme court of language disrespectful to the lower court: *Friedlander v. Sumner G. & S. M. Co.*, 61 Cal. 116; striking an attorney in court: *Middlebrook v. State*, 43 Conn. 266; calling a person a liar in presence of the court: *United States v. Emerson*, 4 Cranch C. C. 188; serving a summons upon a witness in court: *In re Henley*, 53 Vt. 394; 38 Am. Rep. 713. One who holds money adversely to the receiver in insolvency, claiming it as his own, cannot be punished for contempt in refusing to turn the money over to the receiver, being neither an officer of the court nor a party to the insolvency proceedings: *Ex parte Hollis*, 59 Cal. 405. Disobedience of a decree of distribution by an executor or administrator is a contempt of court: *Ex parte Smith*, 53 Cal. 204; *Ex parte Cohn*, 55 Cal. 193. Where a defendant cited under an order of examination, with the view to defeat such order, disposes of his property pending the examination, he is guilty of contempt of court: *Ex parte Kellogg*, 64 Cal. 343. Sending threatening and insulting letters to the grand jury is a contempt of court: *In re Tyler*, 64 Cal. 434. The superior courts of the state have power to inquire into the imprisonment of one held under a requisition from the governor of a neighboring state, and to punish for disobedience to its writ of *habeas corpus*: *In re Robb*, 64 Cal. 431. See the case of *Robb v. Connolly*, 111 U. S. 624, where the view of the supreme court of California was affirmed, and the doctrine laid down by the United States circuit court in the case of *In re Robb*, 9 Saw. 568, disapproved.

*Extent of power to punish for contempt.*

§ 779. [726.] Every court of justice and every judicial officer has power to punish contempt by fine or imprisonment, or both. But such fine shall not exceed three hundred dollars, nor the imprisonment six months; and when the contempt is not of those mentioned

in subdivisions one and two of the last section, it must appear that the right or remedy of a party to an action, suit, or proceeding was defeated or prejudiced thereby, before the contempt can be punished otherwise than by a fine not exceeding one hundred dollars.

*Contempts in court may be punished summarily.*

§ 780. [727.] When a contempt is committed in the immediate view and presence of the court or officer, it may be punished summarily, for which an order must be made reciting the facts as occurring in such immediate view and presence, determining that the person proceeded against is thereby guilty of contempt, and that he be punished as therein prescribed.

**Order reciting facts.** — The order of court must show upon its face the facts upon which the exercise of the power is based: *People v. Turner*, 1 Cal. 152. It should set forth that it is in the power of the party to comply with the order, if it is for disobedience: *Ex parte Cohen*, 6 Cal. 318.

*In other cases, order to show cause.*

§ 781. [728.] In cases other than those mentioned in the preceding section, before any proceedings can be taken therein, the facts constituting the contempt must be shown by an affidavit presented to the court or judicial officer, and thereupon such court or officer may either make an order upon the person charged to show cause why he should not be arrested to answer, or issue a warrant of arrest to bring such person to answer in the first instance.

**Affidavit.** — If the affidavit be defective in absence of an affidavit: *Batchelder v. Moore*, stating the facts, it is equivalent to the utter 42 Cal. 412.

*Order to produce the person of the offender.*

§ 782. [729.] If the party charged be in custody of an officer by virtue of a legal order or process, civil or criminal, except upon a sentence for a felony, an order may be made for the production of such person by the officer having him in custody that he may answer, and he shall thereupon be produced and held until an order be made for his disposal.

*How prosecuted.*

§ 783. [730.] In the proceeding for a contempt, the state is the plaintiff. In all cases of public interest, the proceeding may be prosecuted by the prosecuting attorney on behalf of the state, and in all cases where the proceeding is commenced upon the relation of a private party, such party shall be deemed a co-plaintiff with the state.

*Warrant of arrest, contents and execution of.*

§ 784. [731.] Whenever a warrant of arrest is issued pursuant to this chapter, the court or judicial officer shall direct therein whether

the person charged may be let to bail for his appearance upon the warrant, or detained in custody without bail, and if he may be bailed, the amount in which he may be let to bail. Upon executing the warrant of arrest, the sheriff must keep the person in actual custody, bring him before the court or judicial officer, and detain him until an order be made in the premises, unless the person arrested execute and deliver to the sheriff, at any time before the return day of the warrant, a bond, with two sufficient sureties, to the effect that he will appear on such return day and abide the order or judgment of the court or officer thereupon.

*Return of warrant — Investigation of case.*

§ 785. [732.] The sheriff shall return the warrant of arrest and the bond, if any, given him by the defendant, by the return day therein specified. When the defendant has been brought up or appeared, the court or judicial officer shall proceed to investigate the charge by examining such defendant and witnesses for or against him, for which an adjournment may be had from time to time, if necessary.

*Judgment.*

§ 786. [733.] Upon the evidence so taken, the court or judicial officer shall determine whether or not the defendant is guilty of the contempt charged; and if it be determined that he is so guilty, shall sentence him to be punished as provided in this chapter.

*Remedy of individual injured.*

§ 787. [734.] If any loss or injury to a party in an action, suit, or proceeding, prejudicial to his rights therein, have been caused by the contempt, the court or judicial officer, in addition to the punishment imposed for the contempt, may give judgment that the party aggrieved recover of the defendant a sum of money sufficient to indemnify him, and to satisfy his costs and disbursements, which judgment, and the acceptance of the amount thereof, is a bar to any action, suit, or proceeding by the aggrieved party for such loss or injury.

*Offender may be imprisoned to compel performance of duty.*

§ 788. [735.] When the contempt consists in the omission or refusal to perform an act which is yet in the power of the defendant to perform, he may be imprisoned until he shall have performed it, and in such case the act must be specified in the warrant of commitment.

*Offender also liable to indictment.*

§ 789. [736.] Persons proceeded against according to the provisions of this chapter are also liable to indictment for the same misconduct, if it be an indictable offense, but the court before which a



conviction is had on the indictment in passing sentence shall take into consideration the punishment before inflicted.

*Alias warrant — Prosecution of bond.*

§ 790. [737.] When the warrant of arrest has been returned served, if the defendant do not appear on the return day, the court or judicial officer may issue another warrant of arrest, or may order the bond to be prosecuted, or both. If the bond be prosecuted and the aggrieved party join in the action, and the sum specified therein be recovered, so much thereof as will compensate such party for the loss or injury sustained by reason of the misconduct for which the warrant was issued shall be deemed to be recovered for such party exclusively.

*Either party may appeal.*

§ 791. [738.] Either party to a judgment in a proceeding for a contempt may appeal therefrom in like manner and with like effect as from judgment in an action, but such appeal shall not have the effect to stay the proceedings in any other action, suit, or proceeding, or upon any judgment, decree, or order therein, concerning which or wherein such contempt was committed. Contempts of justices' courts are punishable in the manner specially provided for in the title relating to justices of the peace and to their practice and jurisdiction.

"Title" substituted for "act."

## TITLE X.

### MISCELLANEOUS PROVISIONS WITH RELATION TO ACTIONS.

- § 792. Pleadings are not proof on the trial.
- § 793. New party entitled to notice.
- § 794. Computation of time.
- § 795. Process, to whom directed.
- § 796. Service of process when sheriff is disqualified.
- § 797. Notice must be served when — Proof of service.
- § 798. Accountability for falsely charging crime.
- § 799. Officer authorized to take bail may examine surety.
- § 800. Bonds are not to fail for want of form or other unimportant defect.
- § 801. Money may be deposited for bail.
- § 802. Levy of execution on joint property of defendant and others.
- § 803. Judgment for attorney's fees.
- § 804. Faith given to judgments of other states.
- § 805. Defense to suits on judgments.
- § 806. Set-offs — When allowed.
- § 807. Demand against beneficiary may be set off in action by trustee.
- § 808. Demand against decedent, in action by executor or administrator.
- § 809. Effect of judgment for defendant in such actions.
- § 810. Set-offs in actions against executors and administrators.
- § 811. Set-off must be pleaded.
- § 812. Judgment for balance only.
- § 813. No judgment for defendant for balance when plaintiff is assignee.
- § 814. Court may appoint commissioner when.
- § 815. What deed of commissioner must show.
- § 816. Effect of such deed.
- § 817. Effect of deed made on sale of property.
- § 818. Deed invalid till approved by court.
- § 819. Commissioner's signature sufficient.
- § 820. When conveyance must be recorded.
- § 821. Court may compel party to convey.
- § 822. After appearance party is entitled to notice.

#### *Pleadings are not proof on the trial.*

§ 792. [741.] Pleadings sworn to by either party in any case shall not, on the trial, be deemed proof of the facts alleged therein, nor require other or greater proof on the part of the adverse party.

#### *New party entitled to notice.*

§ 793. [742.] When a new party is introduced into an action as a representative or successor of a former party, such new party is entitled to the same notice, to be given in the same manner, as required for defendants in the commencement of an action.

#### *Computation of time.*

§ 794. The time within which an act is to be done, as herein provided, shall be computed by excluding the first day and including the last, unless the last day is a holiday or Sunday, and then it is also excluded. [January 27, 1888, § 1. In effect from May 1, 1888.]

Fractions of a day will be considered by rights of parties are concerned: *Craig v. Godhe* courts, where time is important and the *freely*, 1 Cal. 415; *People v. Beatty*, 14 Cal. 566.

*Process, to whom directed.*

§ 795. Unless otherwise provided by statute, all process issuing out of the [superior] court shall be directed to the sheriff of the county in which it is to be served, and be by him executed according to law. [February 25, 1891, § 5.]

*Service of process when sheriff is disqualified.*

§ 796. [745.] When there is no sheriff of a county, or he is disqualified from any cause from discharging any particular duty, it shall be lawful for the officer or person commanding or desiring the discharge of that duty to appoint some suitable person, a citizen of the county, to execute the same; *provided*, that final process shall in no case be executed by any other person than the legally authorized officer; or in case he is disqualified, some suitable person appointed by the court, or judge thereof, out of which the process issues, who shall make such appointment in writing; and before such appointment shall take effect, the person so appointed shall give security to the party interested for the faithful performance of his duties, which bond of suretyship shall be in writing, be approved by the court or judge appointing him, and be placed on file with the papers in the case.

*Notice must be served when — Proof of service.*

§ 797. [746.] In all cases where notice is required by this code, it shall be in writing, and must be duly served upon the party. If served by an officer whose duty it is to serve process, his return shall be sufficient. It may be served, however, when not otherwise especially provided herein, by any disinterested person, in which event, proof of service must be established by the affidavit of the person making such service; *provided*, the written admission of service of the party, his agent or attorney, shall be equivalent to personal service.

*Accountability for falsely charging crime.*

§ 798. [747.] Every charge of incest, fornication, adultery, or whoredom falsely made by any person against a female, also words falsely spoken of any person charging such person with incest or the infamous crime against nature, either with mankind or the brute creation, shall be accountable [actionable] in the same manner as in the case of slanderous words charging a crime the commission of which would subject the offender to death or other degrading penalties.

*Officer authorized to take bail may examine surety.*

§ 799. [748.] Every court and officer authorized to take any bail or surety shall have power to examine on oath the person offering to become such bail or surety concerning his property and sufficiency as such bail or surety.



*Bonds are not to fail for want of form or for other unimportant defect.*

§ 800. [749.] No bond required by law, and intended as such bond, shall be void for want of form or substance, recital, or condition; nor shall the principal or surety on such account be discharged, but all the parties thereto shall be held and bound to the full extent contemplated by the law requiring the same, to the amount specified in such bond. In all actions on such defective bond, the plaintiff may state its legal effect in the same manner as though it were a perfect bond.

*Money may be deposited for bail.*

§ 801. [750.] Any person required to give bail may deposit with the clerk the amount of money for which he is required to give bail, and thereupon be discharged from arrest.

*Levy of execution on joint property of defendant and others.*

§ 802. [751, 752.] When a defendant in execution owns real estate subject to execution jointly or in common with any other person, the judgment shall be a lien, and the execution be levied upon the interest of the defendant only. When he owns personal property jointly or in copartnership with any other person, and the interest cannot be separately attached, the sheriff shall take possession of the property, unless the other person having an interest therein shall give the sheriff a sufficient bond, with surety, to hold and manage the property according to law; and the sheriff shall then proceed to sell the interest of the defendant in such property, describing such interest in his advertisement as nearly as may be, and the purchaser shall acquire all the interest of such defendant therein; but nothing herein contained shall be so construed as to deprive the copartner of any such defendant of his interest in any such property.

*Judgment for attorney's fee.*

§ 803. In all judgments on promissory notes, and similar instruments in writing, whether secured by mortgage or not, an attorney's [fee] may be allowed when specially contracted to be paid by the terms of the note or mortgage in any amount so specially contracted. [February 25, 1891, § 1.]

*Faith given to judgments of other states.*

§ 804. Judgment for debt rendered in any other state or any territory against any person or persons residents of this state at the time of the rendition of such judgment shall not be of any higher character as evidence of indebtedness than the original claim or demand upon which such judgment is rendered, unless such judgment shall be rendered upon personal service of summons, notice, or other due process against the defendant therein. [February 25, 1891, § 1.]

*Defense to suits on judgments.*

§ 805. [740.] The same defense to suits on judgment rendered without such personal service may be made by the judgment debtor which might have been set up in the original proceeding.

*Set-offs, when allowed.*

§ 806. [497.] The defendant in a civil action upon a contract expressed or implied may set off any demand of a like nature against the plaintiff in interest which existed and belonged to him at the time of the commencement of the suit. And in all such actions, other than upon a negotiable promissory note or bill of exchange negotiated in good faith, and without notice before due, which has been assigned to the plaintiff, he may also set off a demand of a like nature existing against the person to whom he was originally liable, or any assignee prior to the plaintiff of such contract, provided such demand existed at the time of the assignment thereof, and belonging to the defendant in good faith before notice of such assignment, and was such a demand as might have been set off against such person to whom he was originally liable, or such assignee while the contract belonged to him.

**Set-off** was a subject of chancery jurisdiction before statutes of set-off existed; and the English statutes were passed mainly to obviate the necessity of a resort to chancery in every case of mutual independent claims upon both sides: *Blake v. Langdon*, 47 Am. Dec. 701. As to set-offs in equity, see *Jeffries v. Evans*, 43 Am. Dec. 158. Right of set-off before judgment is statutory entirely, and exists only in cases provided for by the statute: *Annan v. Houck*, 45 Am. Dec. 133; *Chandler v. Drew*, 26 Am. Dec. 704. Set-off in equity is governed by the same rules as at law: *McDonald v. Neilson*, 14 Am. Dec. 431. And this has been made ex-

pressly so by statute in New York: *Jennings v. Webster*, 35 Am. Dec. 722. Set-off is admitted by failure to reply: *Gunn's Adm'r v. Todd*, 64 Am. Dec. 231. As to set-off of mutual judgments, see extended note to *Duncan v. Bloomstock*, 13 Am. Dec. 729-731. The cases are not uniform as to whether unliquidated damages can be made the subject of set-off in states where a set-off is provided for in addition to counterclaim: See note to *Woodruff v. Garner*, 89 Am. Dec. 483. As to how set-off is distinguished from recoupment, see note to *Van Epps v. Harrison*, 40 Am. Dec. 322.

*Demand against beneficiary may be set off in action by trustee.*

§ 807. [498.] If the plaintiff be a trustee to any other, or if the action be in a name of the plaintiff who has no real interest in the contract upon which the action is founded, so much of a demand existing against those whom the plaintiff represents or for whose benefit the action is brought may be set off as will satisfy the plaintiff's debt, if the same might have been set off in an action brought by those beneficially interested.

*Demand against decedents in action by executor or administrator.*

§ 808. [499.] In actions brought by executors and administrators, demands against their testators and intestates, and belonging to defendant at the time of their death, may be set off by the defendant in the same manner as if the action had been brought by and in the name of the deceased.

*Effect of judgment for defendant in such actions.*

§ 809. [500.] When a set-off shall be established in action brought by executors or administrators, and a balance found due to the defendant, the judgment rendered thereon against the plaintiff shall have the same effect as if the action had been originally commenced by the defendant.

*Set-offs in actions against executors and administrators.*

§ 810. [501.] In actions against executors and administrators, and against trustees and others, sued in their representative character, the defendants may set off demands belonging to their testators or intestates, or those whom they represent, in the same manner as the person so represented would have been entitled to set off the same in an action against them.

*Set-off must be pleaded.*

§ 811. [502.] To entitle a defendant to a set-off, he must set the same forth in his answer.

*Judgment for balance only.*

§ 812. [503.] If the amount of the set-off duly established be equal to the plaintiff's debt or demand, judgment shall be rendered that the plaintiff take nothing by his action; if it be less than the plaintiff's debt or demand, the plaintiff shall have judgment for the residue only.

*No judgment for defendant for balance when plaintiff is assignee.*

§ 813. [504.] If there be found a balance due from the plaintiff in the action to the defendant, judgment shall be rendered in favor of the defendant for the amount thereof, but no such judgment shall be rendered against the plaintiff when the contract which is the subject of the action shall have been assigned before the commencement of such action, nor for any balance due from any other person than the plaintiff in the action.

*Court may appoint commissioner when.*

§ 814. [528.] The several superior courts may, whenever it is necessary, appoint a commissioner to convey real estate,—

1. When, by a judgment in an action, a party is ordered to convey real property to another, or any interest therein;

2. When real property, or any interest therein, has been sold under a special order of the court, and the purchase-money paid therefor.

*What deed of commissioner must show.*

§ 815. [529.] The deed of the commissioner shall so refer to the judgment authorizing the conveyance that the same may be readily found, but need not recite the record in the case generally.



*Effect of such deed.*

§ 816. [530.] A conveyance made in pursuance of a judgment shall pass to the grantee the title of the parties ordered to convey the land.

*Effect of deed made on sale of property.*

§ 817. [531.] A conveyance made in pursuance of a sale ordered by the court shall pass to the grantee the title of all the parties to the action or proceeding.

*Deed invalid till approved by court.*

§ 818. [532.] A conveyance by a commissioner shall not pass any right until it has been examined and approved by the court, which approval shall be indorsed on the conveyance, and recorded with it.

*Commissioner's signature sufficient.*

§ 819. [533.] It shall be sufficient for the conveyance to be signed by the commissioner only, without affixing the name of the parties whose title is conveyed, but the names of the parties shall be recited in the body of the conveyance.

*When conveyance must be recorded.*

§ 820. [534.] The conveyance shall be recorded in the office in which by law it should have been recorded had it been made by the parties whose title is conveyed by it.

*Court may compel party to convey.*

§ 821. [535.] In case of a judgment to compel a party to execute a conveyance of real estate, the court may enforce the judgment by attachment or sequestration, or appoint a commissioner to make the conveyance.

*After appearance, party is entitled to notice.*

§ 822. [2140.] When a party to an action has appeared in the same, he shall be entitled to at least three days' notice of any trial, hearing, motion, or application to be had or made therein, before any judge at chambers; which notice shall be in writing, setting forth the nature of the motion or application and the grounds thereof, and specifying the time and place where the same will be made, and which may be served on the adverse party or his attorney; but if neither such party or his attorney reside in the county in which the action or proceeding is pending, or where such motion or application is to be made, then service by mail may be had on such party or his attorney, by mailing to either of them a copy of such notice, properly addressed, with the postage thereon paid, at least ten days before the time appointed for such hearing or application.

## TITLE XI.

## OF COSTS AND DISBURSEMENTS.

- § 823. Compensation of attorneys — Costs.
- § 824. Prevailing party entitled to costs and disbursements.
- § 825. Limitations of amount of costs and disbursements.
- § 816. Costs restricted to one of several actions.
- § 827. Defendant recovers costs when plaintiff does not.
- § 828. Costs to defendants defending separately.
- § 829. Amount of costs taxable.
- § 830. Disbursements follow costs — Cost-bill.
- § 831. Amount of referee's fees taxable.
- § 832. Costs may be imposed on postponement.
- § 833. Costs recoverable by defendant after tender.
- § 834. Costs when amount due is deposited with the clerk.
- § 835. Costs in cases appealed from justice's court.
- § 836. Costs against guardian if infant plaintiff.
- § 837. Costs in cases of executors and other trustees.
- § 838. Assignee, after action commenced, is liable for costs.
- § 839. Costs against state or county.
- § 840. Revisory proceedings deemed actions as far as relates to costs.
- § 841. Costs in supreme court, when allowed.
- § 842. Costs in discretion of the court.
- § 843. Party aggrieved may have retaxation.
- § 844. Security for costs may be required when.

*Compensation of attorneys — Costs.*

§ 823. [505.] The measure and mode of compensation of attorneys and counselors shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed to the prevailing party upon the judgment certain sums by way of indemnity for his expenses in the action, which allowances are termed costs.

*Prevailing party entitled to costs and disbursements.*

§ 824. In any action in the superior court of Washington, the prevailing party shall be entitled to his costs and disbursements; but the plaintiff shall in no case be entitled to costs taxed as attorneys' fees in actions within the jurisdictions of a justice of the peace, when commenced in the superior court. [March 27, 1890, § 1.]

**Costs, generally.** — Costs may be paid in any kind of money recognized by law, except in cases arising under specific contract laws: *Coffin v. Coffin*, 2 Or. 205.

The proper mode of correcting an error as to costs allowed is an appeal from the judgment: *Sterenson v. Smith*, 28 Cal. 105; *Cross v. Cluchester*, 4 Or. 114. Where a judgment awards plaintiff full costs and disbursements when he is only entitled to a limited

amount, the appeal is properly from the judgment, and not from the determination in the statute proceeding for taxing costs: *Burt v. Ambrose*, 11 Or. 26.

Costs can never be allowed to both parties: *McDonald v. Evans*, 3 Or. 474. Costs are an incident to the judgment, to be taxed by the clerk of the court, and cannot be given by the jury by way of damages: *Shay v. Tuolumne Co.*, 6 Cal. 286.

*Limitation of amount of costs and disbursements.*

§ 825. [508.] In an action for an assault and battery, or for false

imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction, if the plaintiff recover less than ten dollars, he shall be entitled to no more costs or disbursements than the damage recovered.

*Costs restricted to one of several actions.*

§ 826. [509.] When several actions are brought on one bond, undertaking, promissory note, bill of exchange, or other instrument in writing, or in any other case for the same cause of action against several parties, who might have been joined as defendants in the same action, no costs or disbursements shall be allowed to the plaintiff in more than one of such actions, which may be at his election, if the parties proceeded against in the other actions were, at the commencement of the previous action, openly within this state.

*Defendant recovers costs when plaintiff does not.*

§ 827. [510.] In all cases where costs and disbursements are not allowed to the plaintiff, the defendant shall be entitled to have judgment in his favor for the same.

*Costs to defendants defending separately.*

§ 828. [511.] In all actions where there are several defendants not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such defendants as recover judgments in their favor, or either of them.

**Joint defense.** — In an action against several defendants, who do not sever in their defense, they are not, upon judgment in their favor, entitled to recover separate costs. Only one bill of costs will be allowed as though there had been but one defendant: *Tyler v. Trustees*, 14 Or. 485; *Rice v. Leonard*, 5 Cal. 61. See § 802, *supra*.

*Amount of costs taxable.*

§ 829. [512.] When allowed to either party, costs, to be called the attorney fee, shall be as follows:—

1. In all actions settled before issue is joined, five dollars;
2. In all actions where judgment is rendered without a jury, ten dollars;
3. In all actions where judgment is rendered after impaneling a jury, fifteen dollars;
4. In all actions removed to the supreme court and settled before argument, ten dollars;
5. In all actions where judgment is rendered in the supreme court after argument, fifteen dollars.

*Disbursements follow costs — Cost-bill.*

§ 830. [513.] The prevailing party, in addition to allowance for costs, as provided in the last section, shall also be allowed for all



necessary disbursements, including the fees of officers allowed by law, the fees of witnesses, the necessary expenses of taking depositions by commission or otherwise, and the compensation of referees. The disbursement shall be stated in detail and verified by affidavit, which shall be filed with the clerk of the court within ten days after the judgment.

**Taxing costs.** — In taxing costs, the practice requires a cost-bill or statement of disbursements, which must state the items separately, specifying the amount of each item, and for what the expense is incurred, and it must be verified: *Cross v. Chichester*, 4 Or. 114. In preparing a bill of costs and disbursements which one party claims to recover of the other, each item is a separate claim, for which a separate allowance might be asked, and each item should be briefly but particularly set forth, just as in a complaint: *Wilson v. City of Salem*, 3 Or. 482. The written objection to the bill of costs and disbursements need not be on oath, but it must point out particularly the errors in the bill: *Cross v. Chichester*, 4 Or. 114. A party who failed to file with the clerk a memorandum of costs within the time limited was held to have waived his right to costs, whether they were clerk's or sheriff's fees or other costs; and in the absence of such memorandum, the clerk had no power to include costs in the judgment. If the clerk's and sheriff's fees are inserted in the judgment when not so claimed, the judgment is so far a nullity, and may be attacked

collaterally: *Chapin v. Broder*, 16 Cal. 403. The cost-bill must be filed within the time prescribed by statute. Successful party cannot wait for notice of judgment from the opposing party: *O'Neil v. Donahue*, 57 Cal. 226; *Porter v. Hopkins*, 63 Cal. 53; *Mullaly v. Irish etc. Society*, 69 Cal. 559.

**Witnesses.** — A party is entitled to tax as costs the fees of witnesses subpoenaed by him in good faith, although they were not sworn on the trial: *Randall v. Falkner*, 41 Cal. 242. See *Meagher v. Van Zandt*, 18 Nev. 230; fees of those witnesses only who have been required to attend regularly are taxable.

**New trial — Costs of first trial.** — Where the judgment below is reversed on appeal, and a new trial had, the costs of the first trial are part of the final bill of costs: *Visher v. Webster*, 13 Cal. 58.

**Clerk cannot enter judgment for costs pending motion to retax.** — The clerk of the court has no authority to enter a judgment for costs while a motion to retax is pending: *Santa Clara etc. Co. v. Board of Supervisors etc.*, 71 Cal. 268.

### *Amount of referee's fees taxable.*

§ 831. [514.] The fees of referees shall be five dollars to each for every day necessarily spent in the business of the reference, and twenty cents per folio for writing testimony; but the parties may agree in writing upon any rate of compensation, and thereupon such rate shall be allowed.

### *Costs may be imposed on postponement.*

§ 832. [515.] When an application shall be made to a court or referees to postpone a trial, the payment to the adverse party of a sum not exceeding ten dollars, besides the fees of witnesses, may be imposed as the condition of granting the postponement.

### *Costs recoverable by defendant after tender.*

§ 833. [516.] When, in an action for the recovery of money, the defendant alleges in his answer that, before the commencement of the action, he tendered to the plaintiff the full amount to the which he is entitled, in such money as by agreement ought to be tendered, and thereupon brings into court, for the plaintiff, the amount tendered, and the allegation be found true, the plaintiff shall not recover costs, but shall pay them to the defendant.

Where money is paid into court, in the nature of a tender, and is received by the plaintiff, his act terminates his right to further litigation; and neither he nor his attor-

ney will afterwards be permitted to return a part of the money, or even the whole of it, and prosecute an appeal: *Lyons v. Bain*, 1 Wash. 482.

*Costs when amount due is deposited with the clerk.*

§ 834. [517.] If the defendant, in any action pending, shall at any time deposit with the clerk of the court, for the plaintiff, the amount which he admits to be due, together with all costs that have accrued, and notify the plaintiff thereof, and such plaintiff shall refuse to accept the same in discharge of the action, and shall not afterwards recover a larger amount than that deposited with the clerk, exclusive of interest and cost, he shall pay all costs that may accrue from the time such money was so deposited.

*Costs in cases appealed from justice's court.*

§ 835. [518.] In all civil actions tried before a justice of the peace, in which an appeal shall be taken to the superior court, and the party appellant shall not recover a more favorable judgment in the superior court than before the justice of the peace, such appellant shall pay all costs.

**Construction.** — The expression "a more favorable judgment," in the above section, does not mean a judgment a few dollars or cents larger or smaller than the judgment recovered in the justice's court, but one substantially more favorable, which is to be determined by the court, in view of the circumstances of each particular case: *Baxter v. Brooks*, 2 Wash. 86.

*Costs against guardian if infant plaintiff.*

§ 836. [519.] When costs are adjudged against an infant plaintiff, the guardian or person by whom he appeared in the action shall be responsible therefor, and payment may be enforced by execution.

*Costs in cases of executors and other trustees.*

§ 837. [520.] In actions prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered as in an action by or against a person prosecuting in his own right, but such costs shall be chargeable only upon or collected of the estate of the party represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally for mismanagement or bad faith in such action or defense.

*Assignee after action commenced is liable for costs.*

§ 838. [521.] When the cause of action, after the commencement of the action, by assignment, or in any other manner, becomes the property of a person not a party thereto, and the prosecution or defense is thereafter continued, such person shall be liable to the costs in the same manner as if he were a party, and payment thereof may be enforced by execution.

*Costs against state or county.*

§ 839. [522.] In all actions prosecuted in the name and for the use of the state, or in the name and for the use of any county, the state

or county shall be liable for costs in the same case and to the same extent as private parties.

*Revisory proceedings deemed actions, so far as relates to costs.*

§ 840. [523.] When the decision of a court of inferior jurisdiction, in an action or special proceeding, is brought before the supreme court or a superior court for review, such proceedings shall, for purpose of costs, be deemed an action at issue upon a question of law from the time the same is brought into the supreme court or superior court, and costs thereon may be awarded and collected in such manner as the court shall direct, according to the nature of the case.

*Costs in supreme court, when allowed.*

§ 841. [524.] In the following cases the costs of an appeal to the supreme court shall be in the discretion of the court:—

1. When a new trial shall be ordered;
2. When a judgment shall be affirmed in part and reversed in part.

**Costs on appeal—Modification of judgment.** —Where a judgment in plaintiff's favor was affirmed in part and reversed in part, on appeal by defendant, the court gave plaintiff (respondent) the costs in court below, and defendant (appellant) the costs of appeal: *Cole v. Swanston*, 1 Cal. 51. Where the supreme court modifies the judgment below for an apparent error, which the counsel for appellant might have corrected below by specific motion, the court will not tax the costs to the respondent: *Cassin v. Marshall*, 18 Cal. 693.

Where judgment is reversed on appeal upon the judgment roll, appellant cannot recover disbursement for transcript of the testimony intended to be used on motion for a new trial: *Bank of Woodland v. Hiatt*, 59 Cal. 580.

**Voluminous transcript.** —The appellate court may refuse to allow costs where the transcript is unnecessarily voluminous: *People v. Miles*, 56 Cal. 401; *Butcher v. Vaca V. R. R. Co.*, 56 Cal. 600. In fact, an encumbrance of the record with superfluous matter should be punished by the imposition of costs: *King Co. v. Collins*, 1 Wash. 469.

**Supreme court may continue case** for further hearing on condition that appellant pay costs in both courts, where he has wantonly disregarded the rules of the appellate court as to filing briefs, etc., and in having the transcript to contain a statement of facts, or a bill or other record of exceptions taken at the trial, and unless appellant comply, there will be an affirmance of the judgment: *Dodd v. Bowles*, 3 Wash. 11.

*Costs in discretion of the court.*

§ 842. [525.] In all actions and proceedings other than those mentioned in this chapter, where no provision is made for the recovery of costs, they may be allowed or not; and if allowed, may be apportioned between the parties, in the discretion of the court.

**Costs in discretion of court.** — See notes to last preceding section. If the plaintiff in a suit for recovery of possession of personal property takes the property at the commencement of the action, and the defendant asks a return of it, and the defendant was entitled to the property at the commencement of the action, but his right to possession of the property ceased and rested in the plaintiff before trial, the judgment should leave the property in plaintiff's possession, but award costs to defendant: *O Connor v. Blake*, 29 Cal. 312. In an action for damages for diverting water where an injunction was claimed, and the action was brought to try the right to the use of the water, the court held that a verdict, though

for less than the statutory amount, would enable it to grant costs in its discretion: *Marius v. Bicknell*, 10 Cal. 217; *Esmond v. Chico*, 17 Cal. 339.

In cases where costs are in the discretion of the court, the discretion exists, and may be exercised in every stage of the action, and, therefore, by the appellate court as to costs of appeal: *Chipman v. Montgomery*, 63 N. Y. 220. Costs in an action for the construction of a will are in the discretion of the court: *Gourley v. Campbell*, 66 N. Y. 169; *Provost v. Provost*, 70 N. Y. 141; and the costs of any or all of the parties may be charged upon the estate: *Lawrence v. Lindsay*, 68 N. Y. 108; *Gourley v. Campbell*, 66 N. Y. 169.



*Party aggrieved may have retaxation.*

§ 843. [526.] Any party aggrieved by the taxation of costs by the clerk of the court may, upon application, have the same retaxed by the court in which the action or proceeding is had.

**Retaxation.** — The party complaining must move in the lower court to retax, and thus obtain, distinctly, the judgment of the court of original jurisdiction upon the disputed items, before resort can be had to a higher tribunal: *Huntington v. Blakeney*, 1 Wash. 111; *Guy v. Franklin*, 5 Cal. 417; and this is the proper remedy: *Newberg v. Farmer*, 1 Wash. 182. The mere fact that some of the items are not legally chargeable affords no just ground for recalling the execution

or denying another: *Meeker v. Harris*, 23 Cal. 286.

**Cost-bill** is not part of judgment roll, and court having only the judgment roll before it cannot reverse the order to retax costs: *Kelly v. McKibben*, 54 Cal. 192. The appellate court cannot reverse the order retaxing costs if there is nothing in the record except the memorandum of costs and the motion to retax: *Evans v. Jacobs*, 59 Cal. 629. Court may retax in case of mistake: *Higuerra v. Bernal*, 46 Cal. 581.

*Security for costs may be required when.*

§ 844. [527.] When a plaintiff in an action resides out of the county, or is a foreign corporation, security for the costs and charges which may be awarded against such plaintiff may be required by the defendant. When required, all proceedings in the action shall be stayed until a bond, executed by two or more persons, be filed with the clerk, conditioned that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, not exceeding the sum of two hundred dollars. A new or additional bond may be ordered by the court or judge, upon proof that the original bond is insufficient security, and proceedings in the action stayed until such new or additional bond be executed and filed. The plaintiff may deposit with the clerk the sum of two hundred dollars in lieu of a bond.

**Residence.** — Every corporation has some locality where its principal office or place of business is established, and it may very properly be said to "reside" at such locality: *Jenkins v. Cal. Stage Co.*, 22 Cal. 538.

**Defendant may require security for costs** of non-resident plaintiff, but waives this right unless he uses diligence in making his application: *Swift v. Stine*, 3 Wash. 518.

## TITLE XII.

### OF MATTERS OF PROBATE.

#### CHAPTER I.—OF THE POWERS OF THE COURT IN MATTERS OF PROBATE.

##### II.—OF THE MANNER OF BRINGING PERSONS INTO COURT IN PROBATE PROCEEDINGS.

##### III.—OF THE VENUE OF PROBATE PROCEEDINGS.

##### IV.—OF THE PROOF OF WILLS.

##### V.—OF LETTERS TESTAMENTARY AND OF ADMINISTRATION, AND BONDS OF EXECUTORS AND ADMINISTRATORS.

VI. — OF THE INVENTORY AND EFFECTS OF DECEASED PERSONS.

VII. — OF PROVISION FOR THE SUPPORT OF THE FAMILY.

VIII. — OF CLAIMS AGAINST THE ESTATE.

IX. — OF SALES OF PROPERTY BY EXECUTORS AND ADMINISTRATORS.

X. — GENERAL PROVISIONS RELATING TO THE POWERS AND DUTIES OF ADMINISTRATORS.

XI. — OF ACCOUNTS OF EXECUTORS.

XII. — PARTITION AND DISTRIBUTION OF THE ESTATE.

XIII. — OF SPECIFIC PERFORMANCE OF CONTRACTS OF DECEASED PERSONS.

XIV. — OF THE GUARDIANSHIP OF INFANTS.

XV. — OF THE GUARDIANSHIP OF IDIOTS AND INSANE PERSONS.

XVI. — OF PRIVATE SALES OF REAL PROPERTY BELONGING TO ESTATES.

## CHAPTER I.

### OF THE POWERS OF THE COURT IN MATTERS OF PROBATE.

§ 845. Powers of the court in probate.

§ 846. Records to be kept in probate matters.

§ 847. Powers of judges at chambers in probate matters.

#### *Powers of the court in probate.*

§ 845. The superior courts, in the exercise of their jurisdiction of matters of probate, shall have power, —

1. To take proof of wills, and to grant letters testamenary and of administration, and to bind apprentices as by law provided;

2. To settle the estates of deceased persons, and the accounts of executors, administrators, and guardians;

3. To allow or reject claims against the estates of deceased persons as hereinafter provided;

4. To hear and determine all controversies between masters and their apprentices;

5. To award process, and cause to come before them all persons whom they may deem it necessary to examine, whether parties or witnesses, or who, as executors, administrators, or guardians, or otherwise, shall be intrusted with or in any way accountable for any property belonging to a minor, orphan, or person of unsound mind, or estate of any deceased person;

6. To order and cause to be issued all writs which may be necessary to the exercise of their jurisdiction. [March 9, 1891, § 1.]

#### *Records to be kept in probate matters.*

§ 846. There shall be kept in the office of the clerk of the superior court the following books of record of probate matters: —

1. A journal, in which shall be entered all orders, decrees and judgments made by the court, or the judge thereof, and the minutes of the court, in probate proceedings;

2. A record of wills, in which shall be recorded all wills admitted to probate;

3. A record of letters testamentary and of administration, in which all letters testamentary and of administration shall be recorded;

4. A record of bonds, in which all bonds and obligations required by law to be approved by the court or judge in matters of probate shall be recorded;

5. A record of petitions, in which all petitions for orders of sale of real estate shall be recorded;

6. A record of claims, in which at least one page shall be given to each estate, or case, wherein shall be entered, under the title of each estate or case, in separate columns properly ruled, — 1. The names of claimants against the estate; 2. The date of filing proof of claim; 3. The amount claimed; 4. The amount allowed; 5. The date of allowance; 6. The nature of the claim; 7. The amount paid; 8. Number of the voucher for each payment; 9. The date of filing the voucher.

7. A memorandum of the files, in which at least one page shall be given to each estate or case, wherein shall be noted each paper filed in the case, except proof of claims and vouchers noted in record of claims, and the date of filing each paper;

8. A record of marriages, in which certificates of all marriages solemnized in the county shall be recorded. [*March 9, 1891, § 2.*]

*Powers of judges at chambers in probate matters.*

§ 847. The judges of the superior courts may, at chambers, appoint appraisers, receive inventories and accounts, suspend the powers of executors, administrators, or guardians in the cases allowed by law, grant letters of administration or guardianship, approve claims and bonds, and direct the issuance of all writs and process necessary in the exercise of their powers. [*February 26, 1891, § 15.*]

## CHAPTER II.

### OF THE MANNER OF BRINGING PERSONS INTO COURT IN PROBATE PROCEEDINGS.

§ 848. Persons may be brought in by citation.

§ 849. Service and return of citations.

§ 850. Length of time allowed for answer to citation.

*Persons may be brought in by citation.*

§ 848. Whenever personal notice is required to be given to any party to a proceeding in matters of probate, and no other mode of giving notice is prescribed, it shall be given by citation issued from the



court, signed by the clerk and under the seal of the court, directed to the sheriff of the proper county, requiring him to cite such person to appear before the court or judge, as the case may be, at a time and place to be named in such citation. In the body of the citation shall be briefly stated the nature or character of the proceedings. [*March 9, 1891, § 3.*]

*Service and return of citations.*

§ 849. [1312.] The officer to whom the citation is directed shall serve it by delivering a copy to the person or persons named therein, and shall return the original to the court according to its direction, indorsing thereon the time and manner of service.

*Length of time allowed for answer to citation.*

§ 850. In all cases in which citations are issued from the superior court in probate proceedings, they shall be served at least ten days before the term at which they are made returnable, except when issued from the court in cases where the law requires the judge to issue them upon his own motion, and he does so issue them; and in such cases they shall be served in sufficient time to allow the person served to be in attendance on the court. [*March 9, 1891, § 4.*]

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## CHAPTER III.

### OF THE VENUE OF PROBATE PROCEEDINGS.

§ 851. When letters testamentary, etc., to be granted.

§ 852. Same subject.

§ 853. Subsequent proceedings must be in same county.

*When letters testamentary, etc., to be granted.*

§ 851. [1340.] Wills shall be proved and letters testamentary or of administration shall be granted, —

1. In the county of which deceased was a resident or had his place of abode at the time of his death;

2. In the county in which he may have died, leaving estate therein, and not being a resident of the state;

3. In the county in which any part of his estate may be, he having died out of the state, and not having been a resident thereof at the time of his death.

*Same subject.*

§ 852. [1341.] When the estate of the deceased is in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, the superior court of that county in which application is first made for letters testamentary or of administration shall have exclusive jurisdiction of the settlement of the estate.

The superior court of the county in which application is first made, decedent dying out of the state, but leaving property in the county, has exclusive jurisdiction of the settlement of the estate: *Territory v. Klee*, 23 Pac. Rep. 417; and a decree in probate proceedings under the above section vesting property in the state as an escheat, as provided by the chapter on descent of real estate, because its owner died without kindred or husband or wife, is void, where the court of another county has already granted letters of administration on the estate: *Territory v. Klee*, 23 Pac. Rep. 417.

*Subsequent proceedings must be in same county.*

§ 853. All orders, settlements, trials and other proceedings in probate shall be had or made in the county in which letters testamentary or of administration were granted. [*March 9, 1891, § 5.*]

## CHAPTER IV.

### OF THE PROOF OF WILLS.

- § 854. Person having possession of will must produce it.
- § 855. Person named as executor must produce will.
- § 856. Executor must petition for probate, or decline in writing.
- § 857. Liability of persons failing to comply.
- § 858. Petition by executor for production and probate of will.
- § 859. Petition by other interested person.
- § 860. Court may compel production.
- § 861. Applications may be heard out of court.
- § 862. Certificate of probate or rejection to be granted.
- § 863. Manner of taking testimony of absent witnesses.
- § 864. Effect of testimony so taken.
- § 865. Proof by one witness and handwriting of the others.
- § 866. Proof in case all witnesses are dead.
- § 867. All the testimony must be reduced to writing and signed.
- § 868. All wills proved must be recorded.
- § 869. Wills proved, recorded, and certified are admissible in evidence.
- § 870. Authenticated copies are admissible in evidence.
- § 871. Will to be recorded in different counties when.
- § 872. Petition to set aside or establish will.
- § 873. Parties interested must be cited.
- § 874. How far proceedings binding when parties fail to appear.
- § 875. Former testimony of deceased or absent witness on such trial.
- § 876. Probate annulled when.
- § 877. Annulment of probate takes away powers of execution.
- § 878. Losing party pays costs.
- § 879. Establishment of lost or destroyed wills.
- § 880. What decree must show — Record of letters testamentary thereon.
- § 881. Restraining order pending such proceedings.
- § 882. Foreign wills, how proved.
- § 883. Foreign wills carried into effect the same as domestic.

*Person having possession of will must produce it.*

§ 854. [1342.] Any person having the custody of any will shall, within thirty days after he shall have knowledge of the death of the testator, deliver said will into the superior court which has jurisdiction, or to the person named in the said will as executor.

*Person named as executor must produce will.*

§ 855. [1343.] Any person named as executor in any will shall,

within thirty days after he has knowledge that he is executor, present the will, if in his possession, to the superior court which has jurisdiction.

*Executor must petition for probate, or decline in writing.*

§ 856. [1344.] An executor named in the will may decline to act by filing a written renunciation at the time of filing said will; but if he intends to accept, he shall present with the will a petition praying that the will be admitted to probate, and that letters testamentary be issued to him.

**Renunciation by executor.** — If one only of two executors applies for letters, and the petition does not disclose the residence of the co-executor, and no citation to him is issued, it will not be assumed, for the purpose of invalidating the probate, that the co-executor was a resident of the county in which the petition was filed: *McCrea v. Harasthy*, 51 Cal. 146.

*Liability of persons failing to comply.*

§ 857. Any person violating either of the next three preceding sections, without reasonable excuse, shall be liable to every person interested in the will for damages caused by such neglect. [*Mar. 9, '91, § 6.*]

*Petition by executor for production and probate of will.*

§ 858. [1346.] Any person named as an executor in a will, not having the same in his possession, may petition the court of proper jurisdiction for an order to have the same produced, that it may be admitted to probate, and that letters testamentary may be issued to him.

*Petition by other interested person.*

§ 859. [1347.] Any person having an interest in the will may in like manner present a petition praying that it may be required to be produced and admitted to probate.

*Court may compel production.*

§ 860. [1348.] The said court may compel by citation and attachment any person in whose possession any will may be to produce it in court at such time as the court may order.

*Applications may be heard out of court.*

§ 861. [1349.] Applications for the probate of a will, or for letters testamentary, may be made to the judge of the superior court, and he may also at any time issue all necessary orders and process to enforce the production of any will.

*Certificate of probate or rejection to be granted.*

§ 862. [1350.] When any will is exhibited to be proven, the court may immediately receive the proof and grant a certificate of probate, or if such will be rejected, issue a certificate of rejection.



**Questions to be tried.** — It is necessary, before the court can admit a will to probate, to require proof of all the acts requisite to constitute the execution of a valid will: *Estate of Canterbury*, 56 Cal. 470. Where the instrument offered is evidently of a testamentary character, the inquiry is only as to the mental condition of the testator; whether he has acted under duress, menace, fraud, or undue influence; whether the will was duly executed, and the like. Questions concerning the construction to be placed upon the will cannot be considered until it shall have been admitted to probate: *In re Cobb*, 49 Cal. 604. It is sufficient to state as a ground for the contest of a will that the deceased, at the time of making

it, was not of sound and disposing mind; but when menace, duress, etc., are charged, the facts relied upon must be pleaded: *Estate of Gharky*, 57 Cal. 274; undue influence is ground for setting aside a will. It is not necessary that it should be by one who is benefited by the will: *In re Cahill*, 74 Cal. 52.

Upon an issue as to the mental condition of the testator, opinions of persons connected with his business and social habits are admissible: *Estate of Brooks*, 54 Cal. 471.

**Bequests void for uncertainty.** — A will otherwise effective should not be refused probate because certain bequests contained therein are void for uncertainty: *Estate of Shillaber*, 74 Cal. 144.

*Manner of taking testimony of absent witnesses.*

§ 863. [1351.] If any witness be prevented by sickness from attending at the time when any will may be produced for probate, or reside out of the state or more than thirty miles from the place where the will is to be proven, such court may issue a commission, annexed to such will, and directed to any judge, justice of the peace, or mayor, or other person, empowering him to take and certify the attestation of such witness.

*Effect of testimony so taken.*

§ 864. [1352.] If such witness appear before such officer and make oath or affirmation that the testator signed the writing annexed to such commission as his last will, or that some other person signed it by his direction and in his presence, that he was of sound mind, that the witness subscribed his name thereto in presence of the testator, the testimony so taken shall have the same force as if taken before the court.

*Proof by one witness and handwriting of the others.*

§ 865. [1353.] When one of the witnesses to such will shall be examined, and the other witnesses are dead, insane, or their residence unknown, then such proof shall be taken of the handwriting of the testator, and of the witnesses dead, insane, or residence unknown, and of such other circumstances as would be sufficient to prove such will.

*Proof in case all witnesses are dead.*

§ 866. [1354.] If it shall appear, to the satisfaction of the court, that all the subscribing witnesses are dead, insane, or their residence unknown, the court shall take and receive such proof of the handwriting of the testator and subscribing witnesses to the will, and of such other facts and circumstances as would be sufficient to prove such will.

*All the testimony must be reduced to writing and signed.*

§ 867. [1355.] All the testimony adduced in support of the will

shall be reduced to writing, signed by the witnesses, and certified by the judge of the court.

*All wills proved must be recorded.*

§ 868. [1356.] All wills shall be recorded in a book kept for that purpose, within thirty days after probate, and the originals shall be carefully filed.

*Wills proved, recorded, and certified are admissible in evidence.*

§ 869. [1357.] Every will proved according to the provisions of this chapter, recorded and certified by the judge of the superior court, and attested by the seal of said court, may be read as evidence without any further proof.

*Authenticated copies are admissible in evidence.*

§ 870. The record of any will made, proved, and recorded as aforesaid, and the exemplification of such record by the clerk in whose custody the same may be, shall be received as evidence, and shall be as effectual in all cases as the original would be if produced and proven. [March 9, 1891, § 7.]

*Will to be recorded in different counties when.*

§ 871. [1359.] In all cases where lands devised by last will are situated in different counties, a copy of such will shall be recorded in the county auditor's office in each county within six months after probate.

*Petition to set aside or establish will.*

§ 872. If any person interested in any will shall appear within one year after the probate or rejection thereof, and, by petition to the superior court having jurisdiction, contest the validity of said will, or pray to have the will proven which has been rejected, he shall file a petition containing his objections and exceptions to said will, or to the rejection thereof. Issues shall be made up, tried and determined in said court respecting the competency of the deceased to make last will and testament, or respecting the execution by the deceased of such last will and testament under restraint or undue influence or fraudulent representations, or for any other cause affecting the validity of such will. [March 9, 1891, § 8.]

**Within one year.** — The contestant must appear within the year and file his petition. Time is of the essence of the proceeding: *Estate of Shabro*, 63 Cal. 5. That the probate may be conclusive as to some of the heirs who have allowed the time to contest the probate to lapse, and voidable as to an infant heir applying in time, see *Thompson v. Samson*, 64 Cal. 330. Under this section a party interested in

the estate of a testator, who was under no disability at the time of the admission of the will to probate, cannot contest its validity, or the validity of any of its items, in the proceedings for the settlement of the estate, after the expiration of one year from the time the will was probated: *Estate of Maxwell*, 74 Cal. 384.

**Practice.** — All questions relating to the amendment of the pleadings should be passed

upon when presented and before proceeding further with the trial: *Estate of Brooks*, 54 Cal. 471.

**Burden of proof is upon him who seeks reprobate of a will which has once been rejected:** *Hubbard v. Hubbard*, 7 Or. 42.

*Parties interested must be cited.*

§ 873. Upon the filing of the petition referred to in the next preceding section, a citation shall be issued to the executors who have taken upon them the execution of the will, or to the administrators with the will annexed, and to all legatees named in the will residing in the state, or to their guardians if any of them are minors, or their personal representatives if any of them are dead, requiring them to appear before the court on a day therein specified, to show cause why the petition should not be granted. [March 9, 1891, § 9.]

*How far proceedings binding when parties fail to appear.*

§ 874. [1362.] If no person shall appear within the time aforesaid, the probate or rejection of such will shall be binding, save to infants, married women, persons absent from the United States, or of unsound mind, a period of one year after their respective disabilities are removed.

*Former testimony of deceased or absent witness on such trial.*

§ 875. [1363.] In all trials respecting the validity of a will, if any subscribing witness be deceased, or cannot be found, the oath of such witness, examined at the time of probate, may be admitted as evidence.

*Probate annulled when.*

§ 876. [1364.] If, upon the trial of said issue, it shall be decided that the will is for any reason invalid, or that it is not sufficiently proved to have been the last will of the testator, the will and probate thereof shall be annulled and revoked.

**Annuling will after distribution.** — Where the probate of a will has been annulled upon a contest initiated by an heir after the entry of a decree of distribution, the heir may pursue the property, and perhaps its proceeds, in the hands of the distributee, but not in the hands of a bona fide purchaser: *Thompson v. Samson*, 64 Cal. 330.

**Partial revocation.** — Where the will is found to be invalid, a judgment should be entered entirely annulling the probate, and revoking the powers of the executors. A partial revocation pursuant to a stipulation of the parties is void: *Estate of Freud*, 73 Cal. 555.

*Annulment of probate takes away powers of executor.*

§ 877. [1365.] Upon the revocation being made, the powers of the executor or administrator with the will annexed shall cease, but such executor or administrator shall not be liable for any act done in good faith previous to service of written notice of intention to contest said will.

**Appeal from order of revocation** simply keeps alive the character of executor for the purposes of the appeal, but does not preserve his powers, nor prevent the court from appointing a special administrator: *Estate of Crozier*, 65 Cal. 332.



*Losing party pays costs.*

§ 878. [1366.] The fees and expenses shall be paid by the losing party. If the probate be revoked or the will annulled, the party who shall have resisted such revocation shall pay the cost and expenses of proceedings out of the property of the deceased.

*Establishment of lost or destroyed wills.*

§ 879. [1367.] Whenever any will be lost or destroyed, by accident or design, the superior court shall have power to take proof of the execution and validity of the will, and to establish the same, notice to persons interested having first been given; such proof shall be reduced to writing, and signed by the witnesses. But no will shall be allowed to be proved as a lost or destroyed will, unless the same shall be proved to have been in existence at the time of the death of the testator, or be shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions shall be clearly and distinctly proved by at least two credible witnesses.

**Lost will or fraudulent destruction.** — The petition for the probate of a will alleged to have been fraudulently destroyed during the lifetime of the testator must specifically state the facts and circumstances constituting the fraud. Whether there was a fraudulent destruction is a question of fact to be proved: *Estate of Kidder*, 66 Cal. 487.

The petition for the probate of a lost will must allege the existence of the will at the time of testator's death, if it was lost or destroyed after his death, or if before his death, the petition must allege its "fraudulent" destruction,

and must prove it. The fact that the court finds that the will was fraudulently destroyed during the testator's lifetime will not sustain a decree admitting the will to probate, if the petition does not contain proper allegations to support such finding: *Estate of Kidder*, 57 Cal. 282.

**On application to have lost will admitted to probate under this section,** the provisions of the will must be clearly and distinctly proved by at least two credible witnesses: *Estate of Kidder*, 66 Cal. 487.

*What decree must show — Record of same — Letters testamentary thereon.*

§ 880. When any such will shall be established, the provisions thereof shall be distinctly stated in the judgment establishing it, and a copy of such decree shall be certified by the clerk, under the seal of the court; and such copy, together with the testimony upon which the decree is founded, shall be recorded as other wills are required to be recorded, and letters testamentary or of administration, with the will annexed, shall be issued thereon, in the same manner as upon wills produced and duly proved. [March 9, 1891, § 10.]

*Restraining order pending such proceedings.*

§ 881. [1369.] If, before or during the pendency of an application to prove a lost or destroyed will, letters of administration be granted on the estate of the testator, or letters testamentary of any previous will of the testator be granted, the court shall have authority to restrain the administrators or executors so appointed from any acts or proceedings which would be injurious to the legatees or devisees claiming under the lost or destroyed will.

*Foreign wills, how proved.*

§ 882. [1370.] Wills probated in any other state or territory of the United States, or in any foreign country or state, shall be admitted to probate in this state on the production of a copy of such will and of the original record of probate thereof, authenticated by the attestation of the clerk of the court in which such probation was made; or if there be no clerk, by the attestation of the judge thereof, and by the seal of office of such officers, if they have a seal.

*Foreign wills carried into effect the same as domestic.*

§ 883. [1371.] All provisions of law relating to the carrying into effect of domestic wills after probate shall, so far as applicable, apply to foreign wills admitted to probate in this state, as contemplated in the preceding section.

## CHAPTER V.

### OF LETTERS TESTAMENTARY AND OF ADMINISTRATION, AND BONDS OF EXECUTORS AND ADMINISTRATORS.

- § 884. Letters testamentary, when and to whom granted.
- § 885. Objections to granting may be made.
- § 886. Letters during minority of person named as executor.
- § 887. Discovery of will revokes previous letters.
- § 888. Setting aside will revokes letters.
- § 889. Marriage extinguishes power of executrix or administratrix.
- § 890. Letters revoked by court when person becomes disqualified.
- § 891. Executor of executor does not administer former estate.
- § 892. Powers of executors when only part of those named are appointed.
- § 893. Administrator with will annexed, power of.
- § 894. Letters to be signed and under seal.
- § 895. Affidavit as to knowledge of other will.
- § 896. Letters must be recorded before delivery.
- § 897. Certified copies are evidence.
- § 898. Form of letters testamentary.
- § 899. Form of letters of administration with will annexed.
- § 900. Who are entitled to letters of administration.
- § 901. Manner of applying for letters of administration.
- § 902. Application for letters of administration *de bonis non*.
- § 903. Notice of application for letters of administration.
- § 904. Form of letters of administration.
- § 905. Oath of executors and administrators.
- § 906. Bond of executors and administrators.
- § 907. Conditions of bond.
- § 908. Addition before order to sell property.
- § 909. Separate bonds when two or more persons are appointed.
- § 910. Successive recoveries on same bond.
- § 911. Qualification of sureties.
- § 912. Justification of sureties — Additional bond.
- § 913. New bond discharges former sureties.
- § 914. If sufficient security not given, powers cease.
- § 915. Bond may be dispensed with if will so provide.
- § 916. Interested party may apply for additional security.
- § 917. Citation therein — Service of citation.

- § 918. Hearing an order upon such application.
- § 919. Letters revocable for failure to comply with order.
- § 920. Order for further security on court's own motion.
- § 921. Who not to be sureties.
- § 922. Judge must exercise care with regard to sureties.
- § 923. Bonds must be recorded.
- § 924. Bond not to fail for defects, if intended as a bond.
- § 925. Applications and acts heard in court or at chambers.
- § 926. When judge must suspend executor or administrator.
- § 927. Hearing and determination after suspension.
- § 928. Issues may be framed at the hearing.
- § 929. Service of notice by publication.
- § 930. Executor or administrator required to answer on oath.
- § 931. Special administrator, when may be appointed.
- § 932. Bond of special administrator.
- § 933. Duties of special administrator.
- § 934. Powers of special administrator cease when.
- § 935. Special administrator not liable to creditors.
- § 936. Account of special administrator.
- § 937. Executor or administrator may resign.
- § 938. Letters to be surrendered.
- § 939. In case of resignation of one or more, the others may act.
- § 940. When executor or administrator dies or resigns, next in title takes the appointment.
- § 941. Representatives of deceased executor or administrator must account.
- § 942. Succeeding administrator may have action for assets of the estate.
- § 943. Such action must be commenced in six years.
- § 944. Attachment for failure to settle.
- § 945. Attachment of special administrator.
- § 946. Costs upon such attachment.
- § 947. Partnership property, inventory of.
- § 948. Administration of partnership property.
- § 949. Surviving partner entitled to administration.
- § 950. Bond of administrator of partnership.
- § 951. General administrator must give additional bond for partnership property.
- § 952. Surviving partner must give information as to estate.
- § 953. Citation of surviving partner for failure to give information.
- § 954. Disqualifications to act — Revocation in such case.
- § 955. Settlement of estates without administration.

*Letters testamentary, when and to whom granted.*

§ 884. [1372.] After the probate of any will, letters testamentary shall be granted to the persons therein appointed executors. If a part of the persons thus appointed refuse to act, or be disqualified, the letters shall be granted to the other persons appointed therein. If all such persons refuse to act, letters of administration with the will annexed shall be granted to the person to whom administration would have been granted if there had been no will.

**Renunciation of executor.** — Upon the renunciation of the person in a will as executor of his right to letters testamentary, letters of administration with the will annexed must be issued as provided by § 900, *post*, for the grant of letters in cases of intestacy: *estate of Garber*, 74 Cal. 338.

*Objections to granting may be made.*

§ 885. [1373.] Any person interested in a will may file objections in writing to the granting of letters testamentary to the persons



named as executors, or any of them, and the objection shall be heard and determined by the court.

*Letters during minority of person named as executor.*

§ 886. [1374.] If the executor be a minor, or absent from the state, letters of administration with the will annexed shall be granted, during the time of such minority or absence, to some other person, unless there be another executor, who shall accept the trust, in which case the estate shall be administered by such other executor until the disqualification shall be removed, when such minor, having arrived at full age, or such absentee, shall be admitted as joint executor with the former.

*Discovery of will revokes previous letters.*

§ 887. [1375.] If, after letters of administration are granted, a will of the deceased be found, and probate thereof be granted, the letters shall be revoked, and letters testamentary or of administration with will annexed shall be granted.

*Setting aside will revokes letters.*

§ 888. [1376.] If, after a will has been found and letters thereon granted, the will shall afterwards be set aside, the letters shall be revoked, and letters of administration granted on the goods unadministered.

**Probate, effect of.** — If an administrator is appointed, and qualifies, and afterwards, without his removal (a will having been found), another person is appointed administrator with the will annexed, and qualifies, the latter ap-

pointment supersedes the former administration, but the acts of the administrator with the will annexed are valid: *McCauley v. Harvey*, 49 Cal. 497.

*Marriage extinguishes powers of executrix or administratrix.*

§ 889. [1377.] If any executrix or administratrix marry, her husband shall not thereby acquire any interest in the effects of her testator or intestate, nor shall the administration thereby devolve on him, but the marriage shall extinguish her powers, and the letters be revoked.

**Marriage of executrix**, while it extinguishes her powers and authority (*Teschmacher v. Thompson*, 18 Cal. 11), does not *eo instanti* deprive her of the power to act. It merely renders her incompetent, so that she may be proceeded against for suspension and removal, as provided by the code: *Schroeder v. Superior Court*, 70 Cal. 343. See § 941, *post*.

*Letters revoked by court when person becomes disqualified.*

§ 890. [1378.] If an executor or administrator become of unsound mind, or be convicted of felony or infamous crime, or become an habitual drunkard, or otherwise incapable of or unsuitable for executing the trust reposed in him, or so fail to discharge his official duties, or waste or mismanage the estate, or so act as to endanger any co-executor or co-administrator, the probate court, upon complaint in writing made by any person interested, supported by affidavit, and

due notice given to the person complained of, shall hear the complaint, and if found to be just, shall revoke the letters granted.

Granting fresh letters is *per se* a revocation: *McCauley v. Harvey*, 49 Cal. 505.

*Executor of executor does not administer former estate.*

§ 891. [1379.] No executor of an executor shall, as such, be authorized to administer upon the estate of the first testator, but on the death of the sole or surviving executor of any last will, letters of administration with the will annexed, of the estate of the first testator left unadministered, shall be issued.

*Powers of executors when only part of those named are appointed.*

§ 892. [1380.] When all the executors named shall not be appointed by the court, such as are appointed shall have the same authority to perform every act and discharge every trust required by the will, and their acts shall be as effectual for every purpose as if all were appointed and should act together.

*Administrator with will annexed, power of.*

§ 893. [1381.] Administrators with the will annexed shall have the same authority as the executor named in the will would have had, and their acts shall be as effectual for every purpose.

Administrators with will annexed are prescribed by § 900. It is not a case of intestacy: not required to be appointed in the order pre- *Estate of Barton*, 52 Cal. 538.

*Letters to be signed and under seal.*

§ 894. [1382.] Letters testamentary and of administration with the will annexed shall be signed by the clerk of the court, and be under the seal of the court, and a copy of the will shall be attached to the letters.

*Affidavit as to knowledge of other will.*

§ 895. [1383.] Every administrator with the will annexed, and executor, at the time letters are granted him, shall make an affidavit that he knows of no other and subsequent will of the deceased.

*Letters must be recorded before delivery.*

§ 896. The clerk shall record, in a well-bound book kept for that purpose, all letters testamentary and of administration, before they are delivered to the executors or administrators, and shall certify on such letters that they have been so recorded. [March 9, 1891, § 11.]

See §§ 899, 900.

*Certified copies are evidence.*

§ 897. Copies of such letters, or copies of the records thereof, certified by the clerk, and under the seal of the superior court, shall be received as evidence in any court in this state. [Mar. 9, 1891, § 12.]

*Form of letters testamentary.*

§ 898. [1386.] Letters testamentary to be issued to executors under the provisions of this act may be in the following form:—

State of Washington, }  
County of ——. }

In the superior court of the county of ——.

Whereas, the last will of A B, deceased, was, on the — day of —, A. D. —, duly exhibited, proven, and recorded in our said superior court, a copy of which is hereto annexed; and whereas, it appears in and by said will that C D is appointed executor thereon, — now, therefore, know all men by these presents, that we do hereby authorize the said C D to execute said will according to law.

Witness my hand and the seal of said court this — day of —, A. D. 18—

*Form of letters of administration with will annexed.*

§ 899. [1387.] Letters of administration with the will annexed may be substantially in the following form:—

State of Washington, }  
County of ——. }

In the superior court of the county of ——.

The last will of A B, deceased, a copy of which is hereunto annexed, having been proved and recorded in the said superior court, and — (as the case may be), —, C D is hereby appointed administrator with the will annexed.

Witness my hand and the seal of said court this — day of —, A. D. 18—.

*Who are entitled to letters of administration.*

§ 900. [1388.] Administration of the estate of a person dying intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the following order:—

1. The surviving husband or wife, or such person as he or she may request to have appointed.

2. The next of kin, in the following order: 1. Child or children; 2. Father or mother; 3. Brothers or sisters; 4. Grandchildren.

3. To one or more of the principal creditors; *provided*, that if the persons so entitled or interested shall neglect for more than forty days after the death of the intestate to present a petition for letters of administration, or if there be no relatives or next of kin, or if the heirs or one or more of the principal creditors, in writing, waive their right to administration, or if there be no principal creditor or creditors, then the court or judge may appoint any suitable and competent person to administer such estate.



**Wife's interest in community property** is not, on her death, the subject of administration: *Packard v. Arreianes*, 17 Cal. 536.

**Next of kin entitled to share, etc.** — This means the next of kin capable of inheriting, or who would be entitled to distribution if there were no nearer kindred: *Anderson v. Potter*, 5 Cal. 64.

**Children.** — An illegitimate child is not entitled to administer on the estate of his father in preference to the brother of the father: *Estate of Pico*, 52 Cal. 84.

**Brothers** of the father administer on the father's estate in preference to his illegitimate child: *Estate of Pico*, 52 Cal. 84.

**Failing to apply for letters.** — If one entitled to administer waives his right to, or refuses to apply for, letters, the court may ap-

point another, and refuse thereafter to revoke these letters: See *Estate of Keane*, 56 Cal. 407. But the court may appoint any of the persons specified in the above section after such time, notwithstanding their failure to so apply: *Ramp v. McDaniel*, 12 Or. 108.

**Administrator de facto.** — The recognition by the probate court of a person acting as administrator, but who has not qualified and received letters, does not make him administrator *de facto*: *Pryor v. Downey*, 50 Cal. 388.

**Dying intestate.** — The order prescribed by the above section applies only to cases of intestacy; if a man leaves a will entitled to probate, the appointment of an administrator with the will annexed is not required to follow the order above stated: *Estate of Burton*, 52 Cal. 538.

### *Manner of applying for letters of administration.*

§ 901. [1389.] Application for letters of administration shall be made by petition in writing, signed by the applicant or his attorney, and filed in the superior court, which petition shall set forth the facts essential to giving the court jurisdiction of the case, and such applicant, at the time of making such application, shall make an affidavit, stating, to the best of his knowledge and belief, the names and places of residence of the heirs of the deceased, and that the deceased died without a will.

**Petition, statement of facts and admissions in.** — The petition ought to state all the facts upon which the petitioner relies to entitle him to letters of administration in preference to other persons: *Lucas v. Todd*, 28 Cal. 186.

An executor who represents in his petition for letters testamentary that certain property belonged to the estate of the decedent, and files an inventory including such property, is not thereby estopped from afterwards claiming the property as his own: *Anthony v. Chapman*, 65 Cal. 73.

A petition for letters of administration is

governed by the rules of pleading, and the rules in regard to admissions in pleadings apply to it: *Duff v. Duff*, 71 Cal. 513. In this case, it was held that a statement in a petition for letters of administration, to the effect that certain real property therein particularly described belonged to the deceased, could not be received in evidence against the petitioner as an estoppel, but that it might be received as proof, open to rebuttal and explanation, that he admitted such fact, provided the petition was signed by him personally, or by an attorney who acted within the scope of his authority in making the statement.

### *Application for letters of administration de bonis non.*

§ 902. [1390.] A similar affidavit, with such variations as the case may require, shall be made by administrators of the goods remaining unadministered, and by administrators during the time of a contest about a will, or the granting of letters of administration.

### *Notice of application for letters of administration.*

§ 903. [1391.] When a petition praying for letters of administration is filed, the clerk must give notice thereof, by causing notices to be posted in at least three public places in the county, one of which must be at the place where the court is held, containing the name of the decedent, the name of the applicant, and the time when the application will be heard. Such notice must be given at least ten days before the hearing.

*Form of letters of administration.*

§ 904. [1392.] Letters of administration shall be signed by the clerk, and be under the seal of the court, and may be substantially in the following form:—

State of Washington, }  
County of ——. }

Whereas, A B, late of —, on or about the — day of —, A. D. —, died intestate, leaving, at the time of his death, property in this state subject to administration,—now, therefore, know all men by these presents, that we do hereby appoint — administrator upon said estate, and hereby authorize him to administer the same according to law.

Witness my hand and the seal of said court this — day of —, A. D. 18—.

**Form of letters.**—It is not necessary or material that the seal of the court to letters of administration should be affixed at the particular place indicated in the form prescribed by this section: *Sharpe v. Dye*, 64 Cal. 9.

*Oath of executors and administrators.*

§ 905. [1393.] Before letters testamentary or of administration are issued to the executor or administrator, he must take and subscribe an oath, before some person authorized to administer oaths, that he will perform, according to law, the duties of his trust as executor or administrator, which oath must be attached to and recorded with the letters.

*Bond of executors and administrators.*

§ 906. [1394.] Every person to whom letters testamentary or of administration are directed to issue must, before receiving them, execute a bond to the state of Washington, with two or more sufficient sureties, to be approved by the judge. In form the bond must be joint and several, and the penalty must not be less than twice the value of the personal property, and twice the probable value of the annual rents, profits, and issues of the real property belonging to the estate; which values must be ascertained by the judge by examining on oath the party applying, and any other persons.

**Certain obligee should be named in bond,** so that no mistake may be made as to the one to whom the service or duty is owing. Either of the expressions, "The people of the state of Washington," or "The state of Washington," is descriptive of the same sovereignty, and may be indifferently used in the bond: *Tevie v. Randall*, 6 Cal. 635.

*Conditions of bond.*

§ 907. [1396.] The bond must be conditioned that the executor or administrator shall faithfully execute the duties of the trust according to law.

**Breach of conditions of bond.**—The refusal of an administrator to pay money into court when ordered was held to be no breach of the conditions of the bond: *Wilson v. Hernandez*, 5 Cal. 443. Liability of surety does not attach until lia-

bility of principal is determined. During the lifetime of his principal the surety cannot be sued until the *status* of the former's account has been determined by the superior court: *Allen v. Tiffany*, 53 Cal. 16; *Chaquette v. Ortel*, 60 Cal. 594; *Hamlin v. Kinney*, 2 Or. 91; and

the decree of that court will be conclusive upon the surety: *Id.*; *Irwin v. Backus*, 25 Or. 272. If the principal die without rendering an account, the account must first be settled in equity before the surety can be charged: *Chaquette v. Ortel*, 60 Cal. 594.

*Additional bond before order to sell property.*

§ 908. [1395.] The judge must require an additional bond whenever the sale of any real estate belonging to an estate is ordered by him; but no such additional bond must be required when it satisfactorily appears to the court that the penalty of the bond given, before receiving letters, or of any bond given in place thereof, is equal to twice the value of the personal property remaining in or that may come into the possession of the executor or administrator, including the annual rents, profits, and issues of real estate, and twice the probable amount to be realized on the sale of the real estate ordered to be sold.

**Bonds of executors or administrators.** —An administrator's bond expressing no amount, and containing no blank therefor, is not a binding obligation: *Everts v. Steger*, 6 Or. 55. The authority of the administrator ceases if he fails, after order, to file a new undertaking:

*Lery v. Riley*, 4 Or. 492. An administrator cannot be sued on his bond until final settlement of his account, and his removal for misconduct does not change the rule: *Adams v. Petrain*, 11 Or. 304.

*Separate bonds when two or more persons are appointed.*

§ 909. [1397.] When two or more persons are appointed executors or administrators, the judge must require and take a separate bond from each of them.

*Successive recoveries on same bond.*

§ 910. [1398.] The bond shall not be void upon the first recovery, but may be sued and recovered upon, from time to time, by any person aggrieved in his own name, until the whole penalty is exhausted.

*Qualifications of sureties.*

§ 911. In all cases where bonds or undertakings are required to be given under this title, the sureties must possess the qualifications and justify thereon in the same manner as required for bail upon an arrest, and the certificate thereof must be attached to and filed and recorded with the bond or undertaking. All such bonds or undertakings must be approved by the judge before being filed or recorded. [March 9, 1891, § 13.]

*Justification of sureties — Additional bond.*

§ 912. [1400.] Before the judge approves any bond required under this title, and after its approval, he may, of his own motion, or upon the motion of any person interested in the estate, supported by affidavit that the sureties, or some one or more of them, are not worth as much as they have justified to, order a citation to issue, requiring such sureties to appear before him at a designated time and place, to



be examined touching their property and its value; and the judge must, at the same time, cause notice to be issued to the executor or administrator, requiring his appearance on the return of the citation, and on its return he may examine the sureties and such witnesses as may be produced touching the property of the sureties and its value; and if upon such examination he is satisfied that the bond is insufficient, he must require sufficient additional security.

*New bond discharges former sureties.*

§ 913. [1401.] Such additional bond, when given and approved, shall discharge the former sureties from any liability arising from the misconduct of the principal after the filing of the same, and such former sureties shall only be liable for such misconduct as happened prior to the giving such new bond.

*If sufficient security not given, powers cease.*

§ 914. [1402.] If sufficient security is not given within the time fixed by the judge's order, the right of such executor or administrator to the administration shall cease, and the person next entitled to the administration on the estate, who shall execute a sufficient bond, must be appointed to the administration.

*Bond may be dispensed with if will so provide.*

§ 915. [1403.] When it is expressly provided in the will that no bond shall be required of the executor, letters testamentary may issue and sale of real estate be made and confirmed without any bond, unless the court for good cause require one to be executed; but the executor may at any time afterwards, if it appear from any cause necessary or proper, be required to file a bond, as in other cases.

**Court, in probate proceedings, has** the letters of a sole executrix, without bonds, **general power to require bond** in proper cases. This and § 913, *supra*, are not in conflict: *Estate of White*, 53 Cal. 19, where were revoked, and her powers suspended until a hearing upon the order requiring bonds to be given.

*Interested party may apply for additional security.*

§ 916. Any person interested in an estate may, by verified petition, represent to the judge that the sureties of the executor or administrator thereof have become, or are becoming, insolvent, or that they have removed, or are about to remove, from the state, or from any other cause the bond is insufficient, and ask that further security be required. [March 9, 1891, § 13½.]

**Further bonds.** — The further security here provided for is intended as an additional security, and these new sureties are liable for the improper performance of the executor's or administrator's duties, irrespective of the time of the execution of the bond: *Lacoste v. Splivalo*, 64 Cal. 35.

*Citation thereon — Service of citation.*

§ 917. [1405.] If the judge is satisfied that the matter requires investigation, citation must be issued to the executor or administrator

requiring him to appear, at a time and place specified, to show cause why he should not give further security. The citation must be served personally on the administrator or executor, at least five days before the return day. If he has absconded or cannot be found, it may be served by leaving a copy of it at his last place of residence, or by such publication as the court or judge may order.

*Hearing and order upon such application.*

§ 918. [1406.] On the return of the citation, or at such other time as the judge may appoint, he must proceed to hear the proof and allegations of the parties. If it satisfactorily appears that the security is from any cause insufficient, he may make an order requiring the executor or administrator to give further security, or to file a new bond in the usual form, within a reasonable time, not less than five days.

*Letters revocable for failure to comply with order.*

§ 919. [1407.] If the executor or administrator neglects to comply with the order within the time prescribed, the judge must by order revoke his letters, and his authority must thereupon cease.

*Order for further security on court's own motion.*

§ 920. [1408.] When it comes to his knowledge that the bond of any executor or administrator is from any cause insufficient, the judge, without any application, must cause him to be called to appear and show cause why he should not give further security, and must proceed thereon as upon the application of any person interested.

*Who not to be sureties.*

§ 921. No judge of the superior court, no sheriff, clerk of a court, or deputy of either, and no attorney at law, shall be taken as surety in any bond required to be taken in any proceeding in probate. [March 9, 1891, § 14.]

*Judge must exercise care with regard to sureties.*

§ 922. The judge shall take special care to take as sureties men who are solvent and sufficient, and who are not bound in too many other bonds; and to satisfy himself, he may take testimony, and examine, on oath, the applicant or person offered as surety. [March 9, 1891, § 15.]

*Bonds must be recorded.*

§ 923. The clerk shall record, in a well-bound book kept for that purpose, all bonds given by executors and administrators, and preserve the originals in regular file. [March 9, 1891, § 16.]

*Bond not to fail for defects, if intended as a bond.*

§ 924. [1412.] No bond required under the provisions of this

chapter, and intended as such bond, shall be void for want of form or substance, recital or condition; nor shall the principal or surety on such account be discharged, but all the parties thereto shall be held and bound to the full extent contemplated by the law requiring the same, to the amount specified in such bond. In all actions on such defective bond, the plaintiff may state its legal effect in the same manner as though it were a perfect bond.

**Want of form** in specifying obligee: See note to § 906, *ante*.

*Applications and acts heard in court or at chambers.*

§ 925. The applications and acts authorized by the foregoing sections in this chapter may be heard and determined in court or at chambers. All orders made therein must be entered upon the minutes of the court. [*March 9, 1891, § 17.*]

*When judge must suspend executor or administrator.*

§ 926. [1414.] Whenever the judge has reason to believe, from his own knowledge, or from credible information, that any executor or administrator has wasted, embezzled, or mismanaged, or is about to waste or embezzle, the property of the estate committed to his charge, or has committed, or is about to commit, a fraud upon the estate, or is incompetent to act, or has permanently removed from the state, or has wrongfully neglected the estate, or has long neglected to perform any acts as such executor or administrator, he must, by order entered upon the minutes of the court, suspend the powers of such executor or administrator until the matter is investigated.

**Suspending powers:** See note to § 889, *ante*. The judge of the superior court is the general supervisor and guardian of the estates of deceased persons, and the appellate court will not interfere with the exercise of his discretion unless there has been gross abuse: *Deck's Estate v. Gherke*, 6 Cal. 669.

It is the duty of the court to remove an executor who fraudulently procures property of the estate to be conveyed to others than the estate: *Mesmer v. Jenkins*, 61 Cal. 151; or one who refuses to include in his inventory, and to have appraised, part of estate: *Mesmer v. Jenkins*, 61 Cal. 151.

*Hearing and determination after suspension.*

§ 927. When such suspension is made, notice thereof must be given to the executor or administrator, and he must be cited to appear and show cause why his letters should not be revoked. If he fail to appear in obedience to the citation, or if, appearing, the court is satisfied that there exists cause for his removal, his letters must be revoked, and letters of administration granted anew, as the case may require. [*March 9, 1891, § 18.*]

**Pending appeal from order removing administrator,** he is merely suspended from office, and no general administrator can be ap-

pointed; a special one only can be appointed: *Moore's Estate*, 24 Pac. Rep. 846.

*Issues may be framed at the hearing.*

§ 928. [1416.] At the hearing, any person interested in the estate may appear and file his allegations in writing, showing that the



executor or administrator should be removed, to which the executor or administrator may demur or answer.

*Service of notice by publication.*

§ 929. [1417.] If the executor or administrator has absconded or conceals himself, or has removed or absented himself from the state, notice may be given him of the pendency of the proceedings by publication in such manner as the court may direct, and the court may proceed upon such notice as if the citation had been personally served.

*Executor or administrator required to answer on oath.*

§ 930. [1418.] In the proceedings authorized by the preceding section for the removal of an executor or administrator, the court may compel his attendance by attachment, and may compel him to answer questions on oath touching his administration, and upon his refusal so to do, may commit him to jail until he obey, or may revoke his letters, or both.

*Special administrator, when may be appointed.*

§ 931. When, by reason of an action concerning the proof of a will, or from any other cause, there shall be a delay in granting letters testamentary or of administration, the judge may, in his discretion, appoint a special administrator (other than one of the parties) to collect and preserve the effects of the deceased; and in case of an appeal from the decree appointing such special administrator, he shall, nevertheless, proceed in the execution of his trust until he shall be otherwise ordered by the appellate court. [March 9, 1891, § 19.]

**Special administrator** may be appointed after revocation of probate of will and pending appeal from order of revocation: *Estate of Crozier*, 65 Cal. 332. Pending an appeal from an order removing an administrator, he is merely suspended from office, and no general administrator can be appointed; a special one only can be appointed: *Moore's Estate*, 24 Pac. Rep. 846.

sued to an executrix, the superior court has no power afterwards to appoint a special administrator of the estate, unless the executrix is first suspended or removed: *Schroeder v. Superior Court of San Mateo County*, 70 Cal. 343. An *ex parte* order appointing a special administrator does not operate as a removal of an executrix previously appointed: *Schroeder v. Superior Court of San Mateo County*, 70 Cal. 343.

Where letters testamentary have been is-

*Bond of special administrator.*

§ 932. [1420.] Every such administrator shall, before entering on the duties of his trust, give bond, with sufficient surety or sureties, in such sum as the judge shall order, payable to the state of Washington, with condition as required of an executor or in other cases of administration, to make and return into court, as soon as practicable, a true inventory of the goods, chattels, rights, and credits of the deceased which have or shall come into his possession or knowledge; and that he will truly account for all the goods, chattels, debts, and effects of the deceased that shall be received by him as special admin-

istrator, whenever required by the court, and will deliver the same to the person who shall be appointed executor or administrator of the deceased, or to such other person as shall be lawfully authorized to receive the same.

*Duties of special administrator.*

§ 933. [1421.] Such special administrator shall collect all the goods, chattels, and debts of the deceased, and preserve the same for the executor or administrator who shall thereafter be appointed; and for that purpose may commence and maintain suits as an administrator, and may also sell such perishable and other goods as the court shall order sold, and he shall be allowed such compensation for his service as the said court shall deem reasonable.

**Conversion by special administrator.**— If a special administrator, as such, without authority, sells stock of a corporation, which had been pledged to the deceased in his lifetime as a security for a loan, and receives the proceeds, which he pays over to executors subsequently appointed, this does not constitute a conversion by the estate, so as to enable the pledgor to recover the enhanced value of the stock in an action of trover against the executors: *Von Schmidt v. Bourn*, 50 Cal. 616.

*Powers of special administrator cease when.*

§ 934. [1422.] Upon granting letters testamentary or of administration, the power of the special administrator shall cease, and he shall forthwith deliver to the executor or administrator all the goods, chattels, money, and effects of the deceased in his hands, and the executor or administrator may be admitted to prosecute any suit commenced by the special administrator, in like manner as an administrator *de bonis non* is authorized to prosecute a suit commenced by a former executor or administrator.

*Special administrator not liable to creditors.*

§ 935. [1423.] Such special administrator shall not be liable to an action by any creditor of the deceased, and the time for limitation of all suits against the estate shall begin to run from the time of granting letters testamentary or of administration in the usual form, in like manner as if such special administration had not been granted.

See § 125.

*Account of special administrator.*

§ 936. [1424.] The special administrator shall also render an account, under oath, of his proceedings, in like manner as other administrators are required to do.

**Accounting.**— Under section 933, *ante*, and this section, the special administrator of the estate of a deceased person, who is individually indebted to the deceased, must charge himself in his account as special administrator with the amount of his indebtedness: *Estate of Armstrong*, 69 Cal. 239.

*Executor or administrator may resign.*

§ 937. [1425.] If any executor or administrator, having first settled his accounts, shall publish for six weeks, in some newspaper in

this state in general circulation in the county wherein his letters were granted, a notice of his intention to apply to the court to resign his letters, and the court, on proof of such publication, believe that he should be permitted to resign, it shall so order.

*Letters to be surrendered.*

§ 938. [1426.] Such person shall then surrender his letters, his power from that time shall cease, and he shall pay the expense of publication and of all the proceedings on such application.

*In case of resignation of one or more, the others may act.*

§ 939. [1427.] If there be more than one executor or administrator of an estate, and the letters to part of them be revoked or surrendered, or a part die or in any way become disqualified, those who remain shall perform all the duties required by law.

*When executor or administrator dies or resigns, next entitled takes the appointment.*

§ 940. [1428.] If the executor or administrator of an estate shall die, resign, or the letters be revoked before the settlement of the estate, letters of administration of the goods remaining unadministered shall be granted to those to whom administration would have been granted if the original letters had not been obtained, or the person obtaining them had renounced administration, and the administrator *de bonis non* shall perform the like duties and incur the like liabilities as the former executors or administrators.

**Order accepting resignation of executor.** — An order of the probate court accepting the resignation of an executor, and discharging him from his trust, is presumed to be regular, and cannot be collaterally attacked: *Luco v. Commercial Bank*, 70 Cal. 339.

*Representatives of deceased executor or administrator must account.*

§ 941. [1429.] If any executor or administrator resign, or his letters be revoked, or he die, he or his representatives shall account for, pay, and deliver to his successor, or to the surviving or remaining executor or administrator, all money and property of every kind, and all rights, credits, deeds, evidences of debt, and papers of every kind of the deceased, at such time and in such manner as the court shall order on final settlement with such executor or administrator, or his legal representatives.

**Resignation.** — See notes to next preceding section.

*Succeeding administrator may have action for assets of the estate.*

§ 942. The succeeding administrator, or remaining executor or administrator, may proceed by law against any delinquent former executor or administrator, or his personal representatives, or the sureties of either, or against any other person possessed of any part of the estate. [March 9, 1891, § 20.]



*Such action must be commenced in six years.*

§ 943. All actions against sureties shall be commenced within six years after the revocation or surrender of letters of administration or death of the principal. [*March 9, 1891, § 21.*]

*Attachment for failure to settle.*

§ 944. [1432.] If any executor or administrator fail to make either annual or final settlement as required by law, and do not show good cause for such failure, after having been cited for that purpose, the court shall order such executor or administrator to make such settlement, and may enforce obedience to such order by attachment, and may revoke his letters.

*Attachment of special administrator.*

§ 945. [1433.] If any person who has surrendered his letters testamentary or of administration, or whose letters have been revoked, or the legal representatives of any deceased executor or administrator, shall fail to make final settlement as required by law, after being cited for that purpose by the court, it shall order such delinquent to make such settlement, and may enforce obedience to such order by attachment.

*Costs upon such attachment.*

§ 946. [1434.] In all cases where citations or attachments may be issued against any executor, administrator, or other person for failing to settle his accounts, such delinquent shall pay all costs incurred thereby, the collection of which costs may be enforced by attachment.

*Partnership property, inventory of.*

§ 947. [1435.] The executor or administrator of a deceased person who was a member of a copartnership shall include in the inventory of such person's estate, in a separate schedule, the whole of the property of such partnership; and the appraisers shall estimate the value thereof, and also the value of such person's individual interest in the partnership property, after the payment or satisfaction of all the debts and liabilities of the partnership.

*Administration of partnership property.*

§ 948. [1436.] After the inventory is taken, the partnership property shall be in the custody and control of the executor or administrator for the purposes of administration, unless the surviving partner shall within five days from the filing of the inventory, or such further time as the court may allow, apply for the administration thereof, and give the bond therefor hereinafter prescribed.

*Surviving partner entitled to administration.*

§ 949. [1437.] If the surviving partner apply therefor, as provided in the last section, he is entitled to the administration of the partnership estate, if he have the qualifications and competency required for a general administrator. He is denominated an administrator of the partnership, and his powers and duties extend to the settlement of the partnership business generally, and the payment or transfer of the interest of the deceased in the partnership property remaining after the payment or satisfaction of the debts and liabilities of the partnership, to the executor or general administrator, within six months from the date of his appointment, or such further time, if necessary, as the court may allow. In the exercise of his powers and the performance of his duties, the administrator of the partnership is subject to the same limitations and liabilities, and control and jurisdiction of the court, as a general administrator.

*Bond of administrator of partnership.*

§ 950. [1438.] The bond of the administrator of the partnership shall be in a sum not less than double the value of the partnership property, and shall be given in the same manner and be of the same effect as the bond of a general administrator.

*General administrator must give additional bond for partnership property.*

§ 951. [1439.] In case the surviving partner is not appointed administrator of the partnership, the administration thereof devolves upon the executor or general administrator, but before entering upon the duties of such administration, he shall give an additional bond in double the value of the partnership property.

*Surviving partner must give information as to estate.*

§ 952. [1440.] Every surviving partner, on the demand of an executor or administrator of a deceased partner, shall exhibit and give information concerning the property of the partnership at the time of the death of the deceased partner, so that the same may be correctly inventoried and appraised; and in case the administration thereof shall devolve upon the executor or administrator, such survivor shall deliver or transfer to him, on demand, all the property of the partnership, including all books, papers, and documents pertaining to the same, and shall afford him all reasonable information and facilities for the performance of the duties of his trust.

*Citation of surviving partner for failure to give information.*

§ 953. [1441.] Any surviving partner who shall refuse or neglect to comply with the requirements of the last section may be cited to appear before the court; and unless he show cause to the contrary, the

court shall require him to comply with such section in the particular complained of.

*Disqualifications to act — Revocation in such case.*

§ 954. [1442.] The following persons are not qualified to act as executors or administrators: Non-residents of this state, minors, judicial officers other than justices of the peace, persons of unsound mind or who have been convicted of any felony or of a misdemeanor involving moral turpitude, or a married woman. And when any person to whom letters testamentary or of administration have been issued becomes disqualified to act because of leaving the state, becoming of unsound mind, or is convicted of any crime or misdemeanor involving moral turpitude, or if a woman and she ceases to be single, the court having jurisdiction shall revoke his or her letters as in this act provided.

**Generally.** — The court has no discretion to exclude a person, except for some of the specified causes: *In re Pacheco*, 23 Cal. 478; *Coope v. Louerre*, 1 Barb. Ch. 45. Property in this state vested in a non-resident administrator is liable to attachment and other process: *Barlow v. Coggin*, 1 Wash. 257. A personal representative of deceased will not be recognized unless clothed with authority under our laws: *Barlow v. Coggin*, 1 Wash. 257.

**Want of understanding.** — Great age, and inability to read or write or to speak English, do not show any want of understanding: *In re Pacheco*, 23 Cal. 478.

**Insanity of administrator.** — The fact

that the administrator of the estate of a deceased person was sent to an insane asylum, by the order of a judge of the superior court, does not create an absolute vacancy in the administration of the estate: *Estate of Moore*, 68 Cal. 281. During the time the administrator is so confined in the asylum, he is incapable of executing his trust, and an application then made by a proper person for letters of administration should be granted, but an application made after his incapacity has been removed, and he has again entered upon his duties as administrator, should be refused: *Estate of Moore*, 68 Cal. 281.

*Settlement of estates without administration.*

§ 955. [1443.] In all cases where it is provided in the last will and testament of the deceased that the estate shall be settled in a manner provided in such last will and testament, and that letters testamentary or of administration shall not be required, it shall not be necessary to take out letters testamentary or of administration, except to admit to probate such will in the manner required by existing laws; and after the probate of such will, all such estates may be managed and settled without the intervention of the court, if the said last will and testament so provides; *provided, however*, in all such cases, if the party named in such will as executor shall decline to execute the trust, or shall [die], or be otherwise disabled from any cause from acting as such executor, then letters testamentary or of administration shall issue as in other cases; *and provided further*, if the party named in the will shall fail to execute the trust faithfully and to take care and promote the interests of all parties taking under the will, then, upon petition of any creditor of such estate, or of any of the heirs, or of any person on behalf of any minor heirs, it shall be the duty of the superior court of the county wherein such estate is situated to cite



such person having the management of such estate to appear before such court, and if, upon hearing of such petition, it shall appear that the trust in such will is not faithfully discharged, and that the parties interested, or any of them, have been or are about to be damaged by such acts or doings of the executor, then letters testamentary or of administration shall be had and required in such cases, and all other matters and proceedings shall be had and required as are now required in the administration of estates, and in such cases the costs of the citation and hearing shall be charged against the party failing and neglecting to execute the trust as required in such will.

## CHAPTER VI.

### OF THE INVENTORY AND EFFECTS OF DECEASED PERSONS.

- § 956. Executor or administrator has right to all property.
- § 957. Inventory required.
- § 958. Appraisement of estate.
- § 959. Oath and duties of appraisers.
- § 960. Inventory to include moneys, etc.
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- § 966. Personal estate, how applied.
- § 967. Penalty for embezzling property of estate.
- § 968. Citation of party charged with illegal custody or disposition of property.
- § 969. Penalty for failure to submit to examination.
- § 970. Court to cite person intrusted with property.
- § 971. Proceeding where estate does not exceed one thousand dollars.

#### *Executor or administrator has right to all property.*

§ 956. [1444.] Every executor or administrator shall, after having qualified, by giving bond as hereinbefore provided, have a right to the immediate possession of all the real as well as personal estate of the deceased, and may receive the rents and profits of the real estate until the estate shall be settled or delivered over, by order of the court, to the heirs or devisees, and shall keep in tenantable repair all houses, buildings, and fixtures thereon, which are under his control.

**Administrator's right to possession of estate:** See § 1041, *post*. The administrator takes entire charge of decedent's estate, whether it passes to the heir by descent or otherwise: *Ward v. Moorey*, 1 Wash. 104. Anything of value susceptible of exclusive possession is property, such as an inchoate title to a pre-emption claim, and should be administered: *Burch v. McDaniel*, 2 Wash. 58. An action in the nature of damages for the conversion of property may be brought by the administrator without the aid of § 967, *post*, against any person who has embezzled or alienated the personal property of the estate; that section does not

give a new right of action, nor a new remedy, but merely increases the measure of damages: *Jahns v. Nolting*, 29 Cal. 510. The executor of a tenant in common has no right to exclude a surviving co-tenant from the common lands, and an action of ejectment can be maintained by either against intruders, or they may sue jointly, at their election: *McLeran v. Benton*, 31 Cal. 33. An executor or administrator, being entitled to possession of the real estate of the deceased, may maintain ejectment: *Curtis v. Herrick*, 14 Cal. 117. When a widow, who was both devisee and executrix, married, and she and her husband then deeded the land

devised, it was held that though the marriage might have operated as a revocation of the letters testamentary, yet there was an unclosed administration, and the grantee was not entitled to possession: *Chapman v. Hollister*, 42 Cal. 462. The executor or administrator has a right to the possession of the decedent's estate; and during administration until distribution, partial or final, the personal representative may maintain an action for the possession even against

an heir or devisee: *Page v. Tucker*, 54 Cal. 121. But he has no power to bring a suit to enforce a trust and to compel a conveyance of land to himself: *Janes v. Throckmorton*, 57 Cal. 368.

**Personal estate.** — If an executor or administrator has obtained possession of a note, part of the estate, no matter from whom, the defendant cannot, in an action brought on it, object that it is not properly in the custody of the administrator: *Lucas v. Todd*, 28 Cal. 182.

### *Inventory required.*

§ 957. [1445.] Every executor and administrator shall make and return, upon oath, into the court, within one month after his appointment, a true inventory of the real and personal estate of the deceased, which shall come to his possession or knowledge.

**Inventory does not estop executor to show that property recited therein as part of his decedent's estate does in fact belong to him-** self: *Anthony v. Chapman*, 65 Cal. 73; *Duff v. Duff*, 71 Cal. 513.

### *Appraisement of estates.*

§ 958. The estates and effects comprised in the inventory shall be appraised by three suitable disinterested persons, who shall be appointed by the court. If any part of the estate shall be in another county than that in which letters are issued, appraisers residing in such county may be appointed by the court having jurisdiction of the case, or, if most advisable, the same appraisers may act. Such appraisers shall receive as compensation for their services three dollars per day, to be paid out of the estate, and when they have to go out of their county, mileage shall be allowed; *provided*, that where it appears to the satisfaction of the court, from the return of the inventory or other proof, that the whole estate consists of personal property of less value than one hundred dollars, exclusive of moneys, drafts, checks, bonds, or other securities of fixed valuation, an appraisement may be dispensed with, in the discretion of the court. [January 28, 1888, § 1. *In effect immediately.*]

### *Oath and duties of appraisers.*

§ 959. [1447.] Before proceeding to the discharge of their duties, the appraisers shall take and subscribe an oath, before any officer authorized to administer oaths, to be attached to the inventory, that they will honestly and impartially appraise the property which shall be exhibited to them, according to the best of their knowledge and ability; they shall proceed to estimate and appraise the property, and set down each article separately, with the value thereof in dollars and cents, in figures, opposite the respective articles. The inventory shall contain all the estate of the deceased, real and personal, a statement of all debts, partnership and other interests, bonds, mortgages, notes, and other securities for the payment of money belonging to the deceased, specifying the name of the debtor in each security, the

date, the sum originally payable, the indorsements thereon, if any, and their dates, and the sum which, in the judgment of the appraisers, may be collectible on each debt, interest, or security.

Valuation in the inventory is not conclusive: *Estate of Hinckley*, 58 Cal. 457, 516.

*Inventory to include moneys, etc.*

§ 960. [1448.] The inventory shall also contain an account of all moneys belonging to the deceased, which shall have come to the possession or knowledge of the executor or administrator; and if none shall come to his possession or knowledge, the fact shall be so stated in the inventory.

*Demands of person unaffected by his being named executor or administrator.*

§ 961. [1449.] The naming of any person as executor in a will, or the appointment of any person as administrator, shall not operate as a discharge from any just claim which the testator or intestate had against the executor or administrator, but the claim shall be included in the inventory, and the executor and administrator shall be liable to the same extent as he would have been had he not been appointed executor or administrator.

*In what case bequest invalid against creditor.*

§ 962. [1450.] The discharge or bequest in a will of any debt or demand of the testator against any executor named in his will, or against any other person, shall not be valid against the creditors of the deceased, but shall be construed as a specific bequest of such debt or demand, and the amount thereof shall be included in the inventory, and shall, if necessary, be applied in payment of his debts; if not necessary for that purpose, it shall be paid in the same manner and proportions as other specific legacies.

*Inventory to be signed and verified.*

§ 963. [1451.] The inventory shall be signed by the appraisers, and be verified by the oath of the executor or administrator to the effect that the inventory contains a true statement of all of the estate of the deceased which has come to his possession or knowledge, and particularly of all moneys belonging to the deceased, and of all just claims of the deceased against the executor or administrator.

*Penalty for failure to return inventory.*

§ 964. [1452.] If any executor or administrator shall neglect to refuse to return the inventory within the period prescribed, or within such further time, not exceeding three months, as the court shall allow, the court shall revoke the letters testamentary or of administration; and the executor or administrator shall be liable on his bond to



any party interested for the injury sustained by the estate through his neglect.

*Additional inventory to be returned when.*

§ 965. [1453.] Whenever property not mentioned in an inventory shall come to the knowledge and possession of the executor or administrator, he shall cause the same to be appraised in the manner prescribed in this chapter, and an additional inventory to be returned, subscribed and sworn to as is provided in this chapter, as soon as practicable after the discovery thereof, and the making of such inventory may be enforced, after notice, by attachment to which may be added the revocation of the letters.

*Personal estate, how applied.*

§ 966. [1454.] The personal estate of the deceased which shall come into the hands of the executor or administrator shall be first chargeable with the payment of the debts and expenses; and if the goods, chattels, rights, and credits in the hands of the executor or administrator shall not be sufficient to pay the debts of the deceased, the expenses of the administration, and the allowance to the family of the deceased, the whole, or so much as may be necessary, of the real estate may be sold for that purpose by the executor or administrator, in the manner prescribed in this act.

*Penalty for embezzling property of estate.*

§ 967. [1455.] If any person, before the granting of letters testamentary or administration, shall embezzle or alienate any of the moneys, goods, chattels, or effects of any deceased person, he shall stand chargeable, and be liable to the action of the executor or administrator of the estate, in double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.

**Action for conversion, etc.:** See note to § 956, *ante*.

*Citation of party charged with illegal custody or disposition of property.*

§ 968. If the executor, administrator, heir, legatee, creditor, or other person interested in the estate of any deceased person, shall complain to the court, on oath, that any person is suspected of having concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the deceased, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings which contain evidence of or tend to disclose the right, title, interest, or claim of the deceased to any real or personal estate, or any claim, demand, or last will of the deceased, the said court may cite such person to appear, and may examine him on oath upon the matter of such complaint. If such person be not in the

county where letters have been granted, he may be cited and examined, either before the court for the county where he may be found, or before the court issuing the order or citation; but in the latter case, if he appear and be found innocent, his necessary expenses shall be allowed him out of the estate. [*March 9, 1891, § 22.*]

**Property in possession of person claiming title.** — Under this section, the superior court, in a proceeding for the settlement of the estate of a decedent, has no power to order property in the possession of a person claiming title thereto to be delivered up to the executor or administrator, or deposited subject to the order of the court; and the refusal of the person claiming title to obey such an order is not a contempt: *Ex parte Casey*, 71 Cal. 269.

*Penalty for failure to submit to examination.*

§ 969. [1457.] If the person so cited refuse to appear and submit to such examination, or to answer such interrogatories as may be put to him touching the matter of such complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he shall submit to the order of the court; and all such interrogatories and answers shall be in writing, and shall be signed by the party examined, and filed in the court.

*Court to cite person intrusted with property.*

§ 970. [1458.] The court, upon the complaint on oath of any executor or administrator, may cite any person who shall have been intrusted with any part of the estate of the deceased person to appear before the said court, and may require such person to give a full account, on oath, of any moneys, goods, chattels, bonds, accounts, or other papers belonging to the estate, which shall have come to his possession in trust for such executor or administrator, and of his proceeding thereon; and if the person so cited shall refuse to appear and answer such account, the court may proceed against him as provided in the preceding section.

*Proceedings where estate does not exceed one thousand dollars.*

§ 971. If, by the return of the inventory of the estate of any intestate who died leaving a widow or minor children, it shall appear that the value of the estate does not exceed one thousand dollars, the court shall, by decree for that purpose, assign for the use and support of the widow and minor children of the [int]estate, or for the support of the minor child or children, if there be no widow, the whole estate, after the payment of the funeral expenses and expenses of administration, and there shall be no further proceedings in the administration unless further estate be discovered. [*March 9, 1891, § 23.*]

## CHAPTER VII.

### OF PROVISION FOR THE SUPPORT OF THE FAMILY.

- § 972. Family to retain possession of homestead, wearing apparel, etc.
- § 973. Court to set apart exempt property for widow and children.
- § 974. Allowance to family has preference.
- § 975. Distribution of property set apart for family of deceased.
- § 976. When no widow or minor children, all estate subject to administration.

*Family to retain possession of homestead, wearing apparel, etc.*

§ 972. When a person shall die, leaving a widow, or minor child or children, the widow, child or children, shall be entitled to remain in possession of the homestead, and of all the wearing apparel of the family, and of all the household furniture of the deceased; and if the head of the family in his lifetime had not complied with the provisions of the law relative to the acquisition of a homestead, the widow, or the child or children, may comply with such provisions, and shall be entitled on such compliance to a homestead as now provided by law for the head of a family, and the same shall be set aside for the use of the widow, child or children, and shall be exempt from all claims for the payment of any debt, whether individual or community. Said homestead shall be for the use and support of said widow, child or children, and shall not be assets in the hands of any administrator or executor for the debts of the deceased, whether individual or community. [March 9, 1891, § 24.]

This section is identical with section 1 of the act of February 3, 1886; but as enacted then, its title was probably insufficient: *Harland v. Territory*, 3 Wash. 131.

**Homestead, setting apart.** — See next succeeding section. Where decedent resided upon certain lands at the time of his death, but had taken no steps toward acquiring the same as a homestead, the widow's right, under this section, to the selection of a homestead any time before sale cannot be cut off by a general judgment lien acquired against said lands during the lifetime of decedent: *McMillan's Estate*, 23 Pac. Rep. 441 (Wash.).

**Family allowance.** — An order refusing a family allowance to the widow and children of deceased, to whom a homestead consisting of farming land, and also some personal property, had already been set apart, will not be reversed, where the petition for such allowance contains no statement that the proceeds of the farm are insufficient: *Estate of Luther*, 67 Cal. 319. This

and the next succeeding section are independent of the action of the deceased as expressed in his will, and of creditors, heirs, and legatees, so far that when the necessity exists the court may provide for the support of the family until in course of administration they can receive the share of the estate to which they are entitled: *Walkerley's Estate*, 77 Cal. 642. And where there is not property out of which a homestead can be set apart, the court has no power to order a sum of money to be paid the widow in lieu of a homestead: *In re Noah*, 73 Cal. 590. The homestead should be selected from the community property, if there is any, and not from the separate property of the husband: *Lord v. Lord*, 65 Cal. 84.

When a wife has entered into agreement with her husband for a separation, or where the widow marries again, no allowance will be made for maintenance under this and the next succeeding section: *In re Noah*, 73 Cal. 583; *Estate of Hamilton*, 66 Cal. 576.

*Court to set apart exempt property for widow and children.*

§ 973. In case of the appointment of an executor or administrator upon the death of the husband, as mentioned in the last preceding section, the court shall, without cost to the widow, minor child or children, set apart, for the use of such widow, minor child or children, all the property of the estate by law exempt from execu-



tion; if the amount thus exempt be insufficient for the support of the widow and minor child or children the court shall make such further reasonable allowance out of the estate as may be necessary for the maintenance of the family according to their circumstances, during the progress of the settlement of the estate. [*March 9, 1891, § 25.*]

This is substantially the same as section 2 of the act of February 3, 1886, referred to in note to last preceding section.

**Homestead.** — See next preceding section. The judge must set apart the homestead: *In re Ballentine*, 45 Cal. 696; and his act is valid, although no notice of the application for the homestead was given to the heirs: *Kearney v. Kearney*, 72 Cal. 591. The power of testamentary disposition is not paramount, but subordinate, to the authority conferred upon the probate court to appropriate the property for the support of the family of the testator, and for a homestead for the widow and minor child or children, as well as for payment of debts. The homestead is to be set apart in pursuance of the statute in force at the time when the order is made, and the interest of the widow, etc., therein is decided by the same statute: *Sulzberger v. Sulzberger*, 50 Cal. 387.

The homestead may be set apart out of the separate estate of the husband: *Mawson v. Mawson*, 50 Cal. 541. Where no homestead has been selected, etc., before the decease, the statute does not provide that one shall be set apart free from all encumbrances, nor declare that the order shall destroy or impair any lien on the property; and the probate court may, if the property set apart is encumbered, and cannot be partitioned without material injury, direct it to be sold subject to the liens, and the homestead to be set apart out of the proceeds: *In re McCauley*, 50 Cal. 544.

The effect of setting it apart is merely to relieve the property from administration: *In re Orr*, 29 Cal. 101; *Rich v. Tubbs*, 41 Cal. 34; *Schadt v. Heppe*, 45 Cal. 434; *Estate of Burton*, 63 Cal. 36. A probate homestead, however, is not an estate, either at law or in equity: *Estate of Moore*, 57 Cal. 437; *Estate of Burton*, 63 Cal. 36. And see *infra*, in this note, "Title," etc. After the order the probate court ceases to have any control over the homestead, and can make no order that will impair or cloud the widow's title: *Estate of Hardwicke*, 59 Cal. 292. When the homestead has been set apart, it ceases to be a part of the assets of the estate, and neither the court nor the administrator has any further power over it: *In re Orr*, 29 Cal. 104.

The superior court, sitting as a court of probate, has no power, in setting aside certain realty for a homestead, to decree that it be subject to liens and payment of existing mortgages: *Estate of Chalmers*, 12 Pac. C. L. J. 12. The remedy to enforce the liens is not in the probate proceeding: *Id.*

The homestead and the tests by which it is ascertained are the same whether the question arises between those claiming the homestead, or one of them, and a vendee, a mortgagee, a creditor, or the heirs of the deceased husband or wife: *In re Delaney*, 37 Cal. 179-181; *Gregg v. Bostwick*, 33 Cal. 220. It was held that property held as partnership assets, and after the death

of one of the partners assigned to his estate in the partition of the real estate of the firm, could not be set apart by the probate court of homestead: *Kingsley v. Kingsley*, 39 Cal. 665. If the widow marries again, and has no children of the former marriage under her control when the application for homestead or family allowance is made, it must be refused: *In re Bokind*, 43 Cal. 642.

**Additional family allowance.** — Where the family allowance previously granted to the widow of a deceased person for a limited period has been exhausted, the estate being solvent, she is entitled to such further allowance as is necessary for her maintenance during the progress of the settlement of the estate: *Estate of Roberts*, 67 Cal. 349.

Under the general homestead law, the homestead goes to the wife alone, if she survives her husband, and her children by a former marriage have no interest in it, while the children of her last marriage would have no interest in a homestead set apart from the estate of her first husband. The fact that a homestead has been set apart from the estate of a woman's first husband, for the use of herself and her minor children, does not estop her from claiming a homestead out of the estate of her second husband: *Higgins v. Higgins*, 46 Cal. 265.

The separate estate of the decedent cannot be resorted to where there is community property from which a homestead may be carved: *Lord v. Lord*, 65 Cal. 84.

Setting apart a homestead under this section does not divest the lien of a mortgage given by the decedent to secure the purchase-money of the land: *Fairbank v. Robinson*, 64 Cal. 250.

**Title to land claimed for homestead.** — While it is competent for the court of probate to inquire into the title of tracts of land as a basis for exercising its discretion in selecting a homestead: *Estate of Chalmers*, 12 Pac. C. L. J. 12; *Estate of Burton*, 63 Cal. 36; yet as between the estate and contestants, involving a question as to the title to land, this court has no jurisdiction; title to real estate cannot be tried in the proceeding: *Estate of Burton*, 63 Cal. 36. It must be tried in another forum: *Estate of James*, 23 Cal. 417; *Estate of Orr*, 29 Cal. 101; *Estate of Delaney*, 37 Cal. 176; *Estate of Burton*, 63 Cal. 36.

It is the duty of the probate court, irrespective of the question concerning the title, to set apart the land as a homestead, the facts in other respects warranting it, as the question of title could not in any wise be affected thereby: *Estate of Burton*, 63 Cal. 36.

**Widow.** — Except as provided in the statute, the widow has no right in or control over the personal estate until it is set over to her by the executor or administrator, by order of the probate court, or according to the provisions of the will: *Jahns v. Nolting*, 29 Cal. 513.

**Property exempt from execution.** -- A bill of sale, executed by the widow for all the personal property which she may own "as heir at law of her said husband," does not pass personalty exempt from execution: *Estate of Moore*, 57 Cal. 446.

**Allowance where estate insolvent.** — The order making extra allowance is not final; but it may and ought to be discontinued after a year from the granting letters: *Estate of Montgomery*, 60 Cal. 648.

*Allowance to family has preference.*

§ 974. [1462.] Any allowance made by the court in accordance with the provisions of the preceding section shall be paid by the executor or administrator in preference to all other charges, except funeral charges and expenses of administration.

*Distribution of property set apart for family of deceased.*

§ 975. [1463.] When property shall have been set apart for the use of the family, in accordance with the provisions of this chapter, if the deceased shall have left a widow and no minor children, such property shall be the property of the widow; if he shall have left also a minor child or children, one half to the widow, and the remainder to such child, or in equal shares to such children, if there are more than one; if there be no widow, then the whole shall belong to the minor child or children.

**Homestead set apart to widow.** — in the proceedings for the settlement of his estate becomes her separate property, she becoming the owner thereof in fee: *McKinnie v. Shaffer*, 74 Cal. 614.

*When no widow or minor children, all estate subject to administration.*

§ 976. [1464.] If intestate leave no widow or minor children, all his estate shall be assets in the hands of the administrator, after payment of funeral expenses and expenses of administration, for the payment of the debts of the deceased, or distribution according to law.

## CHAPTER VIII.

## OF CLAIMS AGAINST THE ESTATE.

- § 977. Executor or administrator to publish notice to creditors.
- § 978. Copy of notice to be filed in superior court.
- § 979. Claims barred in one year.
- § 980. Claims to be verified.
- § 981. Allowance and rejection of claims.
- § 982. Claims to be filed in superior court.
- § 983. Claims of judge referred to judge of superior court in adjoining county.
- § 984. Claim barred unless suit brought within three months after its rejection.
- § 985. No claim allowed if barred by statutes of limitations.
- § 986. No action upon claim until presented.
- § 987. Time during vacancy excluded.
- § 988. Claim to be presented, though action pending at death of decedent.
- § 989. No costs to creditor who fails to recover more than amount allowed.
- § 990. Effect of judgment against executor or administrator.
- § 991. No execution after death of judgment debtor — Proceedings in such case.
- § 992. Executor or administrator may agree to arbitration when.
- § 993. Referees and their duties.
- § 994. Claims of executor or administrator to be presented to superior court.
- § 995. Letters revoked upon two months' failure to give notice to creditors.
- § 996. Statements required of executors and administrators.
- § 997. Notice in case of change of executors or administrators.

*Executor or administrator to publish notice to creditors.*

§ 977. [1465.] Every executor or administrator shall, immediately after his appointment, cause to be published in some newspaper printed in the county, if there be one, if not, then in such newspaper as may be designated by the court, a notice to the creditors of the deceased, requiring all persons having claims against the deceased to present them, with the necessary vouchers, within one year after the date of such notice, to such executor or administrator, at the place of his residence or transaction of business, to be specified in the notice. Such notice shall be published as often as the court shall deem necessary, but not less than once in a week for four successive weeks.

**Claims and presentation thereof.** — The duty to present a claim is governed by the law in existence at the time the notice was published, not by the law in existence when the mortgage was executed or when action thereon was commenced: *Hibernia S. & L. Soc. v. Hayes*, 56 Cal. 297.

The presentation and rejection of the claim is a condition precedent to fix the liability of the administrator for the costs of a suit in the superior court: *Hentsch v. Porter*, 10 Cal. 559.

Where a note is payable thirty days after demand, an averment of the demand is essential. Presentation to the administratrix of the plaintiff's claim for the amount of the note is not in any sense a demand of payment: *Chase v. Eroy*, 49 Cal. 469.

The statute does not require a presentation of notes, etc., to be postponed until after the publication of notice by the executor; the

holder may anticipate such publication: *Ricketson v. Richardson*, 19 Cal. 354; *Janin v. Broigne*, 59 Cal. 37. Where a promissory note is extinguished by the substitution of a new obligation in its place, and afterwards the maker of the note dies, the claim presented against his estate must be based upon the new obligation, and not upon the note: *Matter of Sullenberger*, 72 Cal. 549.

The objection that there was no presentment of the claim cannot be taken for the first time in the appellate court: *Coleman v. Woodworth*, 28 Cal. 568.

The payee and legal owner of the note and mortgage, and not the equitable owner, is the one to present the claim: *Marsh v. Dooley*, 52 Cal. 232.

**Trust fund.** — If it is "ear-marked" in the hands of the deceased and the executor or administrator, a suit can be maintained by the



*cestui que trust* against the executor, etc., to enforce the trust; but if not, a claim must be presented: *Lathrop v. Bampton*, 31 Cal. 17; *Treothick v. Austin*, 4 Mason, 16; *Johnson v. Ames*, 11 Pick. 173; *Merrick's Estate*, 8 Watts & S. 402; *Thompson v. Perkins*, 3 Mason, 232; *Kelly v. Munson*, 7 Mass. 319; *Beach v. Forsyth*, 14 Barb. 499; *Stanwood v. Sage*, 22 Cal. 518. See an application of this principle in *Sharpstein v. Friedlander*, 54 Cal. 58, where plaintiff was allowed to recover, without presenting a claim, one of two promissory notes, the amount of plaintiff's share of a recovery by decedent.

**Taxes.**—Taxes assessed and assessments made against the property of an estate, pending administration, are not "claims": *People v. Olvera*, 43 Cal. 492; *Hancock v. Whittemore*, 50 Cal. 522.

**Claim in favor of the United States** against the estate of a decedent must be presented for allowance before it can be sued upon: *United States v. Hailey*, 2 West Coast Rep. 324 (Idaho).

**Contingent claims.**—Where a deceased who has been executor of an estate has wasted it, the claim is absolute against him at once, and is not, after his death, contingent (so far

as creditors of the estate of which he was executor are concerned) on whether that estate turns out solvent or not: *In re Halleck*, 49 Cal. 115.

**Out of the state.**—A creditor who is absent from the state during the whole period of publication of the notice to creditors, and had no actual knowledge of the publication, may present his claim at any time before the decree of distribution is entered. No other proof of absence will be required than his own affidavit. Nor will the time for filing his claim be limited by the fact of his return to the state before the expiration of the ten months within which, by the terms of the notice, claims were required to be presented: *Cullerton v. Mead*, 22 Cal. 96.

**Garnishing executor or administrator.**—Neither an executor nor administrator is liable to garnishment, nor can an allowed and approved claim be levied upon under an execution against the claimant: *Norton v. Haydon*, 2 West Coast Rep. 41 (Nev.).

**Guardian and ward.**—Ward's claim for an accounting must be presented to his guardian's administrator: *Gillespie v. Winn*, 3 West Coast Rep. 371.

### *Copy of notice to be filed in court.*

§ 978. [1466.] After the notice shall have been published, a copy thereof, together with the affidavit attached thereto, of the publisher or printer of the paper in which the same was published, shall be filed by the executor or administrator in court.

### *Claims barred in one year.*

§ 979. [1467.] If a claim be not presented within one year after the first publication of the notice, it shall be barred.

**Non-presentment, effect of.**—An unsecured claim, if not presented within one year, etc., is barred: *Zachary v. Chambers*, 1 Or. 321; *Davidson v. Rankin*, 34 Cal. 503, an action based upon the testator's individual responsibility, in his lifetime, as a stockholder of a mining corporation. But a claim secured by mortgage is not barred if not presented within the year. The mortgaged land may still be subjected to the payment of decedent's debt, but the failure to present the claim as required by the above section will bar the mortgagee's right to have decedent's other estate applied on any deficiency that remains after exhausting the land: *Scammon v. Ward*, 23 Pac. Rep. 439 (Wash.). See §§ 1035, 1037, *post*.

**Presentation of claims as to time.**—

Only such claims are required to be presented to the personal representative of a deceased person as when allowed will rank among the acknowledged debts of the estate, to be paid in due course of administration: *Hibernia Savings and Loan Society v. Conlin*, 67 Cal. 178. But all claims against the estate of a deceased person, whether due or not, stand upon the same footing as to the time of presenting the same for allowance: *Estate of Swain*, 67 Cal. 637. Unless barred by the statute of limitations, the right of action against the estate of a deceased person cannot be lost by reason of the negligence of the claimant in the prosecution of his claim after it has been presented to and allowed by the executor: *Nally v. McDonald*, 66 Cal. 530.

### *Claims to be verified.*

§ 980. [1468.] Every claim presented to the administrator shall be supported by the affidavit of the claimant that the amount is justly due, that no payments have been made thereon, and that there are no offsets to the same to the knowledge of the claimant. The oath may be taken before any officer authorized to administer oaths. The executor or administrator may also require satisfactory vouchers to be produced in support of the claim.

**Affidavit to claim.** — A United States court commissioner is not an officer authorized to administer oaths, within the meaning of the above section: *Winder v. Hendricks*, 56 Cal. 464. As to sufficiency of alleging the verification of rejected claim in an action against the estate, see *Chase v. Eroy*, 58 Cal. 349.

An affidavit to a claim against the estate of

a deceased person stated "that the amount thereof, to wit, the sum of four hundred, is justly due," etc., the word "dollars" being omitted. In the body of the claim the amount due was stated to be four hundred dollars. It was held that the affidavit was sufficient: *Hall v. Superior Court*, 69 Cal. 79.

### *Allowance and rejection of claims.*

§ 981. [1469.] When a claim, accompanied by the affidavit required in the preceding section, has been presented to the executor or administrator, he shall indorse thereon his allowance or rejection, with the day and date thereof. If he allow the claim, it shall be presented to the judge of the court, who shall in the same manner indorse on it his allowance or rejection. If the executor or administrator reject the claim, he shall notify the claimant forthwith of said rejection.

**Allowance and rejection.** — Verbal allowance by executor is not sufficient: *Pitte v. Shipley*, 46 Cal. 161.

The judge may approve claims in chambers: § 36, *ante*. The judge should not reject the claim merely because rejected by the executor or administrator: *Cullerton v. Mead*, 22 Cal. 99; and the court should, if necessary, allow the claimant to file a more full and particular account of his claim, and give him an opportunity to prove that his claim was not barred by the statute: *In re Hidden*, 23 Cal. 363. If the claim is allowed, payment cannot be refused: *In re McKinley*, 49 Cal. 154.

Where claims have been allowed as presented, the presumption is, that they were allowed upon vouchers and proofs satisfactory to the administrator and the court, and although the heirs may contest the allowance, the bur-

den of proof is cast upon them: *Estate of Swain*, 67 Cal. 637. An allowance by the judge of a claim, made on an *ex parte* application, may subsequently be set aside by him without notice to the claimant: *In re Sullenberger*, 72 Cal. 549. Where a claim is presented to the executor, who secretly rejects it, and refuses, on a demand made by the claimant, to inform the latter of his action, the claimant may treat the previous presentation as nugatory, and again present the claim, notwithstanding the demand was made more than three months after the secret rejection: *Stewart v. Hinkel*, 72 Cal. 187.

Attorney's fee, though not technically a "claim," will be so treated, after presentment to administrator and approval by the court; but the order directing its payment is appealable: *Stuttmeister v. Superior Court*, 72 Cal. 487.

### *Claims to be filed in superior court.*

§ 982. [1470.] Every claim which has been allowed by the executor or administrator and the said judge shall be filed in the court and be ranked among the acknowledged debts of the estate, to be paid in the course of the administration.

**Allowance, effect of.** — An allowed claim has the force of a judgment against the estate: *In re Hidden*, 23 Cal. 363. The statute of limitations does not run against an allowed claim: *In re Shroeder*, 46 Cal. 315; *Dohs v. Dohs*, 60 Cal. 255.

When a claim has been allowed, it is good until cause is shown against it; the contestant has the affirmative. There are, at least, two points in the administration at which an allowed claim may be contested, — when an application for the sale of property is made; and when an account is rendered for settlement: *Estate of Loshe*, 62 Cal. 413.

**Filed.** — The statute does not declare by whom the claim should be so filed; the presentation of the claim is the only act essential to save the debt from becoming barred: *Willis v. Farley*, 24 Cal. 501.

**Claim cannot be amended or changed** after the time for presentation of claims, where it has been allowed and filed: *In re Sullenberger*, 72 Cal. 549.

**Lost claim.** — If a claim against the estate of a deceased person is lost after its allowance, the judge may approve a copy thereof: *Nally v. McDonald*, 66 Cal. 530.

### *Claim of judge referred to judge of court in adjoining county.*

§ 983. [1471.] Any judge of a court may present a claim against the estate of any decedent for allowance, to the executor or administrator; and if the executor or administrator allows such claim, he shall,



in writing, designate some judge of the court of an adjoining county, and the said judge shall have the same power to allow or reject it as he would have had letters issued in his court; and the claimant shall have, in the event of his claim being rejected, all the rights incident to any other creditor against the estate.

*Claim barred unless suit brought within three months after its rejection.*

§ 984. [1472.] When a claim is rejected by either the executor, administrator, or the judge of court, the holder must bring suit in the proper court against the executor or administrator within three months after its rejection, otherwise the claim shall be forever barred.

**Time within which suit must be brought:** See § 987, *post*. A note not due at the death of the maker was presented to the administrator March 5, 1859, and rejected, and suit brought thereon March 12, 1859; letters of administration having issued December 4, 1856, no notice to creditors having been published, it was held not barred: See § 125, *ante*; *Smith v. Hall*, 19 Cal. 85. A claim was presented on the 8th of May, 1865, and the administrator retained the claim for more than ten days, refusing to indorse upon it either his allowance or rejection; it was held that the rejection was not earlier than the 18th of May: See § 981, *supra*; and the complaint, which was filed on the 14th of August, 1865, was held in time: *Rice v. Inskeep*, 34 Cal. 225.

The period of three months within which an action upon a rejected claim against the estate of a deceased person must be brought does not commence to run until the actual rejection of the claim by an indorsement to that effect: *Bank of Ukiah v. Shoemaker*, 67 Cal. 147. The complaint need not allege the facts showing how the defendant became invested with his representative character; an allegation that he is the executor or administrator is sufficient: *Wise v. Williams*, 72 Cal. 544; *Moseley v. Heney*, 66 Cal. 478.

**Alleging presentation of claim sufficient averment:** See *Janin v. Browne*, 59 Cal. 37. This allegation is material: *Rowland v. Madden*, 72 Cal. 17.

*No claim allowed if barred by statutes of limitations.*

§ 985. [1473.] No claim shall be allowed by the executor, administrator, or court which is barred by the statute of limitations.

**Claim outlawed cannot be allowed:** *Dorland v. Dorland*, 66 Cal. 189; 4 West Coast Rep. 611.

*No action upon claim until presented.*

§ 986. [1474.] No holder of any claim against an estate shall maintain an action thereon, unless the claim shall have been first presented to the executor or administrator.

**Surviving maker of promissory note.**—Where one of the makers of a promissory note, a partner, dies, before maturity of the note, presentment and demand should be made of the surviving maker, and not of the executor of the deceased partner. This section has no application in such a case: *Barlow v. Coggan*, 1 Wash. 257.

**Action on secured claims.**—While the holder of a mortgage, lien, or other security may bring an action to enforce the same against the property of the estate subject thereto, without first presenting the claim to the executor or administrator, he cannot, without the presentment required by this section, bring such an action against any other property of the estate, or have judgment entered up for any deficiency in the action brought: *Scammon*

*v. Ward*, 23 Pac. Rep. 439 (Wash.); *Pechaud v. Riquet*, 21 Cal. 67; *Security Savings Bank v. Connell*, 65 Cal. 574; 3 West Coast Rep. 681; *Christy v. Dana*, 42 Cal. 174; *Willis v. Farley*, 24 Cal. 499; *Fallon v. Butler*, 21 Cal. 24; *Sichel v. Carrillo*, 42 Cal. 493; *Schadt v. Heppe*, 45 Cal. 436. A pledgee is not obliged to present his claim to the administrator of the pledgor, unless he seeks recourse against other property of the estate than that pledged: *Estate of Kibbe*, 57 Cal. 407. A mortgagee's rights are not barred by a failure to present his claim, secured by mortgage, to the executrix. Such failure only operates to prevent him from making any deficiency out of the decedent's other estate after exhausting the land mortgaged: *Scammon v. Ward*, 23 Pac. Rep. 439 (Wash.).

*Time during vacancy excluded.*

§ 987. [1475.] The time during which there shall be a vacancy



in the administration shall not be included in any limitations herein prescribed.

**Time not included when:** See notes to §§ 979, 984.

*Claim to be presented, though action pending at death of decedent.*

§ 988. [1476.] If any action be pending against the testator or intestate at the time of his death, the plaintiff shall, in like manner, present his claim to the executor or administrator for allowance or rejection, authenticated as in other cases; and no recovery shall be had in the action, unless proof be made of the presentment.

**Judgment in action pending at death.** need not be presented: *In re Page*, 50 Cal. 42.  
— See next section. It seems, where deceased dies between verdict and judgment, the claim See § 991. *infra*.

*No costs to creditor who fails to recover more than amount allowed.*

§ 989. [1477.] Whenever any claim shall have been presented to an executor or administrator and the judge of the court, and a part thereof shall be allowed, the amount of such allowance shall be stated in the indorsement. If the creditor shall refuse to accept the amount so allowed in satisfaction of his claim, he shall recover no costs in any action he may bring against the executor or administrator, unless he shall recover a greater amount than that offered to be allowed, exclusive of interest and costs.

*Effect of judgment against executor or administrator.*

§ 990. [1478.] The effect of any judgment rendered against any executor or administrator shall be only to establish the claim in the same manner as if it had been allowed by the executor or administrator and the court; and the judgment shall be, that the executor or administrator pay, in due course of administration, the amount ascertained to be due. A certified transcript of the judgment shall be filed in the court, and no execution shall issue upon such judgment, nor shall it create a lien upon the property of the estate, or give the judgment creditor any priority of payment.

**Judgment against executor or administrator.** — It should be in the form given by the section: *Myers v. Mott*, 29 Cal. 363; *Racouillat v. Sansevain*, 32 Cal. 396; *Rice v. Inskeep*, 34 Cal. 226. Though if not so, its legal effect may be the same: *Chase v. Swain*, 9 Cal. 130; *Wells v. Robinson*, 13 Cal. 143; *Racouillat v. Sansevain*, 32 Cal. 396. The court may amend the judgment in matters of mere clerical error, when the same appears from the record: *Estate of Schroeder*, 46 Cal. 304; and see *Estate of Brennan*, 3 West Coast Rep. 631. Judgment by default may be taken against an administrator: *Chase v. Swain*, 9 Cal. 137. No execution can issue upon the judgment to enforce its payment: *Racouillat v. Sansevain*, 32 Cal. 376; *Rice v. Inskeep*, 34 Cal. 224. Where an attachment was levied on the property of the deceased in his lifetime, the court rendering the judgment after his death has no power to order the property attached to be sold in satis-

faction of the judgment: *Myers v. Mott*, 29 Cal. 359; *Ham v. Cunningham*, 50 Cal. 365; *Ham v. Henderson*, 50 Cal. 367. If an action can proceed against several joint obligors and the executor of one joint obligor, who died pending the action, there must be several judgments, one against the survivors, payable *de bonis propriis*, and the other against the administrator or executor, payable *de bonis testatoris*, in the due course of administration: *Bank of Stockton v. Howland*, 42 Cal. 131; *Kelly v. Bandini*, 50 Cal. 530.

A decree of a court of equity against the estate of a deceased executor who had made no accounting of the estate he represented during his life is not a judgment within the meaning of this section; but so far, at least, as the enforcement of the payment it directs against the estate of the intestate, it is to be regarded in the light of a decree in probate proceedings settling the account and directing payment: *Chaquette v. Ortel*, 60 Cal. 594.

*No execution after death of judgment debtor — Proceedings in such case.*

§ 991. [1479.] When any judgment has been rendered against the testator or intestate in his lifetime, no execution shall issue thereon after his death, but it shall be presented to the executor or administrator as any other claim, but need not be supported by the affidavit of the claimant, and if justly due and unsatisfied, shall be paid in due course of administration; *provided, however*, that if it be a lien upon any property of the deceased, the same may be sold for the satisfaction thereof, and the officer making the sale shall account to the executor or administrator for any surplus in his hands.

**Judgment against decedent.** — Where the testator in his lifetime, such modified judgment need not be presented against the estate: *Estate of Brennan*, 3 West Coast Rep. 631.

*Executor or administrator may agree to arbitration when.*

§ 992. [1480.] If the executor or administrator doubt the correctness of any claim presented to him, he may enter into an agreement in writing with the claimant to refer the matter in controversy to some disinterested person or persons, to be approved by the judge of the court. Upon filing the agreement in the court, the court shall enter an order referring the matter in controversy to the persons so selected.

**Reference to determine correctness of claim.** — Under this section, a reference to determine the correctness of a claim against the estate of a deceased person may be made in court, if the claimant and the personal representative of the deceased consent thereto: *Hall v. Superior Court*, 69 Cal. 79.

*Referees and their duties — Proceedings upon reference.*

§ 993. The referee or referees, having been sworn, shall proceed to hear and determine the case and make return thereof; and their award, if not excepted to, shall be entered as the decision of the court. If exceptions in writing are filed, the court shall proceed to determine the case in like manner as other claims are determined. The compensation of referees shall be the same as allowed to referees in other causes. [March 9, 1891, § 26.]

*Claims of executor or administrator to be presented to superior court.*

§ 994. If the executor or administrator is himself a creditor of the testator or intestate, his claim, duly authenticated by affidavit, shall be presented for allowance or rejection to the judge of the court, and its allowance by the judge shall be sufficient evidence of its correctness. [March 9, 1891, § 27.]

**Claim.** — A claim by an executor, etc., must be presented within the same time as any other claim: *In re Taylor*, 10 Cal. 483; 16 Cal. 434.

An unauthorized appropriation by an administrator of the funds of the estate cannot be made the basis of a claim by him against the estate: *Estate of Hill*, 67 Cal. 238. An administrator who is personally interested in a claim against the estate is disqualified from acting upon it: *Estate of Hill*, 67 Cal. 238.

*Letters revoked upon two months' failure to give notice to creditors.*

§ 995. [1483.] If the executor or administrator shall neglect, for two months after his appointment, to give notice to creditors as prescribed by section nine hundred and seventy-seven, it shall be the duty of the court to revoke his letters.

*Statements required of executors and administrators.*

§ 996. [1484.] At the same time at which the executor or administrator is required to return his inventory, he shall also return a statement of all claims against the estate which shall have been presented to him, when required by the court, and from time to time thereafter shall present a statement of claims subsequently presented to him; and in all such statements he shall designate the names of creditors, the nature of each claim, when it did or will become due, and whether it was allowed or rejected by him.

*Notice in case of change of executors or administrators.*

§ 997. In case of resignation or removal for any cause of any executor or administrator, and the appointment of another or others after notice has been given by publication as required by law, by such executor or administrator first appointed, to persons to present their claims against the estate, it shall be the duty of the judge of the court to cause notice of such resignation or removal and such new appointment to be published two successive weeks in the same newspaper in which the original notice was published, if the publication of such paper is at the time continued, and if not, then in some other newspaper published in the county, or if there be no newspaper published in such county, then in a newspaper published in the state and of general circulation in the county, and the estate shall be closed up and settled within the year from the date of said original notice, unless further time be granted by the court as provided by law. [March 9, 1891, § 28.]



## CHAPTER IX.

## OF SALES OF PROPERTY BY EXECUTORS AND ADMINISTRATORS.

- § 998. Sale invalid, unless by order of court, when.
- § 999. Application for order of sale.
- § 1000. Sale of perishable property, etc.
- § 1001. Application for order to sell for debts and expenses.
- § 1002. Order of sale, when granted, and what to contain.
- § 1003. Sales of personal property, how made.
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- § 1038. Administrator and sureties liable for neglect, etc.
- § 1039. Liability of administrator for fraudulent sale of real property.
- § 1040. Sale as directed by will — Void unless confirmed.

*Sale invalid, unless by order of court, when.*

§ 998. [1486.] No sale of any property shall be valid unless made under order of the court, unless otherwise provided by will.

**Valid Sales.** — As to sales under a power by the administrator, and citation to the given in the will, see § 1027, *post*. Irregularity in a sale cannot be attacked collaterally: *Halleck v. Moss*, 22 Cal. 276. No sale is valid without an order of court or petition by the administrator, and citation to the heirs and others: *Wright v. Edwards*, 10 Or. 301; *Gilman v. Taylor*, 5 Or. 89. An executor who sells or otherwise disposes of personal property belonging to the estate, which he believes

to be worthless, without an order of court authorizing him to do so, is guilty of conversion, and is liable to the estate for its value, with legal interest. *Estate of Radovich*, 74 Cal. 536.

**Verifying return.** — The recital in the order of confirmation that the return was duly verified is conclusive in a collateral attack upon the sale. *Dennis v. Winter*, 63 Cal. 16.

*Application for order of sale.*

§ 999. [1487] All applications for orders of sale shall be by petition, in writing, in which shall be set forth the facts, showing the sale to be necessary, and upon the hearing any person interested in the estate may file his written objections, which shall be heard and determined.

The petition for sale must set forth the condition of the property, in order to give the court jurisdiction: *Estate of Boland*, 55 Cal. 310.

*Sale of perishable property, etc.*

§ 1000. Within twenty days after the filing of the inventory, the executor or administrator shall apply for an order to sell the perishable property of the estate, and so much other property as may be necessary to be sold to pay the allowance made to the family of the deceased; and the order of sale may be made without notice of the application, but the executor or administrator shall be responsible for the value of the property unless the sale be reported to and approved by the court. [March 9, 1891, § 29.]

**Informalities in sale of personalty** by executrix may be made good by subsequent ratification of the sale by the court: *Brewster v. Baxter*, 2 Wash. 135; 2 West Coast Rep. 791.

*Application for order to sell for debts and expenses.*

§ 1001. If the claims against the estate have been allowed, or a sale of property shall be necessary for the payment of the expenses of the administration, he may also apply for an order to sell so much of the personal estate as shall be necessary. [March 9, 1891, § 30.]

*Order of sale, when granted, and what to contain.*

§ 1002. [1490.] If it appear to the court that a sale is necessary, it shall so order. In making such sale, the court shall order such articles as are not necessary for the support and subsistence of the family of the deceased, or not specially bequeathed, to be first sold.

*Sales of personal property, how made.*

§ 1003. [1491.] Sales of personal property shall be made at public auction, and after notice given for at least two weeks, which notice shall be given by notices posted in ten public places in the county, or by publication in a newspaper, if the judge shall so order, in which shall be stated the time and place of sale.

**Sale of personalty** which has been confirmed cannot be treated as invalid because the administrator received a note for a portion of the price, which, however, would be in addition to the full cash value of the property: *Estate of Kibbe*, 57 Cal. 407.

*Private sale of personal property may be ordered.*

§ 1004. [1492.] If it be made to appear to the satisfaction of the

court that it will be for the interest of the estate to allow the executor or administrator to sell some or the whole of the personal estate at private sale, the court may so order.

*Real property may be sold when.*

§ 1005. [1493.] When the personal estate in the hands of the executor or administrator shall be insufficient to pay the allowance to the family, and all the debts and charges of the administration, the executor or administrator may sell the real estate for that purpose, upon the order of the court. To obtain such order, he shall present a petition to the court, setting forth the amount of the personal estate that has come to his hands, and how much, if any, remains undisposed of, a list and the amounts of the debts outstanding against the deceased, as far as the same can be ascertained, a description of all the real estate of which the testator or intestate died seised, the condition and value of the respective lots and portions, the names and ages of the devisees, if any, and of the heirs of the deceased, which petition shall be verified by the oath of the party presenting the same.

**Petition.** — There is nothing in the statute which makes it necessary that an account of the executor's, etc., transactions should be rendered, and a final adjudication be had upon it, before the court can make the order. He is not required to show a settled account or allowance before he can sell to meet expenses. The court is to ascertain, — 1. Whether there is a legal necessity for a sale; and 2. How much land ought to be sold. A finding that the estate is indebted to the executor in a certain sum on account of expenses incurred in the course of administration must be understood merely as a definite mode of finding a legal necessity for a sale: *Abila v. Burnett*, 33 Cal. 666. Where the real estate left by the deceased is sold by the administrator with the will annexed, and a deed given to the purchaser, objections that the claim to pay which the sale was made was not a debt for which the land stood charged under the will, and that it was not presented to the administrator for allowance, should be taken in the probate proceedings or by appeal, and cannot be raised in

a collateral action to partition the land: *McCaughey v. Harvey*, 49 Cal. 497. A claim against the estate, duly allowed, is *prima facie* evidence of the indebtedness as against the heir: *In re Schroeder*, 46 Cal. 315.

**Supplying defects at hearing.** — That the defects in the petition were supplied at the hearing will be assumed, in a collateral attack on the sale, from a recital in the order of sale of the facts showing the sale to be a proper one: *Dennis v. Winters*, 63 Cal. 16.

**Requisites of petition.** — The petition must describe the condition of the property to be sold, and if it does not, it is demurrable; or this objection may be raised on appeal from the order: *Estate of Smith*, 51 Cal. 563; *Estate of Boland*, 55 Cal. 310.

For a form of petition sufficient under this section, see *Richardson v. Musser*, 54 Cal. 196; and for a defective petition, see *Estate of Rose*, 63 Cal. 346. The petition filed under this section must be verified: *Estate of Boland*, 55 Cal. 310.

*Order to show cause why real estate should not be sold.*

§ 1006. [1494.] If it shall appear by such petition that there is not sufficient personal estate in the hands of the executor or administrator to pay the allowance to the family, the debts outstanding against the deceased, and the expenses of administration, and that it is necessary to sell the whole or some portion of the real estate for the payment of such debts, the court shall thereupon make an order, directing all persons interested to appear at a time and place specified, not less than four nor more than eight weeks from the time of making such order, to show cause why an order shall not be granted to the executor or administrator to sell the real estate of the deceased, or so much



thereof as shall be necessary, to pay such allowances, charges, and debts.

*Service of order to show cause.*

§ 1007. [1495.] A copy of such order to show cause shall be personally served on all persons interested in the estate, at least ten days before the time appointed for hearing the petition, or shall be published at least four successive weeks in such newspaper as the court shall order; *provided, however*, if all persons interested in the estate shall signify, in writing, their assent to such sale, the notice may be dispensed with.

**Generally.** — There must either be personal service on all persons interested, or publication for four successive weeks (i. e., four entire weeks), or all persons interested must join in the petition or signify, in writing, their assent: *Pearson v. Pearson*, 46 Cal. 635.

**Guardian.** — If the general guardian of a minor is also administrator, it would be improper for him to represent the ward; and a special guardian should, it seems, be appointed by the probate court: *Townsend v. Tullant*, 33 Cal. 52.

*Hearing of application for order to sell real estate.*

§ 1008. [1496.] The court, at the time and place appointed in such order, or at such other time to which the hearing may be adjourned, upon proof of the due service or publication of a copy of the order, or upon filing the consent in writing to such sale, of all parties interested, shall proceed to the hearing of such petition; and if such consent be not filed, shall hear and examine the allegation and proofs of the petitioners, and of all persons interested in the estate, who may oppose the application.

**Heirs, etc.,** may oppose the application. This has the effect of giving them their "day in court," as under the old system. The heirs and interested persons may therefore show that the claims are unjust: *Beckett v. Selover*, 7 Cal. 238.

*Guardian of minor heirs to be served — Appointment of guardian ad litem.*

§ 1009. [1497.] If any of the devisees or heirs of the deceased are minors, and have a general guardian in the county, the copy of the order shall be served on the guardian. If they have no such guardian, the court shall, before proceeding to act on the petition, appoint some disinterested person their guardian for the sole purpose of appearing for them, and taking care of their interests in the proceedings.

**Sale void against infant heir.** — A sale of a decedent's real estate to pay debts, by virtue of an order of the court, is void as to an infant heir not made a party to the proceeding, and for whom no guardian was appointed. Such proceedings are hostile to the heirs, who are necessary parties, and the court must have jurisdiction of the persons as well as the subject-matter, in the manner provided for in the statute, or the sale will be void: *Fisk v. Kellogg*, 3 Or. 503.

*Executors, administrators, and witnesses may be examined.*

§ 1010. [1498.] The executor or administrator may be examined under oath, and witnesses may be examined by either party, and process may be issued to compel their attendance and testimony, by the court, in the same manner and with like effect as in other cases.

*Court may order part or all of estate sold.*

§ 1011. [1499.] If it shall appear to the court that it is necessary to sell a part of the real estate, and that by a sale of such part the residue of the estate or some specific part or piece thereof would be greatly injured, the court may authorize the sale of the whole estate, or of such part thereof as may be adjudged necessary, and most to the interest of all concerned.

*Order of sale, when granted.*

§ 1012. [1500.] If the court shall be satisfied, after a full hearing upon the petition, and on examination of the proofs and allegations of the parties interested, that a sale of the whole or some portion of the real estate is necessary for the payment of the allowance to the family, and all valid claims against the estate and charges of administration, or if such sale be assented to by all the parties interested, he shall make an order of sale authorizing the executor or administrator to sell the whole or so much and such parts of the real estate described in the petition as he shall judge necessary or beneficial.

**Order.** — The order is an adjudication that the sale is necessary. The administrator, and any person interested in the estate, may appeal; otherwise the order is conclusive, as to them. This judgment cannot be obviated, nor can its efficacy be impaired, by the fact that too low an estimate was placed upon the value of the property ordered to be sold, or as to the price it would probably bring. Where there are several distinct parcels of property, the court should insert in its order a direction that the sale cease when the amount required has been obtained; but the omission of such a direction

cannot invalidate the order of sales made in pursuance of it: *In re Spriggs's Estate*, 20 Cal. 124. If the administrator procure the order either upon insufficient evidence or contrary to the evidence accessible to the heirs, etc., it is error merely: *Boyd v. Blankman*, 29 Cal. 43.

**Refusing sale.** — Courts of probate have the power, and it is their duty, to refuse an order for the sale of real estate where there has been laches in making the application. So held where seventeen years elapsed between the allowance of the claim and the application for the sale: *Estate of Crosby*, 55 Cal. 574.

*What the order must contain.*

§ 1013. [1501.] The order shall specify the lands to be sold and the terms of the sale, which may be either for cash or on credit, and not exceeding six months, as the court may direct. If it appear that any part of such real estate has been devised, and not charged in such devise with the payment of debts, the court shall order that part descended to heirs to be sold before that so devised.

*Any person interested may apply for order when.*

§ 1014. [1502.] If the executor or administrator shall neglect to apply for an order of sale whenever it may be necessary, any person interested in the estate may make application therefor in the same manner as an executor or administrator, and notice thereof shall be given to the executor or administrator before the hearing.

**Order need not give an exact description of the real estate:** *Stuart v. Allen*, 16 Cal. 503. But the order must be in itself sufficient, and to make it so the description of the land to be sold must be sufficiently definite and certain,

without reference to extraneous matters. The description cannot be helped out by referring to a certain decree: *Hill v. Ward*, 4 West Coast Rep. 501; *Crosby v. Dowd*, 61 Cal. 557.

If the executor, etc., make an agreement to

sell real estate, in consideration that the purchaser will give an agreed sum at the sale, and then petition the court for a confirmation of the agreement or an order for sale, and subsequently the court orders a public sale, at which the purchaser under the agreement buys at the agreed price, that being the highest price bid,

the transaction is good: *Stuart v. Allen*, 16 Cal. 474.

**Executor neglecting to sell**, the court may make an order under this section requiring the executor to proceed and sell according to the original order: *Estate of Martin*, 56 Cal. 208.

*Order delivered to executor or administrator.*

§ 1015. [1503.] Upon making such order, the clerk of the court shall deliver it to the executor or administrator, who shall thereupon be authorized to sell the real estate as directed.

*Notice of sale, what to contain.*

§ 1016. When a sale is ordered, notice of the time and place of sale shall be posted in three of the most public places in the county where the land is situated, at least twenty days before the day of sale, and shall be published in some newspaper of said county, if any there be, and if not, in some newspaper of this state in general circulation in said county, for three successive weeks next before such sale, in which notice the lands and tenements shall be described with proper certainty. [January 27, 1888, § 1. In effect immediately.]

*Sale of real estate, where, when, and how made.*

§ 1017. [1505.] Such sale shall be in the county where the lands are situated, at public auction, between the hours of ten o'clock in the morning and the setting of the sun the same day; but if the executor or administrator shall deem it for the interest of all concerned that the sale should be postponed, he may adjourn it for any time not exceeding fourteen days.

*Notice to be given in case of adjournment.*

§ 1018. [1506.] In case of such adjournment, notice thereof shall be given by a public proclamation at the time and place first appointed for the sale; and if the adjournment shall be for more than one day, further notice shall be given by posting or publishing as the time and circumstances may admit.

*Security taken in case of sale on credit.*

§ 1019. [1507.] The executor or administrator shall, when the sale is on credit, take the note or notes of the purchaser for the purchase-money, with surety, and mortgage on the property to secure their payment.

**Sale on credit.**—Where the defendant held a mortgage on the lots sold, the amount of his mortgage exceeded the amount of his bids, the mortgage debt was drawing two and a half per cent interest per month, by the terms of the sale one half of the purchase-money was to have been cash and the remainder in ninety days, with interest at one per cent per month,

and the bidder had the privilege to pay the whole sum on the day of sale, and the decree of the court directed the whole amount to be credited upon the mortgage, as a payment made on the day of sale, the supreme court held that it should have allowed him interest on half of the purchase-money, and deducted it from the amount credited: *Halleck v. Guy*, 9 Cal. 197.



*Resale, when will be ordered.*

§ 1020. The executor or administrator making any sale of real estate shall, within ten days thereafter, make a return of his proceedings to the court, which shall examine the same, and if the court shall be of opinion that the proceedings were unfair, or that the sum bidden is disproportionate to the value, and that a sum exceeding such bid at least ten per cent, exclusive of expenses of a new sale, may be obtained, the order of sale shall be vacated [and] another sale shall be ordered. On a resale, notice shall be given, and the sale shall be conducted in all respects as if no previous sale had been made. [*March 9, 1891, § 31.*]

**New bid.** — Where there is a new bid of ten per cent more than the amount bid at the sale, and the court refuses to confirm the sale, it may continue the matter, and at a subsequent term accept the new bid or order a new sale; and if in the order refusing to confirm the sale a clause is inadvertently included declaring the sale void, the court may at a subsequent term accept the new bid: *Griffin v. Warner*, 48 Cal. 383.

*Persons interested may object to confirmation.*

§ 1021. [1509.] When the return of the sale is made, any person interested in the estate may file written objections to the confirmation of the sale, and may be heard and produce witnesses in support of his objections.

**Objections.** — A person interested may object to the confirmation on the ground that the sureties on the additional bond were insolvent, and should be allowed to prove the fact: *In re Arguello*, 50 Cal. 308.

*Confirmation of sale.*

§ 1022. [1510.] If it appear to the court that the sale was legally made and fairly conducted, and that the sum bidden was not disproportionate to the value of the property sold, or if disproportionate, that a greater sum, as above specified, cannot be obtained, the court shall make an order confirming the sale and directing conveyances to be executed; and such sale, from that time, shall be confirmed and valid.

**Substitution of one purchaser for another.** — Where a bidder failed to comply with the terms of the sale, and his name was erased on the auctioneer's list, and defendant wrote his own name in place of that of the first bidder about three days after the sale, and before the report of the sale was made to the court, it was held that the mere substitution of one purchaser for another did not affect the validity of the sale: *Halleck v. Guy*, 9 Cal. 196.

**Contract for commissions to broker on selling realty** is contrary to the policy of the law, and invalid: *Danielwitz v. Sheppard*, 62 Cal. 339-342.

*Conveyances by executor or administrator.*

§ 1023. [1511.] Such conveyances shall thereupon be executed to the purchaser by the executor or administrator. They shall refer to the original order authorizing a sale, and the order confirming the sale and directing the conveyance; and they shall be deemed to convey all the estate, rights, and interest of the testator or intestate at the time of his death.

**What title passes.** — The deed conveys the title of the deceased. It can contain no warranty of the title. The purchaser must examine the title for himself. The notice, being of a probate sale, puts him upon his guard. In these sales *caveat emptor* is the rule: *Hal-*

*leck v. Guy*, 9 Cal. 197; 4 Conn. 513; 13 Smedes & M. 101; 9 Ala. 299; 5 Black, 277; 4 Pa. St. 172; 9 Tex. 553; 3 Watts & S. 446.

**Conveyance.** — The court has power to compel the execution of the conveyance: *In re Lewis*, 39 Cal. 306.

*Notice of sale — Proof of service of, to be stated in order of confirmation.*

§ 1024. [1512.] Before any order is entered confirming the sale, it shall be proven to the satisfaction of the court that notice of the sale was given as herein prescribed, and the order of confirmation shall state that such proof was made.

**Order of confirmation:** See note to § 1022, *supra*.

*Property may be sold to pay legacy.*

§ 1025. [1513.] When a testator shall have given any legacy by will that is effectual to charge real estate, and his goods, chattels, rights, and credits shall be insufficient to pay such legacy, together with its debts and charges of administration, the executor or administrator with the will annexed may obtain an order to sell his real estate for that purpose in the same manner and upon the same terms and conditions as are prescribed in this chapter in case of a sale for the payment of debts.

*Debts, etc., to be paid according to provisions of will.*

§ 1026. [1514.] If the testator shall make provision by his will or designate the estate to be appropriated for the payment of his debts, the expenses of administration, or family expenses, they shall be paid according to the provision of the will, and out of the estate thus appropriated, so far as the same may be sufficient.

*Sale without order of court when.*

§ 1027. When such provision has been made, or any property directed to be sold, the executor [or] administrator with the will annexed may proceed to sell without the order of the court; but he shall be bound as an administrator to give notice of the sale, and to proceed in making the sale in all respects as if he were under the order of the court, unless there are special directions given in the will, in which case he shall be governed by such directions; but in [all] cases he shall make return of the sale to the court, which shall vacate such sale unless the same shall appear in all respects to be made according to law, in like manner as upon sales made by administrator. [Mar. 9, '91, § 32.]

*Provision for payment of debts and expenses when will does not sufficiently provide.*

§ 1028. [1516.] If the provision made by the will or the estate appropriated be not sufficient to pay the debts and expenses of administration and family expenses, such part of the estate as shall not have been disposed of by the will, if any, shall be appropriated for that purpose, according to the provisions of this chapter.

*Estate subject to payment of debts.*

§ 1029. [1517.] The estate, real and personal, given by the will to any legatees or devisees, shall be held liable for the payment of the debts, the expenses of administration and of the family, in proportion the value or amount of the several devises or legacies, if there shall not be other sufficient estate, except that specific devises or legacies may be exempted, if it appear to the court necessary to carry into effect the intention of the testator.

*All devisees and legatees to contribute.*

§ 1030. [1518.] When the estate given by any will has been sold for the payment of debts and expenses, all the devisees and legatees shall be liable to contribute according to their respective interests, to any devisee or legatee from whom the estate devised to him may be taken for the payment of the debts or expenses; and the court, when distribution is made, shall, by decree for that purpose, settle the amount of the several liabilities, and decree how much each person shall contribute.

*Contract interest of deceased person in land may be sold.*

§ 1031. [1519.] If the deceased person at the time of his death was possessed of a contract for the purchase of lands, his interest in such lands under such contract may be sold on the application of his executor or administrator, in the same manner as if he had died seised of such lands; and the same proceedings may be had for that purpose as are prescribed in this act, in respect to lands of which he died seised, except as hereinafter provided.

*Sale subject to payments to become due, and not to be confirmed until bond is given.*

§ 1032. [1520.] Such sale shall be made subject to all payments that may thereafter become due on such contract; and if there be any such payments thereafter to become due, such sale shall not be confirmed by the court until the purchaser shall have executed a bond to the executor or administrator for his benefit and indemnity, and for the benefit and indemnity of the persons entitled to the interest of the deceased in lands so contracted for, in double the whole amount of the payments thereafter to become due on such contract, with such sureties as the court shall approve.

*Conditions of bond.*

§ 1033. [1521.] Such bond shall be conditioned that the purchaser will make all payments for such land as shall become due after the date of such sale, and will fully indemnify the executor or administrator and the person so entitled against all demands, costs, and charges and expenses, by reason of any covenant or agreement contained in



such contract; but if there be no payments thereafter to become due on such contract, no bond shall be required of the purchaser.

*Execution and effect of assignment of contract.*

§ 1034. [1522.] Upon the confirmation of such sale, the executor or administrator shall execute to the purchaser an assignment of the contract, which assignment shall vest in the purchaser, his heirs and assigns, all the right, title, and interest of the persons entitled to the interest of the deceased in the land sold at the time of the sale; and such purchaser shall have the same rights and remedies against the vendor of such lands as the deceased would have had if living.

*Mortgaged property of deceased may be redeemed when.*

§ 1035. [1523.] If any person die, having mortgaged any real or personal estate, and shall not have devised the same, or provided for the redemption thereof by will, the court, upon the application of any person interested, may order the executor or administrator to redeem the estate out of the personal assets, if it should appear to the satisfaction of the court that such redemption would be beneficial to the estate, and not injurious to creditors.

**Presentation of claim for redemption.** — Where the owner of a mortgage on lands of a decedent applies to the court, under this section, to have the mortgage redeemed out of the personal assets of the estate, or, in the alternative provided by § 1037, *infra*, to have the land sold, and the proceeds applied on the debt, he must apply within the year allowed by § 968, *ante*, for presentation of claims against the estate of the decedent. *Scammon v. Ward*, 23 Pac. Rep. 439 (Wash.).

**Mortgagee's rights.** — The creditor gets the benefit of the contract made with the deceased, and is under no obligation to pay or contribute any other expenses than those incurred in the enforcement of the mortgage security: *In re Murray*, 18 Cal. 687. Where a mortgage creditor purchased the land mort-

gaged, and credited the mortgage debt with amount of his bid, less ten per cent paid to the administrator, it was held full payment in discharge of his purchase: *In re Lewis*, 39 Cal. 306. There is no power to foreclose a mortgage in probate proceedings. Sales made under such proceedings pass only such title as the decedent had at the time of his death, and such as the estate may have subsequently acquired: *Meyers v. Farquharson*, 46 Cal. 200.

**Claim not affected by limitation.** — A claim presented and allowed is, under the language of this section, held not affected by the statute of limitations until the entry of the decree discharging the executor or administrator: *Dohs v. Dohs*, 60 Cal. 255. That the statute does not run against an allowed claim pending administration, see *Estate of Schroeder*, 46 Cal. 305.

*Court may order mortgaged property redeemed and other property sold.*

§ 1036. If it shall be made to appear to the satisfaction of the court that it will be to the interest of the estate of any deceased person to sell other real or personal estate of the decedent than that mortgaged by him, to redeem the real estate so mortgaged, the court may order any real or personal estate of the decedent which it may deem expedient to be sold for such purpose, which sale shall be conducted in all respects as other sales of like property ordered by the court. [February 2, 1888, § 1.]

*Sale to be made where redemption is inexpedient—Administrator to execute conveyance—Mortgagee may file claim for balance, if any.*

§ 1037. [1524.] If such redemption be not deemed expedient, the court shall order such property to be sold at public sale, which sale

shall be with the same notice, and conducted in the same manner, as required in other cases of real estate provided for in this chapter, and the executor or administrator shall thereupon execute a conveyance thereof to the purchaser, which conveyance shall be effectual to convey to the purchaser all the right, title, and interest which the deceased would have had in the property had not the same been mortgaged by him, and the purchase-money, after paying the expenses of the sale, shall first be applied to the payment and discharge of such mortgage, and the residue in due course of administration. If said sale of the mortgaged premises shall be insufficient to secure the mortgage debt, the mortgagee shall file a claim for balance, authenticated as other claims, and payable in due course of administration.

*Administrator and sureties liable for neglect, etc.*

§ 1038. [1525.] If there shall be any neglect or misconduct in the proceedings of the executor or administrator in relation to any sale, by which any person interested in the estate shall suffer damages, the party aggrieved may recover the same in a suit upon the bond of the executor or administrator, or otherwise, as the case may require.

*Liability of administrator for fraudulent sale of real property.*

§ 1039. [1526.] Any executor or administrator who shall fraudulently sell any real estate of his testator or intestate contrary to the provisions of this chapter shall be liable in double the value of the land sold as damages, to be recovered in an action by the person or persons having an estate of inheritance therein.

**Fraudulent sale of land by executor.** — Under this section, one having an estate of inheritance in land fraudulently sold by an executor or administrator may maintain an action against him to recover double the value of the land sold; but this section does not authorize an action against the sureties on his

official bond: *Weihe v. Statham*, 67 Cal. 245. An administrator cannot be charged with the value of land sold under an order of the probate court, unless it is shown that he has been guilty of gross negligence, fraudulent suggestion, or concealment in obtaining the order of sale: *Richardson v. Sage*, 57 Cal. 212.

*Sale as directed by will — Void unless confirmed.*

§ 1040. [1527.] When property is directed by will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without the order of the court, and either at public or private sale, and with or without notice, as the executor may determine; but the executor must make return of such sales as in other cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case, no title passes unless the sale is confirmed by the court.

**Power of sale — Trust to sell, etc. —** An executor's deed is not evidence of a sale of a testator's property, except upon preliminary proof of a compliance with the statutory provisions for sales by executors and admin-

istrators, or of an express power in the will authorizing the sale in the mode by which it appears by the deed to have been made: *White v. Moses*, 21 Cal. 43. Where the will authorizes the act, it is to be looked to on the ques-

tion of power, and if found sufficient, the act must be declared valid: *Larco v. Casanueva*, 30 Cal. 568. An administrator with the will annexed is invested with all the powers conferred on the executor *virtute officii* in the will, except so far as there are express limitations put upon those powers. A direction to executors "within one year after my decease to sell," etc., is directory only: *Kidwell v. Brummagin*, 32 Cal. 438. This section requiring confirmation of sale is not applicable to sales made by the executor, where the fee of land is devised to him in trust: *In re Delaney*, 49 Cal. 85; *In re Durham*, 49 Cal. 495; *Brown v. Brown*, 7 Or. 285. The "return" spoken of here is the same as that

mentioned in § 1020, *ante*. Where the will creates a naked power, a power not coupled with an interest, the executors, etc., must give notice of the sale, return accounts thereof, and unless there are special directions in the will, conduct the sale in all respects as if made under order of court. The sale must be reported under oath, and confirmed, before the title can pass. The necessity for confirmation implies hearing and examination: § 1020, *ante*. In the absence of proper notification or appearance of parties, the court has no power to confirm the sale: *Perkins v. Gridley*, 50 Cal. 100.

## CHAPTER X.

### GENERAL PROVISIONS RELATING TO THE POWERS AND DUTIES OF ADMINISTRATORS.

- § 1041. Administrator to take and manage estate of decedent.
- § 1042. Actions by and against administrators.
- § 1043. Administrator may bring action of waste, trespass, etc.
- § 1044. Actions of waste, trespass, etc., may be brought against administrator.
- § 1045. Administrator may bring action on bond of former administrator.
- § 1046. Administrator may compromise debts due estates.
- § 1047. Administrator may sue for and recover property fraudulently conveyed by decedent.
- § 1048. Administrator not compelled to sue, except upon application of creditors of deceased.
- § 1049. Recovered real estate to be sold as if deceased had died seised thereof — Proceeds, how applied.

#### *Administrator to take and manage estate of decedent.*

§ 1041. [1528.] The executor or administrator shall take into his possession all the estate of the deceased, real and personal, and collect all debts due to the deceased.

**Possession of estate, etc.:** See § 956, *ante*. No husband, wife, or kindred being left by decedent who dies intestate, any property of which he may die seised will vest immediately in the state without the intervention of probate proceedings: *Territory v. Klee*, 23 Pac.

Rep. 417. An administrator has no power to bind the heirs by consenting to a proceeding for laying out a highway over the lands of the deceased by which the heirs are divested of their estate in the lands: *Rush v. McDermott*, 50 Cal. 471.

#### *Actions by and against administrators.*

§ 1042. [1529.] Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates.

#### **Actions by and against executors, etc.**

— Until the estate is settled, the executor, etc., has the right to maintain suits for the possession of the real property of the estate: *Grattan v. Wiggins*, 23 Cal. 29; *Estate of Page*, 57 Cal. 238.

Plaintiff sued as administrator of two distinct estates, to each of which a portion of personal property, alleged to have been taken from the possession of the plaintiff by the defendants, belonged. The court held that he

might sue in one action. It was not necessary for him to sue as administrator: *Munch v. Williamson*, 24 Cal. 170. In trover by an administrator, an averment in the complaint that the estate owned and possessed the property is equivalent to an averment that the administrator owned and possessed it. The administrator has a special property in the personalty of the estate: *Ham v. Henderson*, 50 Cal. 369.

**Pleading representative capacity.** — For allegation of appointment as administrator



sufficient to support a judgment, there being no demurrer, see *McCutcheon v. Weston*, 1 West Coast Rep. 850.

**Fees of attorneys employed by executor** in conducting suits concerning the estate must be fixed by the court and allowed as part of the expenses of administration. It is not competent for the executor or administrator to make a contract with the attorney for the fee, contingent or otherwise, binding on the estate: *Estate of Page*, 57 Cal. 238. Nor will the fee paid to an attorney by the administrator, on resisting the probate of a will subsequently discovered, be allowed the administrator. Such a contest is an affair of the heirs; the administrator is an officer to administer the estate for the benefit of those interested, leaving interested parties to settle their own differ-

ences: *Estate of Parsons*, 2 West Coast Rep. 875.

In determining the value of services rendered by an attorney, the court is not bound by the opinion of witnesses, but may compare its own judgment with the testimony, and make such allowance as is just: *Estate of Dorland*, 63 Cal. 281.

**Commissions of brokers employed by executor**, contract for, against public policy: *Danielwitz v. Sheppard*, 62 Cal. 339, 342.

**Suits against executor or administrator.** — An action to foreclose a mortgage may be brought against the executor or administrator without joining the heirs of the deceased mortgagor: *Bayley v. Muehe*, 11 Pac. C. L. J. 408; 1 West Coast Rep. 125; 3 West Coast Rep. 195.

*Administrator may bring action of waste, trespass, etc.*

§ 1043. [1530.] Executors and administrators may maintain actions against any person who shall have wasted, destroyed, taken, carried away, or converted to his own use the goods of their testator or intestate in his lifetime; also may maintain actions for trespass committed on the estate of the deceased during his lifetime.

*Action of waste, trespass, etc., may be brought against administrator.*

§ 1044. [1531.] Any person, or his personal representatives, shall have an action against the executor or administrator of any estate or intestate who in his lifetime shall have wasted, destroyed, taken, or carried away, or converted to his own use, the goods and chattels of any such person, or committed any trespass on the real estate of such person.

*Administrator may bring action on bond of former administrator.*

§ 1045. [1532.] Any administrator may in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor or of any former administrator of the same estate.

*Administrator may compromise debts due estate.*

§ 1046. [1533.] Whenever a debtor of a deceased person shall be unable to pay all his debts, the executor or administrator may, with the approbation of the court, compound with him and give him a discharge upon receiving a fair and just dividend of his effects.

**Compromising debts due decedent.** — The common-law power of executors or administrators to compromise debts due their decedents is not intended to be abridged by this section; the authority here given to compromise with the consent of the court is designed

simply for the protection of the personal representative: *Moulton v. Holmes*, 57 Cal. 337.

See also *Estate of Dunne*, 58 Cal. 543, where a compromise of claim was upheld, the executor himself assuming part of the debt, and crediting himself with that amount in his account.

*Administrator may sue for and recover property fraudulently conveyed by decedent.*

§ 1047. [1534.] When there shall be a deficiency of assets in the

hands of an executor or administrator, and when the deceased shall in his lifetime have conveyed any real estate, or any right or interest therein, with intent to defraud his creditors or to avoid any right, duty, or debt of any person, or shall have so conveyed such estate, which deeds or conveyances by law are void as against creditors, the executor or administrator may, and it shall be his duty to, commence and prosecute to final judgment any proper action for the recovery of the same, and may recover for the benefit of the creditors all such real estate so fraudulently conveyed, and may also, for the benefit of the creditors, sue and recover all goods, chattels, rights, and credits which may have been so fraudulently conveyed by the deceased in his lifetime, whatever may have been the manner of such fraudulent conveyance.

**Fraudulent conveyances.** — The general creditors and the administrator are limited by the lines bounding the rights of the deceased, except in cases under this section: *Peck v. Brummaugh*, 31 Cal. 442. The statute does not purport to exclude the creditors from bringing suit, if they are authorized so to do by the general

law: *Hills v. Sherwood*, 48 Cal. 393. A special administrator may bring this suit. The suit may be commenced within three years after the creditors recover judgment against the estate: *Forde v. Exempt Fire Co.*, 50 Cal. 299. See § 115, *ante*.

*Administrator not compelled to sue, except upon application of creditors of deceased.*

§ 1048. [1535.] No executor or administrator shall be bound to sue for such estate as mentioned in the preceding section for the benefit of the creditors, unless on application of the creditors of the deceased; and the creditors making such application shall pay such part of the costs and expenses, or give such security to the executor or administrator thereof, as the court shall direct.

*Recovered real estate to be sold as if deceased had died seised thereof—Proceeds, how applied.*

§ 1049. [1536.] The real estate so recovered shall be sold for the payment of debts, in the same manner as if the deceased had died seised thereof, upon obtaining an order therefor from the court, and the proceeds of all goods, chattels, rights, and credits so recovered shall be appropriated in payment of debts of the deceased, in the same manner as other property in the hands of the executor or administrator.

**Disposition of estate recovered.** — The executor cannot convey part of the land recovered to the attorney in the litigation as his

contingent fee for conducting the same: *Estate of Paige*, 57 Cal. 238.

## CHAPTER XI.

### OF ACCOUNTS OF EXECUTORS AND ADMINISTRATORS, AND OF THE PAYMENT OF DEBTS.

- § 1050. Administrator's promise to pay testator's debts not valid unless in writing, and signed by him.
- § 1051. Administrator is charged with whole estate.
- § 1052. Administrator not to profit by estate or suffer loss therefrom.
- § 1053. Administrator not responsible for worthless debts.
- § 1054. Compensation of executor or administrator.
- § 1055. Administrator shall not purchase claim against the estate.
- § 1056. Commissions to executors and administrators.
- § 1057. Administrator or executor to render exhibit.
- § 1058. Court may require exhibit.
- § 1059. Interested person may apply for order requiring exhibit.
- § 1060. Exhibit ordered upon what showing.
- § 1061. Who may object to exhibit — Proceedings in case of objection.
- § 1062. Court may issue attachment for administrator, or revoke letters.
- § 1063. Account to be rendered at end of one year — Proceedings if not rendered.
- § 1064. Administrator may be cited to account after revocation of his authority.
- § 1065. Revocation of letters for failure to render account.
- § 1066. Vouchers to be filed, etc.
- § 1067. Voucher dispensed with in case claim is less than twenty dollars, etc.
- § 1068. Erection of monument may be authorized by administrator.
- § 1069. Notice to be given of final hearing and settlement of account.
- § 1070. Interested persons may file exceptions to account.
- § 1071. Court to appoint person to represent minor.
- § 1072. Hearing adjourned.
- § 1073. Settlement conclusive except as to persons under disability.
- § 1074. Account not to be allowed without proof that notice has been given.
- § 1075. Order of payment of debts.
- § 1076. Mortgage preference applies only to proceeds of mortgaged property.
- § 1077. Apportionment where estate is insufficient to pay debts of any one class.
- § 1078. Funeral expenses, family allowance, etc., to be paid when — No other payments required without order of court.
- § 1079. Order for payment of debts, what to contain.
- § 1080. Amount of debts not due, and of disputed claim, etc., to be paid into court.
- § 1081. Administrator personally liable to creditors when.
- § 1082. Omission of creditor's name from order of payment after settlement concludes him, but he may recover on bond of administrator if he had no notice.
- § 1083. Payment of legacies and distribution — Time will be extended if debts are unpaid.
- § 1084. When final account is to be rendered.
- § 1085. Proceedings after neglect to render final account.

*Administrator's promise to pay testator's debts not valid unless in writing, and signed by him.*

§ 1050. [1537.] No executor or administrator shall be chargeable upon any special promise to answer damages, or to pay the debts of the testator or intestate out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, is in writing, and signed by such executor or administrator, or by some other person by him thereunto specially authorized.

**Liability.** — Where, without the agency of one of the executors, the property of the estate comes lost to the estate, the first is not chargeable if he had not possession: *Abila v. Burnett*, 33 Cal. 659.



*Administrator is chargeable with whole estate.*

§ 1051. [1538.] Every executor or administrator shall be chargeable in his accounts with the whole estate of the deceased which may come into his possession, at the value of the appraisement contained in the inventory, except as provided in the following sections, and with the interest, profit, and income of the estate.

**Executor, etc., with what chargeable.** — It is competent for the court to require a specification of the kind of money received by the executor, etc. The executor, etc., holds the money in a fiduciary capacity: *Magraw v. McGlynn*, 26 Cal. 429. If the heirs or creditors seek to charge the administrator with interest on funds in his hands, and show affirmatively that he kept the funds an unreasonable length of time, or used the same in his private business, or derived profit therefrom, he will be so charged. If an administrator occupies and uses the real estate of his intestate, he must not only account to the estate for the rental value of the land, but if he makes a profit, for that also. If he sustains a loss, the loss is his, but he cannot be charged with the rental value of the land after it has been sold by the sheriff under foreclosure sale. Whenever he finds himself with funds, he should apply to the court at his next accounting for an order of distribution: *Walls v. Walker*, 37 Cal. 424; *Moseley v. Ward*, 11 Ves. 581; *Ogilvie v. Ogilvie*, 1 Bradf. 356; *Griswold v. Chandler*, 5 N. H. 492; *Benson v. Bruce*, 4 Desaus. Ch. 463; *English v. Harvey*, 2 Rawle, 305; *Robinet's Appeal*, 36 Pa. St. 174. Where the executor is directed by

the will to loan money, and he converts the same, and invests it in his own business, he may, at the election of the parties interested, be held to account either for interest or profits: *In re Holbert*, 39 Cal. 597; *In re Gasq*, 42 Cal. 290; *Utica Ins. Co. v. Lynch*, 11 Paige, 520. But if the executor find money on deposit, though the bank be one of undoubted credit, he must be allowed to exercise his discretion in good faith as to the propriety of reducing the money into his actual possession: *In re McQueen*, 44 Cal. 589.

**Payment of unlawful claim.** — The heirs of an intestate cannot maintain an action on the bond of an administrator to recover for a misappropriation of the funds of the estate, until after an accounting has been had in the probate court, and the administrator has refused to pay the amount adjudged against him: *Weihe v. Statham*, 67 Cal. 84.

**Failure to pay taxes.** — An administrator is properly chargeable with the value of real property, which has become lost to the estate through his neglect to pay the taxes thereon, and with interest on money of the estate which he had drawn and mingled with his own funds and omitted from his account: *Estate of Hertenman*, 73 Cal. 545.

*Administrator not to profit by estate or suffer loss therefrom.*

§ 1052. [1539.] He shall not make profit by the increase nor suffer loss by the decrease or destruction, without his fault, of any part of the estate. He shall account for the excess when he shall have sold any part of the estate for more than the appraisement; and if any has been sold for less than the appraisement, he shall not be responsible for the loss if the sale has been justly made.

**Executor, etc., not to profit by the estate.** — He will be charged with interest where he has the use of the money of the es-

tate: *Merrifield v. Longmire*, 66 Cal. 180; *Estate of Merrifield*, 4 West Coast Rep. 526.

*Administrator not responsible for worthless debts.*

§ 1053. [1540.] No executor or administrator shall be accountable for any debts due the estate, if it shall appear that they remain uncollected without his fault.

**Uncollected debt.** — An executor is answerable for the amount of an uncollected debt due the decedent as appraised in the inventory, unless it appears to the court that the failure to collect the debt was not the result of the negligence of the executor: *Estate of Sanderson*, 74 Cal. 199. But an administrator is not chargeable with the interest stipulated to be paid on a loan of the moneys of the estate made by him, which he afterwards fails to collect, unless it is shown that the interest has

been or can be collected by him: *Estate of Moore*, 72 Cal. 335.

**Successive administrations.** — The negligence of the administrator of the estate of a decedent, who has succeeded a former administrator, to collect from the latter a balance found to be due from him to the estate upon the settlement of his accounts, does not release the sureties on the bond of the former administrator from liability for such balance: *Estate of Connelly*, 73 Cal. 423.

*Compensation of executor or administrator.*

§ 1054. [1541.] He shall be allowed all necessary expenses in the care, management, and settlement of the estate, and for his services such fees as the law provides, but when the deceased, by will, shall have made some other provision for the compensation of his executor, that shall be deemed a full compensation for his services, unless he shall, by a written instrument, filed in the court, renounce all claim for compensation provided by the will.

**Necessary expenses.** — If an administrator goes beyond the strict line of his duty, he can receive no profit, and must bear the loss: *In re Knight*, 12 Cal. 200; *Tompkins v. Weeks*, 26 Cal. 50. He will not be permitted to use the funds of the estate, nor to borrow money upon its credit for speculative purposes; he is not authorized to erect a dwelling-house with the assets of the estate, and charge the estate with money borrowed for that purpose: *Rulison v. Cannon*, 1 West Coast Rep. 696 (Utah). Where an executor incurs expenses in litigating the will, he is not personally chargeable therefor, even if, through the mistake of his counsel, in a matter of unsettled practice at the time, they were lost, when they might probably have been collected from the contestant; but they will be allowed to him as expenses of administration: *Abila v. Burnett*, 33 Cal. 659. A ruling of a probate court in fixing the amount of compensation to be allowed an administrator in payment of counsel in the settlement of an estate will not be disturbed, unless there is a plain abuse of discretion: *In re Gasq*, 42 Cal. 288. An administrator's commission should not be allowed him in the settlement of his annual account, but when he has rendered his final account; he cannot set off his commissions on the settlement of his annual account against a sum due by him to the intestate, and with which he is charged: *In re Minor*, 46 Cal. 564.

**Attorney or book-keeper, amounts paid to:** See *In re Estate of Stuttmeister*, 75 Cal. 346; *In re Estate of Rely*, 75 Cal. 256. An executor cannot litigate the claim of one legatee as against another at the expense of the estate: *Estate of Marrey*, 65 Cal. 287. And it is no part of the duty of an administrator to contest the probate of a will; and the fees paid an attorney at law, for services in such contest, is not a proper charge against the estate: *Estate of Parsons*, 65 Cal. 240. He is not entitled to be allowed for payments made to an attorney or book-keeper for services which he should have performed himself, and for doing which he receives a commission; nor for services made necessary in consequence of neglect of duty, or unnecessary and unreasonable delay in closing the administration; nor for moneys expended in the purchase of land, and the erection thereon of a building adjoining a hotel belonging to the estate: *Estate of Moore*, 72 Cal. 335. Nor to credit for payments made for the services and traveling expenses of his attorney, not exceeding a reasonable compensation for the labor actually performed, when the same were necessary to enable him to properly perform the duties of his trust: *Estate of Moore*, 72 Cal. 335. Whether an administrator should be allowed for payments made for the services of a book-keeper depends upon the circumstances of the estate, and the allowance thereof is properly within the discretion of the judge: *Estate of Moore*, 72 Cal. 335.

**Attorney or book-keeper, amounts**

*Administrator shall not purchase claim against estate.*

§ 1055. [1542.] No administrator or executor shall purchase any claim against the estate he represents; and if he shall have paid any claim for less than its nominal value, he shall only be entitled to charge in his account so much as he shall have actually paid.

*Commissions to executors and administrators.*

§ 1056. [1543.] When no compensation shall have been provided by will, or the executor shall renounce his claim thereto, he shall be allowed commission on the whole estate accounted for by him as follows: For the first one thousand dollars, at the rate of seven per cent; for all above that sum, and not exceeding two thousand dollars, at the rate of five per cent; for all above that sum, at the rate of four per cent; and the same commission shall be allowed to administrators. In all cases such further allowance may be made as the court shall deem just and reasonable for any extraordinary services not required



of an executor or administrator in the common course of his duty; *provided*, that the total amount of such allowance shall not exceed the amount of commission allowed in this section.

**Commissions.** — The value of the estate taken into possession and accounted for is alone to be regarded as the basis for the allowance: *In re Simmons*, 43 Cal. 543; *In re Isaacs*, 30 Cal. 113. There is no joint interest between executors in commissions; one who takes no trouble is entitled to no commission: *Hope v. Ap Jones*, 24 Cal. 92; and see § 1140, note.

There is but one aggregate sum to be allowed as commissions; and in case of a change of administrators, the court has no basis upon which to make an apportionment of the commissions until the close of the estate. The outgoing administrator is therefore entitled to commission upon such portions only of the estate as have been fully administered by him, and for his proportion of the balance of the commissions he must wait until the final settlement of the estate: *Estate of Barton*, 55 Cal. 87. The executors of the last will of a deceased person are not entitled to commissions upon the value of a piece of land of which they had taken pos-

session, and which was included in their inventory as a part of the property of the estates, where it is afterwards determined, in an action brought against them to recover the possession, that the land did not belong to the estate: *Estate of Ricard*, 70 Cal. 69.

**Acting under void letters.** — Commissions, fees, and charges are not allowed to an executor acting under void letters testamentary: *Estate of Frey*, 52 Cal. 658.

**Relinquishing commissions.** — An executor or administrator may renounce his commissions; and a promise made before appointment, to one who has a prior right to administer, that the promisor would not charge commissions, in consideration of which promise the promisee relinquished her rights in favor of the promisor, will bind the latter, and be considered a renunciation of his claim to commissions: *Estate of Davis*, 65 Cal. 309; 3 West Coast Rep. 61.

### *Executor or administrator to render exhibit.*

§ 1057. [1544.] Within six months after his appointment, and thereafter at any time when required by the court, either upon its own motion or the application of any person interested in the estate, the executor or administrator shall render, for the information of the court, an exhibit under oath, showing the amount of money received and expended by him, the amount of all claims presented against the estate, and the names of the claimants, and all other matters necessary to show the condition of its affairs.

**Obligation to account.** — The obligation of an executor to account is continuous, and does not become barred by the statute of limitations: *Estate of Sanderson*, 74 Cal. 199.

### *Court may require exhibit.*

§ 1058. [1545.] If the executor or administrator fail to render an exhibit within six months, as required in the last preceding section, it shall be the duty of the court to issue a citation requiring him to appear and render it.

**Delay in accounting.** — An executor who is guilty of great delay in accounting is properly chargeable with legal interest upon balances, with annual rests: *Estate of Sanderson*, 74 Cal. 199.

Where an account is defective, the court may properly order a full and complete account to date: *Hirschfield v. Cross*, 67 Cal. 661. Accounts should not be settled prematurely: *Estate of Bullock*, 75 Cal. 419.

### *Interested person may apply for order requiring exhibit.*

§ 1059. [1546.] Any person interested in the estate may, at any time before the final settlement of accounts, present his petition to the court, praying that the executor or administrator be required to appear and render such exhibit, setting forth the facts showing that it is necessary and proper that such an exhibit shall be made.



**Final account.** — An order directing an administrator to dismiss a suit brought by him on a claim alleged to be due the estate, and finding that there is no property in the hands of the administrator, and directing that he forthwith file his final account, is an attempt on the part of the court to state and settle the account of the administrator, and is erroneous: *Estate of Bullock*, 75 Cal. 419.

*Exhibit ordered upon what showing.*

§ 1060. If the court be satisfied, either from the oath of the applicant or from any other testimony that may be offered, that the facts alleged are true, and shall consider the showing of the applicant sufficient, a citation shall be issued to the executor or administrator requiring him to appear on some day named in the citation, and render an exhibit as prayed for. [March 9, 1891, § 33.]

*Who may object to exhibit — Proceedings in case of objection.*

§ 1061. [1548.] When an exhibit is rendered by an executor or administrator, any person interested may appear, and, by objections in writing, contest any account or statement therein contained. The court may examine the executor or administrator, and if he have been guilty of negligence, or wasted, embezzled, or mismanaged the estate, his letters shall be revoked.

*Court may issue attachment for administrator, or revoke letters.*

§ 1062. [1549.] If any executor or administrator neglect or refuse to appear and render an exhibit after having been duly cited, an attachment may be issued against him, or his letters may be revoked, in the discretion of the court.

*Account to be rendered at end of one year — Proceedings if not rendered.*

§ 1063. [1550.] Every executor or administrator shall render a full account of his administration at the expiration of one year from the time of his appointment. If he fail to present his account, it shall be the duty of the court to compel the rendering of such account by attachment, and any person interested in the estate may apply for and obtain an attachment, but no attachment shall issue unless a citation shall have been first issued and returned, requiring the executor or administrator to appear and show cause why an attachment should not issue.

**Account.** — Each executor, etc., may keep a separate account, and present the same for final settlement: *Hope v. Ap Jones*, 24 Cal. 92. The superior court, sitting in probate, has power to cite the administrator of an administrator to settle the account of his intestate with the estate of which he was the administrator: *Bush v. Lindsey*, 44 Cal. 124.

*Administrator may be cited to account after revocation of his authority.*

§ 1064. [1551.] Whenever the authority of an executor or administrator shall cease, or be revoked for any reason, he may be cited to account before the court, at the instance of the person succeeding to the administration of the estate, in like manner as he might have been

cited by any person interested in the estate during the time he was administrator or executor.

**Resignation of executor.** — An executor, after he has resigned his trust, may be compelled to account with the estate for the value of personal property converted by him, which he had neglected to include in his prior accounts: *Estate of Radorich*, 74 Cal. 536. And when an executrix, who is also one of the devisees and distributees of an estate, and who has made an assignment of her interest, resigns her trust, and dies without having rendered any account or report, and administrators have been appointed in her stead, the rights of the parties in interest cannot be determined in a proceeding by the administrators for a settlement of their accounts and for distribution. The accounts of the executrix must be adjusted and determined in a court of equity: *Gilman v. Curtis*, 65 Cal. 572.

*Revocation of letters for failure to render account.*

§ 1065. [1552.] If the executor or administrator resides out of the county, or absconds or conceals himself so that the citation cannot be personally served, and shall neglect to render an account within thirty days after the time above prescribed, or if he shall neglect to render an account within thirty days after having been committed where the attachment has been executed, his letters shall be revoked.

*Vouchers to be filed, etc.*

§ 1066. [1553.] In rendering his account the executor or administrator shall produce vouchers for the expenses and charges which he shall have paid, which vouchers shall be filed and remain in court; and he may be examined on oath touching such payments, and also touching any property and effects of the deceased, and the disposition thereof.

**Exceptions to account.** — Under this section, the court, on a proceeding for the settlement of the account of an executor, has power to examine him touching any and all items of the account, and to base its decree of settlement upon such examination, notwithstanding no person interested in the estate has filed specific exceptions to the items to which the examination is directed: *Estate of Sanderson*, 74 Cal. 199.

*Voucher dispensed with in case claim is less than twenty dollars, etc.*

§ 1067. [1554.] On the settlement of his account, he may be allowed any item of expenditure not exceeding twenty dollars for which no voucher is produced, if such item be supported by his own oath, positive to the fact of payment, specifying when, where, and to whom payment was made, if such oath be uncontradicted; but such allowances, in the whole, shall not exceed three hundred dollars for payment in behalf of any one estate.

**Loss of tax receipts.** — Parol evidence of the payment of taxes by the administrator on the property of the estate is admissible, after the loss of the tax receipts has been shown: *Estate of Moore*, 72 Cal. 335.

*Erection of monument may be authorized by administrator.*

§ 1068. [1555.] Executors and administrators of the estates of deceased persons are hereby authorized, by and with the consent of the court of the proper county, to expend a reasonable sum out of the estate of the decedent to erect a monument, or tombstone, suitable to

mark the grave of said decedent, and the expense thereof shall be paid as expenses of administration are paid.

**Monument, etc.:** See note to § 1078, *post*.

*Notice to be given of final hearing and settlement of account.*

§ 1069. When the account is rendered for settlement, the court, or the judge thereof, shall appoint a day for the hearing and settlement of the same, and notice of such hearing and settlement shall be given by posting notices thereof in three of the most public places in the county, and publishing a similar notice for such time as the court or judge may order, in a newspaper published in the county, or if there be no newspaper published in the county, then in a newspaper published in the state, and of general circulation in the county. The notice shall set forth the name of the estate, of the executor or administrator and the day appointed for the settlement of account, which shall be on some day not more than six weeks after the filing of the account. [March 9, 1891, § 34.]

*Interested persons may file exceptions to account.*

§ 1070. [1557.] On the day appointed, or on any subsequent day to which the hearing may have been adjourned by the court, any person interested in the estate may appear and file his exceptions in writing to the account, and contest the same.

**Person interested.**—A creditor is within the meaning of this: *Tompkins v. Weeks*, 26 Cal. 57. The right to appear is expressly restricted to creditors and distributees, and the first duty cast upon the court is to determine whether a person has any interest. If it turns out he has none, he must be excluded from any further participation: *Dayton on Surrogates*, 452. The court has the power to determine the question of interest if controverted, and is not bound to accept as conclusive the *ex parte* statement of the party claiming the right to contest: *Garwood v. Garwood*, 29 Cal. 519.

One who files an opposition, on the ground that he has a contingent claim, must state in his opposition facts showing that such claim

exists. It is not sufficient to aver that for certain reasons he has been unable to determine whether such claim exists, and that upon the happening of a certain event it may exist: *In re Halleck*, 49 Cal. 111. A legatee who has been represented by counsel at the allowance of accounts against the estate will not be allowed, after a lapse of time, to come in and have the allowance set aside on a mere general averment of newly discovered evidence. It is not sufficient to allege ignorance at the time of allowance, but the plaintiff must show that he could not, with the use of due diligence, unmingled with any negligence on his part, have ascertained the existence of the facts. A general averment of such diligence will not do: *Williams v. Price*, 11 Cal. 212.

*Court to appoint person to represent minor.*

§ 1071. [1558.] If there be any minor interested in the estate who has no legally appointed guardian, the court shall appoint some disinterested person to represent him, who, on behalf of the minor, may contest the account as any other person interested might contest it, and who shall be allowed by the court a reasonable compensation for his services.

**Allowed claims may be contested on settling account:** *Estate of Hill*, 62 Cal. 186; *Estate of Loshe*, 62 Cal. 413.

*Hearing adjourned.*

§ 1072. [1559.] The hearing and allegations of the respective parties may be adjourned from time to time as shall be necessary.



*Settlement conclusive except as to persons under disability.*

§ 1073. [1560.] The settlement of the account and the allowance thereof by the court, or upon appeal, shall be conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability, the right to proceed against the executor or administrator, either individually or upon his bond, within two years after their respective disabilities shall have ceased; and in any action brought by any such person, the allowance and settlement of the account shall be deemed presumptive evidence of its correctness.

**Settlement of executor's or administrator's account.** — Where the statute requires notice to be served upon the administrator as to the settlement of his accounts, a settlement without notice, and in his absence, does not bind him or his sureties: *Estate of Arvine*, 53 Cal. 259.

The settlement under this section is conclusive, except as otherwise provided, and after such settlement and discharge, action cannot be brought against the administrator for neglect to sue within the statutory period to recover land of the estate. Whatever liability the administrator had incurred existed at the time of the settlement of his account, and ought to have been adjusted then: *Reynolds v. Brumagin*, 54 Cal. 254; see also *Grady v. Porter*, 53 Cal. 680. An order of the superior court allowing or disallowing a final account is a final settlement and adjudication of the matter of which it assumes to dispose, and cannot afterwards be collaterally attacked or impeached in the same or any other court by the parties thereto or their privies: *Tobelman v. Hilderbrandt*, 72 Cal. 313.

If executors are not negligent in selecting an agent to forward to them moneys of the estate, they will not be held responsible for loss occa-

sioned by his insolvency: *Estate of Taylor*, 52 Cal. 477.

The allowance of the final account is not a discharge of the executor from his trust, nor is it a decree of distribution or the equivalent of such a decree: *McCrea v. Haraszthy*, 51 Cal. 146. Items not based upon anything in the account, or in the report accompanying the same, or in any of the proceedings, cannot be allowed: *Estate of Parsons*, 2 West Coast Rep. 875.

If an executor or administrator die without rendering an account, a court of equity alone has power to settle his accounts: *Estate of Curtiss*, 3 West Coast Rep. 682; *Chiquette v. Ortel*, 60 Cal. 594; *Bush v. Lindsey*, 44 Cal. 125.

**Excessive interest.** — Interest in excess of legal interest is not allowable, in the absence of a written agreement by the testator to pay the same: *Estate of Dunne*, 58 Cal. 543.

**Reopening account.** — The cause will be remanded for further proceedings when it appears that by reason of irregularities some of the parties interested have not been heard in the settlement of the annual account: *Estate of Runyon*, 53 Cal. 196.

**Clerk's fee.** — Court may adjudicate upon in anticipation of settlement: *Estate of Parsons*, 65 Cal. 240; 2 West Coast Rep. 875.

*Account not to be allowed without proof that notice has been given.*

§ 1074. [1561.] The account shall not be allowed by the court until it be first proven that notice has been given as required by this act, and the decree shall show that such proof was made to the satisfaction of the court, and shall be conclusive evidence of the fact.

**Recital of notice in decree conclusive on surety** in an action brought against the surety for the administrator's failure to dis-

tribute money to plaintiff: *McClellan v. Downey*, 63 Cal. 520.

*Order of payment of debts.*

§ 1075. [1562.] The debts of the estate shall be paid in the following order:—

1. Funeral expenses;
2. Expenses of the last sickness;
3. Debts having preference by the laws of the United States;
4. Taxes or any dues to the state;
5. Judgments rendered against the deceased in his lifetime, on

which execution might have issued at the time of his death, and mortgages in the order of their date;

6. All other demands against the estate.

**Order of payment** cannot be changed either by court or administrator: *Thompson v. Weeks*, 26 Cal. 51.

*Mortgage preference applies only to proceeds of mortgaged property.*

§ 1076. [1563.] The preference given in the preceding section to a mortgage shall only extend to the proceeds of the property mortgaged; if the proceeds of such property be insufficient to pay the mortgage, the part remaining unsatisfied shall be classed with other demands against the estate.

*Apportionment where estate is insufficient to pay debts of any one class.*

§ 1077. [1564.] If the estate be insufficient to pay the debts of any one class, each creditor shall be paid a dividend in proportion to his claim, and no creditor of any one class shall receive any payment until all those of the preceding class shall have been fully paid.

**Payment of claims.** — “We do not doubt that the code requires that whenever some of the creditors of an estate, whose claims have been allowed, are paid any proportion of their claims, that a like proportion must be paid into the court to await the final determination of actions commenced and pending against the administrator upon claims disallowed by him.” *Estate of Sigourney*, 61 Cal. 71.

*Funeral expenses, family allowance, etc., to be paid when — No other payments required without order of court.*

§ 1078. [1565.] It shall be the duty of the executor or administrator, as soon as he may have sufficient funds in his hands, to pay the funeral expenses, and expenses of the last sickness, and the allowance made to the family of the deceased, and he may retain in his hands the necessary expenses of administration; but he shall not be obliged to pay any other debt or any legacy until, as prescribed by this chapter, the payment has been ordered by the court.

**Expenses of erection of monument at the grave of a deceased person are funeral ex-** penses, within the meaning of the statute: *Bagnall v. Roach*, 76 Cal. 106. See § 1057, *ante*.

*Order for payment of debts, what to contain.*

§ 1079. [1566.] Upon the settlement of the accounts of the executor or administrator at the end of the year, as required by this chapter, the court shall make an order for the payment of the debts, as the circumstances of the estate shall require. If there be not sufficient funds in the hands of the executors or administrators, the court shall specify in the decree the sum to be paid each creditor.

*Amounts of debts not due, and of disputed claim, etc., to be paid into court.*

§ 1080. [1567.] If there be any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part thereof as the holder would be entitled to if the claim were due, established, or absolute, shall be paid into the court, where it shall remain,

to be paid over to the party when he shall become entitled thereto; or if he fail to establish his claim, to be paid over or distributed, as the circumstances of the case may require; *provided*, that if any creditor whose claim has been allowed, but is not yet due, shall appear and assent to a reduction therefrom of the legal interest for the time the claim has yet to run, he shall be entitled to be paid accordingly.

*Administrator personally liable to creditors when.*

§ 1081. Whenever a decree shall have been made by the court for the payment of creditors, the executor or administrator shall be personally liable to each creditor for his claim, or the dividend thereon; and execution may be issued on such decree, as upon a judgment, in favor of each creditor. The executor or administrator shall also be liable on his bond to each creditor. [*March 9, 1891, § 35.*]

**Execution.** — An administrator filed a petition, asking the court to vacate the decree as to one of the claims, and to permit him to retain the money directed to be paid thereon, and stated, as the ground of his application, that such claim had never been presented to him for allowance. The supreme court held that the decree was a judicial determination of the rights of the parties, and possesses all the

elements of a final judgment, and refused the application: *In re Cook*, 14 Cal. 130; *Cositt v. Biscoe*, 12 Ark. 95; *Austin v. Lamar*, 23 Miss. 189. The provision as to contingent claims (see next preceding section) is a cautionary provision, not affecting the process by which such claims are to be authenticated and presented: *Pico v. De la Guerra*, 18 Cal. 430.

*Omission of creditor's name from order of payment after settlement concludes him, but he may recover on bond of administrator if he had no notice.*

§ 1082. [1569.] When the accounts of the executor or administrator have been settled, and an order made for the payment of the debts and distribution of the estate, no creditor whose name was not included in the order of payment shall have any right to call upon the creditors who have been paid, or upon the heirs, legatees, or devisees, to contribute for the payment of his claim; but if the executor or administrator shall have failed to give the notice to creditors as prescribed in this act, such creditor may recover on the bond of the executor or administrator the amount of his claim, or such part thereof as he would have been entitled to had it been allowed; *provided*, that this section shall not apply to any creditor whose claim was not due one year before the day of settlement, or whose claim was contingent, and did not become absolute one year before such day.

*Payment of legacies and distribution — Time will be extended if debts are unpaid.*

§ 1083. [1570.] If all the debts shall have been paid by the first distribution, the court shall proceed to direct the payment of legacies and the distribution of the estate among the heirs, legatees, or other persons entitled; but if there be debts remaining unpaid, the court shall give such extension of time as may be reasonable for the final settlement of the same.



*When final account is to be rendered.*

§ 1084. [1571.] At the time designated, or sooner, if within that time all property of the estate shall have been sold, or there shall be sufficient funds in his hands to pay all the debts due by the estate, the executor or administrator shall render a final account and pray a settlement of the estate.

*Proceedings after neglect to render final account.*

§ 1085. If the executor or administrator neglect to render his final account, the same proceedings may be had as are prescribed in this chapter in regard to the first account to be rendered by him; and all the provisions of this act relative to the last-mentioned account, and the notice and settlement thereof, shall apply to his account presented for final settlement. [March 9, 1891, § 36.]

See §§ 1057-1060.

**Accounting for notes.**—Negotiable notes found with deceased at the time of his death in the state of Oregon are property, payable in that state, though secured by mortgages in this state; and a proper accounting to the Oregon court will relieve an administrator in that court from any liability in the courts of this state, in an action begun against him by an administrator appointed under the laws of this state: *McCoy v. Ayres*, 2 Wash. 307.

## CHAPTER XII.

### PARTITION AND DISTRIBUTION OF ESTATES.

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- § 1087. Notice required of application for payment of legacy or bequest.
- § 1088. Who may resist application — Who make similar applications.
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- § 1090. Decree, what may contain.
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- § 1095. What decree shall contain.
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- § 1106. Before partition or division of estate, guardians shall be appointed and notice given.
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- § 1110. Court to appoint agent to protect estate of non-resident.
- § 1111. Agent for non-resident shall give bond — Compensation of.

- § 1112. Estate sold after one year — Receipts.
- § 1113. Agent's liability on bonds.
- § 1114. Auditor to draw warrant.
- § 1115. Decree of final discharge to be made when.
- § 1116. Issuance of letters after final settlement.

*Application for payment of legacies, etc., when made.*

§ 1086. At any time after six months from the issuing letters testamentary or of administration, any heir, legatee, or devisee may present his petition to the court that the legacy or share of the estate to which he is entitled may be given to him upon his giving bonds, with security, for the payment of his proportion of the debts of the estate. [March 9, 1891, § 37.]

**Petition by executor — Appeal.** — In a proceeding for the settlement of the estate of a decedent, the court has no authority, under this and the next succeeding section, to decree a partial distribution upon the petition of the executor: *Estate of Letellier*, 74 Cal. 311. It is no concern of his whether an heir, devisee, or legatee gets paid in advance or not: *Estate of Letellier*, 74 Cal. 311. The executrix may appeal from an order of partial distribution, but such order will not be reversed unless error is made to appear by the record: *Estate of Kelly*, 63 Cal. 106.

*Notice required of application for payment of legacy or bequest.*

§ 1087. [1574.] Notice of the application shall be given to the executor or administrator, and to all persons interested in the estate, in the same manner that notice is required to be given of the settlement of the account of the executor or administrator.

**Decree of partial distribution:** See note to next preceding section. substantially correct, and recited in the decree as correct, is good: *Estate of Sbarro*, 70 Cal. 147.

**Notice of hearing for distribution, if**

*Who may resist application — Who make similar applications.*

§ 1088. [1575.] The executor, administrator, or any person interested in the estate, may appear and resist the application; or any other heir, legatee, or devisee may make a similar application for himself.

*Legacies, etc., may be paid prior to settlement upon bond being given when.*

§ 1089. [1576.] If, on the hearing, it appear to the court that the estate is but little in debt, and that the share of the parties applying may be allowed without injury to the creditors of the estate, the court shall make a decree in conformity with the prayer of the applicant or applicants; *provided*, each one of them shall first execute and deliver to the executor or administrator a bond in such sum as shall be designated by the court, and with sureties to be approved by the judge thereof, to the executor or administrator, conditioned for the payment by the devisee or legatee, whenever required, of his proportion of the debts due from the estate.

**Part payment of legacy** will be proper where the assets, including the realty, are sufficient to satisfy all the commissions and claims against the estate, although the actual money on hand may be no more than enough to pay the commissioners: *Estate of Dunne*, 65 Cal. 378.

*Decree, what may contain.*

§ 1090. [1577.] Such decree may order the executor or administrator to deliver to the heir, devisee, or legatee the whole portion of the estate to which he may be entitled, or only a part thereof.

*Partition may be made.*

§ 1091. [1578.] If, in the execution of such decree, any partition be necessary between two or more of the parties interested, it shall be made in the manner hereinafter prescribed.

*Applicant to pay costs.*

§ 1092. [1579.] The costs of the proceedings authorized by the preceding section shall be paid by the applicant, or if there be more than one, shall be equally apportioned among them.

*Payment of money secured by bond may, if necessary for settlement, be enforced by order of court and action.*

§ 1093. [1580.] Whenever any bond has been executed and delivered under the provisions of the preceding sections, and the executor or administrator shall ascertain that it is necessary for the settlement of the estate to require the payment of any part of the money thereby secured, he shall petition the court for an order requiring the payment, and shall have a citation issued and served on the party bound, requiring him to appear and show cause why the order shall not be made. At the hearing, the court, if satisfied of the necessity of the payment, shall make an order accordingly, designating the amount and giving the time within which it shall be paid; and if the money be not paid within the time allowed, an action may be maintained by the executor or administrator on the bond.

*Estate to be distributed upon settlement of account.*

§ 1094. [1581.] Upon the settlement of the account of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or any heir, devisee, or legatee, the court shall proceed to distribute the residue of the estate among the persons who are by law entitled.

**Distribution of estate:** See next section, and note. When there is not an ascertained balance of assets in the hands of an administrator, or if the assets are merely claimed to exist, and the right to them is involved in litigation, the estate is not ready for distribution, and the court has power, in its discretion, to delay the distribution until the right to the assets is judicially determined, and the balance of assets for distribution is ascertained: *Estate of Ricard*, 57 Cal. 421.

After the final settlement, the residue must be distributed, if application therefor is made, although the time has not expired within which

a minor could contest the probate: *Estate of Pritchett*, 52 Cal. 94.

**Community property may be distributed** by the decree in the husband's estate to the heirs of the wife, who died pending the administration of his estate: *McClellan v. Downey*, 63 Cal. 520.

**Petition for final distribution.** — It is improper to include in a petition for final distribution of a decedent's estate a prayer for an accounting against one who is alleged to have come to the possession of property of the estate, and not to have accounted for it: *In re Cook's Estate*, 77 Cal. 220.



**Bona fide assignee is entitled to distribution:** See *Estate of Phillips*, 71 Cal. 285.

**Adverse claim to property distributed.** — A surviving husband, who claims certain property in the possession of the executors of the will of his deceased wife as community property to which he is entitled, cannot have his claim of ownership determined upon a proceeding for the distribution of his wife's estate: *Estate of Rowland*, 74 Cal. 523.

**Distribution of non-resident's estate.** — Personal property in California of a testator

dying in Europe, at the time of his death domiciled in Nevada, should be distributed according to the law of Nevada: *Estate of Apple*, 66 Cal. 432. In the absence of a statute to the contrary, the distribution of a decedent's personal estate is governed by the law of his actual domicile at the time of his death. But so far as creditors are concerned, each state will deal with the property of a decedent within its jurisdiction according to its own laws. This rule has not been changed in California: *Estate of Apple*, 66 Cal. 432.

*What decree shall contain.*

§ 1095. [1582.] In the decree, the court shall name the person and the portion or part to which each shall be entitled; and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same in possession.

**Distribution.** — *Action to recover distributive share.* — An action to recover the amount distributed to the plaintiff by the decree of distribution in the estate of a decedent should be brought against the defendant individually, and not in his representative capacity: *Melone v. Davis*, 67 Cal. 279. In such an action, the complaint need not allege a demand on the defendant as executor or administrator. The action itself is a sufficient demand: *Melone v. Davis*, 67 Cal. 279. After the decree of distribution, money in the hands of the administrator, distributed to an heir or devisee, may be garnished by a creditor of the distributee, or may be reached by proceedings supplementary to execution: *In re Nerac*, 35 Cal. 392.

*After order of distribution*, the court loses jurisdiction of the property, except to enforce the order, and the distributee has an action to recover his proportion or its value: *Wheeler v. Bolton*, 54 Cal. 302.

**Conclusiveness of decree.** — A final decree making distribution of an entire estate is, until reversed or modified on appeal, an investiture of the absolute right and title to the same in the distributees; and a further order

of the court making a different disposition of a portion of the estate, made pending an appeal which was perfected from said final decree, is void. But the appeal court may modify the decree: *In re Garraud*, 36 Cal. 277. The purchaser of an interest in the estate of a decedent, taking a power of attorney to have the seller's interest distributed to him (the purchaser), but not a deed therefor, is bound by the decree distributing the interest to the seller, the purchaser not asserting his right in the probate court: *Freeman v. Rahm*, 58 Cal. 111. But a legatee under a will, who claims certain property in the hands of the executor in his own right, and adversely to the estate, is not concluded by a decree attempting to distribute such property from afterwards asserting his adverse claims against the distributee: *Estate of Rowland*, 74 Cal. 523. No appeal lies by an administrator from a decree of distribution of an estate, where he has no interest as administrator in the matter sought to be reviewed: *Merrifield v. Longmire*, 66 Cal. 180.

The power to set aside a decree of distribution for fraud resides in equity only: *Estate of Hudson*, 63 Cal. 454.

*Decree may be made on application after notice.*

§ 1096. [1583.] The decree may be made on the application of the executor or administrator, or of any person interested in the estate, and shall only be made after notice has been given in the manner required in regard to an application for the sale of land by an executor or administrator. The court may order such further notice to be given as it may deem proper.

*Property of joint claimants may be partitioned.*

§ 1097. [1584.] When the estate, real or personal, assigned to two or more heirs, devisees, or legatees, shall be in common and undivided, and the respective shares shall not be separated and distinguished, partition and distribution may be made by three disinterested persons, to be appointed commissioners for that purpose by the court,

who shall be duly sworn to the faithful discharge of their duties, and the court shall issue a warrant to them for that purpose.

*Estate in different counties to be separately divided.*

§ 1098. [1585.] If the real estate be in different counties, the court may, if it shall judge proper, appoint different commissioners for each county; and in such cases the estate in each county shall be divided separately, as if there were no other estate to be divided, but the commissioners first appointed shall, unless otherwise directed by the court, make division of such real estate, wherever situated within the state.

*Partition and distribution may be ordered upon petition after notice.*

§ 1099. [1586.] Such partition and distribution may be ordered on the petition of any of the persons interested in the estate; but before any partition shall be ordered as directed in this chapter, notice shall be given to all persons interested who shall reside in this state, or to their guardians, and to agents, attorneys, or guardians, if there be any in this state, of such as reside out of the state, either personally or by public notice, as the court may direct.

*Assignee may take shares upon distribution.*

§ 1100. [1587.] Partition of the real estate may be made as provided in this chapter, although some of the original heirs or devisees may have conveyed their shares to other persons, and such shares shall be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs or devisees.

**Partition to person holding.** — This does not mean only the first alienee, nor an alienee receiving a conveyance immediately from the heir or devisee, but the assignee of alienees as well: *In re De Castro v. Barry*, 18 Cal. 99.

*Shares to be set out in severalty, except by consent.*

§ 1101. [1588.] The several shares in the real and personal estate shall be set out to each individual in proportion to his right, by such metes, bounds, and descriptions that the same may be easily distinguished, unless two or more of the parties shall consent to have their shares set out so as to be held by them in common and undivided.

*Court may assign real estate to one or more of the parties.*

§ 1102. [1589.] When any such real estate cannot be divided without prejudice or inconvenience to the owners, the court may assign the whole to one or more of the parties entitled to share therein, who will accept it, providing the party so accepting the whole shall pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction, and the true value of the estate shall be ascertained by the commissioners appointed by the court, and sworn for that purpose.

*Owerty for inequality of shares.*

§ 1103. [1590.] When any tract of land or tenement shall be of greater value than either party's share of the estate to be divided, and cannot be divided without injury to the same, it may be set off, by the commissioners appointed to make partition, to either of the parties who will accept it, giving preference as prescribed in the preceding sections; providing the party so accepting shall pay or secure to one or more of the others such sums as the commissioners shall award to make the partition equal, and the commissioners shall make their award accordingly; but such partition shall not be established by the court until the sums so awarded shall be paid to the parties entitled to the same, or secured to their satisfaction.

*Estate may be sold and proceeds distributed when.*

§ 1104. [1591.] When it cannot be otherwise fairly divided, the whole or any part of the estate, real or personal, may be recommended by the commissioners to be sold; and if the report be confirmed, the court may order a sale by the executor or administrator, and distribute the proceeds.

*Commissioners shall first divide and sever estate of deceased from the interests of other tenants in common.*

§ 1105. [1592.] When partition of real estate among heirs or devisees shall be required, and such real estate shall be undivided and in common with the real estate of any other person, the commissioners shall first divide and sever the estate of the deceased from the estate with which it lies in common; and such division so made and established by the court shall be binding upon all the persons interested.

*Before partition or division of estate, guardians and agents shall be appointed and notice given.*

§ 1106. [1593.] Before any partition shall be made, or any estate divided, as provided in this chapter, guardians shall be appointed for all minors and insane persons interested in the estate to be divided; and some discreet person shall be appointed to act as agent for such parties as reside out of the state, and notice of the appointment of such agent shall be given to the commissioners in their warrant; and notice shall be given to all persons interested in the partition, their guardians or agents, by the commissioners, of the time when they shall proceed to make partition.

*Report to be made by commissioners, and recorded.*

§ 1107. The commissioners shall make a report of their proceedings in writing, and the court may, for sufficient reasons, set aside such report and remit the same to the same commissioners or appoint



others; and the report, when finally accepted and established, shall be recorded in the records of the court, and a certified copy thereof, under the seal of the court, shall be recorded in the office of the county auditor of the county where the land lies. [*March 9, 1891, § 38.*]

*Commissioners need not be appointed when court makes partition of residue.*

§ 1108. [1595.] When the court shall make a decree assigning the residue of any estate to one or more persons entitled to the same, it shall not be necessary to appoint commissioners to make partition or distribution of such estate, unless the parties to whom the assignment shall have been decreed, or some of them, shall request that such partition be made.

*Questions as to advancements to be determined and specified in decree —*

*Conclusiveness of decree.*

§ 1109. [1596.] All questions as to advancements made, or alleged to have been made, by the deceased to any heirs may be heard and determined by the court, and shall be specified in the decree assigning the estate, and in the warrant to the commissioners, and the final decree of the court, or in case of appeal, of the supreme court, shall be binding on all parties interested in the estate.

*Court to appoint agent to protect estate of non-resident.*

§ 1110. [1597.] When any estate shall have been assigned by decree of the court, or distributed by commissioners, as provided in this chapter, to any person residing out of this state, and having no agent therein, and it shall be necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court may appoint an agent for that purpose, and authorize him to take charge of such estate, as well as to act for such absentee in the partition and distribution.

*Agent for non-resident shall give bond — Compensation of.*

§ 1111. [1598.] Such agent shall give a bond to the county in which such estate shall be situated, to be approved by the court, conditioned faithfully to manage and account for such estate, before he shall be authorized to receive the same, and the court appointing such agent may allow a reasonable sum out of the profits of the estate for his services and expenses.

*Estate to be sold after one year — Receipts.*

§ 1112. [1599.] When the estate shall have remained in the hands of the agent unclaimed for one year, it shall be sold under order of the court, and the proceeds, deducting the expenses of the sale, to be allowed by the court, shall be paid into the county treasury. When the

payment is made the agent shall take triplicate receipts, one of which he shall file with the county auditor, and another with the court.

**Unclaimed property.** — The court has no power to direct that the portion allotted to one of the heirs, a non-resident, shall be distributed among the other heirs if the non-resident heirs shall fail to appear and claim it within a year. The money should be paid into the county treasury: *Pyatt v. Brockman*, 6 Cal. 418.

*Agent's liability on bond.*

§ 1113. [1600.] The agent shall be liable on his bond for the care and preservation of the estate while in his hands, and for the payment of the proceeds of sale as required by the preceding section, and may be sued thereon by any person interested.

*Auditor to draw warrant.*

§ 1114. When any person shall appear and claim the money paid into the treasury, the court making the distribution, being first satisfied of his right, shall order the payment of such money, and, upon the presentation of a certified copy of the order to the county auditor, he shall draw his warrant on the county treasurer for the amount. [March 9, 1891, § 39.]

*Decree of final discharge to be made when.*

§ 1115. [1602.] When the estate has been fully administered, and it shall have been shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up, under order of the court, all property of the estate to the persons entitled, the court shall make a decree discharging him from all liability to be incurred thereafter.

**Decree of discharge.** — Until the entry of the decree of discharge, the trust still continues in contemplation of law, and the executor remains clothed with the duty and authority of his office: *Dohs v. Dohs*, 60 Cal. 255; *McCreary v. Haraszthy*, 51 Cal. 146; *Dean v. Superior Court*, 63 Cal. 473.

taking effect contemporaneously: See *Dean v. Superior Court*, 63 Cal. 473.

**Attacking decree of discharge.** — Relief against the decree of discharge cannot be had on motion after the expiration of six months from rendition thereof; the remedies left are by appeal, or by an independent suit in equity: *Dean v. Superior Court*, 63 Cal. 473.

**Discharge and decree of distribution**

*Issuance of letters after final settlement.*

§ 1116. [1603.] The final settlement of the estate shall not prevent a subsequent issuance of letters of administration, should other property of the estate be discovered, or it should become necessary and proper from any cause that letters should be again issued.

## CHAPTER XIII.

### OF SPECIFIC PERFORMANCE OF CONTRACTS OF DECEASED PERSONS.

- § 1117. Decedent's contract to convey may be enforced against representatives.
- § 1118. Manner of commencing proceedings therefor.
- § 1119. Proceedings at the hearing.
- § 1120. Decree for conveyance.
- § 1121. Conveyance, by whom executed.
- § 1122. Proceedings where there is no executor or administrator.
- § 1123. Form and effect of such conveyance.
- § 1124. Appeal may be taken from such decree — Recording and effect of decree.
- § 1125. Decree may stand in place of conveyance.
- § 1126. Representatives of deceased person may maintain such proceedings.
- § 1127. Depositions may be used on the hearing.

*Decedent's contract to convey may be enforced against representatives.*

§ 1117. If any person, who is bound by contract, in writing, to convey any real property, shall die before making the conveyance, the superior court of the county in which such real estate or any portion thereof is situate may make a decree authorizing and directing his executor or administrator to convey such real property to the person entitled thereto. [*March 9, 1891, § 40.*]

The substance of this chapter is contained in chapter 52 of the code of 1881, but most of the sections required considerable modification to conform the proceeding to the present organization of the courts. The chapter was originally taken from the statutes of California, where it is still retained as a part of the probate practice.

**Enforcing contract for sale by deceased.** — A will operates only upon so much of the estate as the deceased may not have contracted to sell: *Bruck v. Tucker*, 32 Cal. 431. This section does not confer power to decree specific performance in cases of oral contracts for the sale or purchase of lands, where there has been such part performance as to destroy the *statu quo*: *Cory v. Hyde*, 49 Cal. 471. Under this section, the court sitting as a pro-

bate court has no greater powers than a court of equity would have. Therefore, where the rights of third parties are involved, as a decree could not be had in equity unless such parties were before the court, the proceedings taken under this section must be dismissed, as no provision is made for bringing in a third party: *Estate of Corwin*, 61 Cal. 160.

Where an action for the specific performance of a contract for the sale of land is brought against a defendant as the executor of the will of the deceased vendor, after the resignation of his executorship has been accepted by the court, and without joining the heirs of the deceased, a judgment rendered therein against him as executor does not bind the heirs: *Luco v. Commercial Bank of San Diego*, 70 Cal. 339.

*Manner of commencing proceedings therefor.*

§ 1118. On filing and presentation of a petition of any person claiming to be entitled to such conveyance under such contract, setting forth the facts upon which such claim is predicated, the court, or the judge thereof, shall make an order appointing a time for hearing such petition, and shall also order notice thereof, and of the time of the hearing, to be published four successive weeks next before such hearing, in such newspaper in the state as the court shall designate; and in case such deceased person was an inhabitant of this state at the time of his death, or died in this state, and in all other cases in which an executor or administrator has been appointed in this state, the court shall further order that the notice be personally served upon the



executor or administrator, by delivery to him of a copy of the same, together with a copy of the petition. [March 9, 1891, § 41.]

*Proceedings at the hearing.*

§ 1119. At the time appointed for such hearing, or at such other time as the same may be adjourned to, upon proof of the publication of the notice and of personal service thereof where personal service is required, the court shall proceed to a hearing, and all persons interested as creditors, heirs, devisees, or personal representatives may appear and resist such petition, by filing their objections in writing, and the court shall examine, on oath, the petitioners, and all witnesses who may be produced on the hearing, by any interested party, for that purpose. [March 9, 1891, § 42.]

*Decree for conveyance.*

§ 1120. [626.] After a full hearing, upon such petition and objections, of the facts and circumstances of the claim, if the court is satisfied that the petitioner is entitled, in equity, to a conveyance of the real estate described in the petition, or any part thereof, or any interest therein, the court shall make a decree authorizing and directing the execution and delivery of a conveyance to the petitioner.

*Conveyance, by whom executed.*

§ 1121. Such conveyance shall be executed by the executor or administrator of the estate of the deceased, if the deceased was a resident of or had his place of abode at the time of his death in this state, or if he died therein, or if an executor or administrator has been appointed therein; but in such case no decree for conveyance shall be made, unless the executor or administrator shall have been served with a copy of the said petition and the notice provided for in section eleven hundred and eighteen at least twenty days prior to the time appointed for the hearing. [March 9, 1891, § 43.]

*Proceedings where there is no executor or administrator.*

§ 1122. If the deceased died out of the state, and was not an inhabitant thereof at the time of his death, and no executor or administrator shall have been appointed in the state, such conveyance shall be executed by a commissioner to be appointed by the court, in the decree, for that purpose; but in such case, in addition to the notice provided for in section eleven hundred and eighteen, it shall appear, to the satisfaction of the court at the hearing, that the executor or administrator of such deceased duly appointed in another state, territory, or country, or his heirs or devisees, shall have had reasonable notice personally of the pendency of said petition, and of the time and place appointed for such hearing. And such foreign executor or

administrator shall have the same right to file objections and resist the claim of the petitioners as an executor or administrator appointed under the laws of this state would have; and it shall not be necessary, in such case, that an administration of the estate of the deceased be had in the state, to authorize the decree of conveyance prayed for. [March 9, 1891, § 44.]

*Form and effect of such conveyance.*

§ 1123. [629.] A conveyance executed under the provisions of this chapter shall so refer to the decree authorizing the conveyance that the same may be readily found, but need not recite the record in the case generally, and the conveyance made in pursuance of a decree shall pass to the grantee all the estate, right, title, and interest contracted to be conveyed by the deceased, as fully as if the contracting party himself were still living and executed the conveyance in pursuance of such contract.

*Appeal may be taken from such decree—Recording and effect of decree.*

§ 1124. Any party interested may appeal therefrom to the supreme court, in the same manner as appeals are taken and prosecuted from final decrees or judgments in equity causes; but if no appeal be taken from such decree within the time limited therefor, or if such decree be affirmed on appeal, it shall be the duty of the executor, administrator, or commissioner to execute and deliver the conveyance according to the directions contained in the decree; and a certified copy of the decree shall be recorded with the deed in the office of the auditor of the county where the lands lie, and shall be conclusive evidence of the correctness of the proceedings and of the authority of the executor, administrator, or commissioner to make such conveyance. [March 9, 1891, § 45.]

*Decree may stand in place of conveyance.*

§ 1125. A copy of the decree for conveyance, made by the court, and duly certified, and recorded in the office of the auditor of the county wherein the land is situate, shall, after affirmance upon appeal, or after expiration of the time for taking an appeal in case no appeal be taken, give to the person entitled to the conveyance a right to the immediate possession of the land contracted for, and of holding the same according to the terms of the intended conveyance, in like manner and with like effect as if they had been conveyed in pursuance of the decree. [March 9, 1891, § 46.]

*Representatives of deceased person may maintain such proceedings.*

§ 1126. If the person to whom the conveyance was to be made shall die before the commencement of the proceedings according to the provisions of this chapter, or before the completion of the conveyance, any person who would have been entitled to the conveyance

under him, as heir, devisee, or otherwise, in case the conveyance had been made according to the terms of the contract, or the executor or administrator of such deceased person, for the benefit of persons entitled, may commence such proceedings, or prosecute the same if already commenced; and the conveyance shall be so made as to vest the estate in the persons who would have been entitled to it, or in the executor or administrator for their benefit. [*March 9, 1891, § 47.*]

*Depositions may be used on the hearing.*

§ 1127. The testimony of witnesses in support of the claim of the petitioner may be taken by deposition whenever the deposition of such witnesses might be taken to be used in the trial of a civil action; but notice of the time and place of taking such deposition shall be published by the petitioner, in the paper required to be designated by section eleven hundred and eighteen, for three successive weeks prior to taking the same, which notice shall also state the name of the officer before whom the deposition is to be taken, and the name[s] of the witnesses whose testimony is proposed to be taken at such time and place, and shall also be served personally in all cases wherein personal service of the notice is required by the provisions of section eleven hundred and eighteen. Any party interested in the estate may appear and cross-examine such witnesses, and the manner of examination and the form of such deposition shall be in conformity with the statute regulating depositions of witnesses in civil actions. Any party interested in the estate, and resisting the claim of the petitioner, may, after filing his objections, take the testimony of witnesses in his behalf in like manner as in civil actions. [*March 9, 1891, § 48.*]



## CHAPTER XIV.

## OF THE GUARDIANSHIP OF INFANTS.

- § 1128. Guardians for minors may be appointed when.
- § 1129. Who may nominate guardian — Who disqualified.
- § 1130. Appointment of guardian must be approved by court.
- § 1131. Guardian not to be removed without reason.
- § 1132. Who entitled to guardianship.
- § 1133. Guardian to have custody of ward when.
- § 1134. Guardianship ceases when — Full age of males and females, what is.
- § 1135. Guardian may prosecute and defend for ward.
- § 1136. Bond of guardian.
- § 1137. Court may require accounting and further security.
- § 1138. Duties of guardians.
- § 1139. Court may change investment of estate.
- § 1140. Removal of guardian and proceedings thereafter.
- § 1141. Provisions applicable to bond of guardian.
- § 1142. Testamentary guardian — Appointment and bond of.
- § 1143. Court may appoint guardian *ad litem*.
- § 1144. Infant's estate may be sold under order of court when.
- § 1145. Requisites of petition for sale of ward's property.
- § 1146. Manner and terms of sale to be fixed by court.
- § 1147. Provisions regulating sales made by guardian.
- § 1148. Guardian to make report of sale, etc.
- § 1149. Confirmation of sale.
- § 1150. Powers of guardian in partition of real property.
- § 1151. Compensation and expenses allowed to guardian.
- § 1152. Removal of property from this state by non-residents.
- § 1153. Discharge of sureties on guardian's bond.

*Guardians for minors may be appointed when.*

§ 1128. [1604.] The superior court of each county, when it shall become necessary, may appoint guardians to minors resident in said county, who have no guardian appointed by will; or who may reside out of the state, having estate within the county.

**Jurisdiction and notice.** — Under this section, the superior court of the county of which a minor is an inhabitant or resident has jurisdiction to appoint a guardian for him: *Guardianship of Raynor*, 74 Cal. 421. And the order appointing a guardian for a minor under fourteen years of age is not void for want of formal notice to the person having custody of the minor, and to resident relatives of the minor, if all persons entitled to such notice appear and consent to the appointment: *Smith v. Biscailuz*, 83 Cal. 344.

**Fraud in appointment — Evidence.** — A judgment of the court appointing a guardian of the person and estate of a minor, which is regular on its face, and rendered by a court having jurisdiction of the matter, cannot be

collaterally attacked on the ground of fraud, collusion, or other matter *aliunde*: *Hodgdon v. Southern Pacific R. R. Co.*, 75 Cal. 642. The testimony of a party that a certain person is her guardian, when not objected to, is sufficient evidence of the fact of his guardianship: *Morrell v. Morgan*, 65 Cal. 575.

**Appointment of guardian for non-resident minors.** — Statutory authority given to probate courts to appoint guardians for non-resident minors having property within the state is valid: *Davis v. Hudson*, 29 Minn. 27. Third persons cannot question the validity of the order upon any allegation that insufficient notice was given of the hearing of the application for the appointment under the statute: *Gronfier v. Puymiro*, 19 Cal. 631.

*Who may nominate guardian — Who disqualified.*

§ 1129. [1605.] If the minor is under fourteen years of age, the judge may nominate and appoint his guardian; if said minor be over fourteen years of age, he or she may nominate the guardian, who, if

approved by the superior court, shall be appointed accordingly; *provided*, that no judicial officer, excepting justice of the peace, no person of unsound mind, or a party convicted of felony, or a misdemeanor involving moral turpitude, shall be appointed guardian, and when a guardian shall incur either of the foregoing disabilities, he shall be displaced. If a guardian becomes superior judge, the superior court of the proper county shall appoint his successor.

*Appointment of guardian must be approved by court.*

§ 1130. [1606.] If the guardian nominated by the minor be not approved by the judge, or if the minor shall reside out of the state, or if, after being duly cited by the court he shall neglect for ten days to nominate a suitable person, the court may appoint the guardian in the same manner as if the minor were under the age of fourteen years.

*Guardian not to be removed without cause.*

§ 1131. [1607.] When a guardian has been appointed for any minor under the age of fourteen, such guardian shall not be removed when such minor arrives at the age of fourteen, except for good cause shown.

*Who entitled to guardianship.*

§ 1132. [1608.] The father of the minor if living, and in case of his decease the mother, being themselves respectively competent to transact their own business, shall be entitled to the guardianship of a minor.

*Guardian to have custody of ward when.*

§ 1133. [1609.] If the minor have no father or mother living, and competent to have the custody and care of the education of such minor, the guardian so appointed shall have the custody and tuition of his ward.

*Guardianship ceases when — Full age of males and females, what is.*

§ 1134. [1610.] Every guardian appointed as aforesaid shall have the custody and tuition of the minor, and the care and management of the estate of such minor, except as hereinafter provided, until he or she shall have attained the age of majority; and males shall be deemed of full and legal age when they shall be twenty-one years old, and females shall be deemed of full and legal age when they shall be eighteen years old, or at any age under eighteen, when, with the consent of the parent or guardian, or other person under whose care or government they may be, they shall have been lawfully married.

*Guardian may prosecute and defend for ward.*

§ 1135. [1611.] Guardians, by virtue of their office as such, shall be allowed in all cases to prosecute and defend for their wards.

*Bond of guardian.*

§ 1136. [1612.] The court shall take of each guardian appointed under this act bond, with approved security, payable to the state of Washington, in a sum double the amount of the minor's estate, real and personal, conditioned as follows:—

The condition of this obligation is such, that if the above-bound A B, who has been appointed guardian for C D, shall faithfully discharge the office and trust of such guardian according to law, and shall render a fair and just account of his said guardianship to the superior court for the county of —, from time to time, as he shall thereto be required by said court, and comply with all orders of said court, lawfully made, relative to the goods, chattels, and moneys of such minor, and render and pay to such minor all moneys, goods, and chattels, title-papers, and effects which may come into the hands or possession of such guardian belonging to such minor, when such minor shall thereto be entitled, or to any subsequent guardian, should such court so direct, this obligation shall be void, or otherwise to remain in full force and virtue, which bond shall be for the use of such minor, and shall not become void upon the first recovery, but may be put in suit from time to time against all or any one or more of the obligors, in the name and [for] the use and benefit of any person entitled by a breach thereof, until the whole penalty shall be recovered thereon.

*Court may require accounting and further security.*

§ 1137. [1613.] Superior courts shall have power, in their respective counties, with or without previous complaint, by an order duly made and served, to oblige all guardians of minors, from time to time, to render their respective accounts, upon oath, touching their guardianship, to said courts for adjustment, and shall have power to compel such guardian to give supplementary security, whenever it shall judge proper, and in default thereof, to remove such guardian.

*Duties of guardians.*

§ 1138. [1614.] It shall be the duty of every guardian of any minor,—

1. To make out and file, within three months after his appointment, a full inventory, verified by oath, of the real and personal estate of his ward, with the value of the same; and failing so to do, it shall be the duty of the court to remove him and appoint a successor.
2. To manage the estate for the best interest of his ward.
3. To render on oath to the proper court an account of his receipts and expenditures as such guardian, verified by [such] vouchers or proof, at least once in every two years, or whenever cited so to do; he shall receive no allowance for services, and be liable to said ward



on his bond for ten per cent in damages on the whole amount of estate, both real and personal, in his hands belonging to such ward.

4. At the expiration of his trust, fully to account for and pay over to the proper person all the estate of said ward remaining in his hands.

5. To pay all just debts due from such ward out of the estate in his hands, and collect all debts due such ward, and in case of doubtful debts, to compound the same, and appear for and defend, or cause to be defended, all suits against such ward.

6. When any ward has no father or mother, or such father or mother is unable or fails to educate such ward, it shall be the duty of his guardian to provide for him such education as the amount of his estate may justify.

**When ward attains majority** the office of guardian comes to an end, and it is then the duty of the guardian to exhibit a final account of his guardianship to a court of probate, make a final settlement, and deliver all the property in his hands to the ward: *In re Allgier*, 65 Cal. 228; 2 West Coast Rep. 876. If the guardian fails to do so, it is a breach of his bond, and his executors, on his death, cannot exhibit to the probate court an account of the guardianship. The remedy of the ward is in equity against the deceased guardian's executors and other necessary parties: *In re Allgier*, 65 Cal. 228; 2 West Coast Rep. 876.

**Accounts may be verified** in exceptional cases by person other than the guardian, if the guardian also swears that he believes his statements are true: *Racouillat v. Requena*, 36 Cal. 651.

**Conclusiveness of account, etc. — Actions by ward.** — The settlement of the account of the guardian by the court is conclusive in a collateral action against his sureties, and evidence is not admissible to show, under a cross-complaint by the sureties, that the account, as settled, was not a true and correct statement of the guardian's transactions with his ward: *Brodrib v. Brodrib*, 56 Cal. 563. Action by ward for an accounting cannot be

brought against the administrator of the deceased guardian unless the claim on which such action is founded is presented to the administrator for allowance: *Gillespie v. Wynn*, 65 Cal. 429; 3 West Coast Rep. 371. Where a joint lease was executed by the deceased lessor as guardian, the ward, after attaining majority, may be joined as plaintiff with the surviving lessor in an action to enforce a covenant made for his benefit: *Salisbury v. Shirley*, 66 Cal. 223.

**Guardian must have order of court to sell ward's property**, either personal or real: *Paty v. Smith*, 50 Cal. 153; *De La Montagnie v. Union Ins. Co.*, 42 Cal. 290.

**Pay all just debts, etc.** — Claims against the ward need not be verified or approved by the judge before payment: *Racouillat v. Requena*, 36 Cal. 651.

**Citation — Service by publication.** — In a proceeding to compel an accounting by a guardian who has left the state, so that personal service on him cannot be had, the citation must be served by publication in the same manner as a summons in a civil action. In the absence of such service, neither the guardian nor his sureties are bound by the decree rendered upon the accounting: *Spencer v. Houghton*, 68 Cal. 82.

### *Court may change investment of estate.*

§ 1139. [1615.] The court may, on the application of a guardian or any other person, said guardian having due written notice thereof, order and decree any change to be made in the investment of the estate of any ward that may to such court seem advantageous to such estate.

### *Removal of guardian and proceedings thereafter.*

§ 1140. [1616.] The court in all cases shall have power to remove guardians for good and sufficient reasons, which shall be entered of record, and to appoint others in their place or in the place of those who may die, who shall give bond and security for the faithful discharge of their duties as heretofore prescribed in this act; and when any

guardian shall be removed or die, and a successor be appointed, the court shall have power to compel such guardian to deliver up to such successor all goods, chattels, moneys, title-papers, or other effects belonging to such minor which may be in the possession of such guardian so removed, or of the executors or administrators of a deceased guardian, or of any other person or persons who have the same, and upon failure, to commit the party offending to prison, until he, she, or they comply with the order of the court.

**Revocation of letters.** — An order revoking letters of guardianship of the estate of a ward is erroneous, when the petition for the revocation only charges dereliction of duty as to the care of the person of the ward, and contains no averment of mismanagement of the estate: *Estate of Rose*, 66 Cal. 240.

**A father as guardian will be removed** when he does not support and educate his children: *In re Swift*, 47 Cal. 629.

*Provisions applicable to bond of guardian.*

§ 1141. [1617.] All the provisions of chapter five of title twelve relative to bonds given by executors and administrators shall apply to bonds taken of guardians.

The reference in the code of 1881 is to chapter 101 of that code, which is chapter 5 of title 12 of this code.

*Testamentary guardian, appointment and bond of.*

§ 1142. [1618.] The father of every legitimate child, who is a minor, may, by his last will in writing, appoint a guardian or guardians for his minor children, whether born at the time of making such will or afterwards, to continue during the minority of such child, or for any less time, and every such testamentary guardian shall give bond in like manner and with like condition as hereinbefore required, and he shall have the same powers and perform the same duties with regard to the person and estate of the ward as a guardian appointed as aforesaid.

**Custody and tuition.** — Neither the testamentary guardian nor the probate guardian is entitled to the custody and tuition of the minor, so long as the child has a father or mother living and worthy: *Lord v. Hough*, 37 Cal. 657.

*Court may appoint guardian ad litem.*

§ 1143. [1619.] Nothing contained in this act shall affect or impair the power of any court to appoint a guardian to defend the interests of any minor interested in any suit or matter pending therein, or to commence and prosecute any suit in his behalf.

*Infant's estate may be sold under order of court, when.*

§ 1144. [1620.] Whenever necessary for the education, support, or payment of the just debts of any minor, or for the discharge of any liens on the real estate of such minor, or whenever the real estate of such minor is suffering unavoidable waste, or a better investment of the value thereof can be made, the court may, on the application of such guardian, order the same or a part thereof to be sold.

**Agent, guardian may employ,** to carry on business: *Ricoultat v. Requena*, 36 Cal. 651.  
**Mismanagement of estate.** — If a guardian lend money of his ward on the promise of

the borrower to execute note and mortgage, which are not executed, and loss follow, the guardian will be responsible: *Estate of Post*, 57 Cal. 273.

*Requisites of petition for sale of ward's property.*

§ 1145. [1621.] Such application shall be by petition, verified by the oath of the guardian, and shall substantially set forth:—

1. The value and character of all personal estate belonging to such ward that has come to the knowledge or possession of such guardian;
2. The disposition made of such personal estate;
3. The amount and condition of the ward's personal estate, if any, dependent upon the settlement of any estate, or the execution of any trust;
4. The annual value of the real estate of the ward;
5. The amount of rent received and the application thereof;
6. The proposed manner of reinvesting the proceeds of the sale, if asked for that purpose;
7. Each item of indebtedness, or the amount and character of the lien, if the sale is prayed for the liquidation thereof;
8. The age of the ward, where and with whom residing;
9. All other facts connected with the estate and condition of the ward necessary to enable the court fully to understand the same. If there is no personal estate belonging to such ward, in possession or expectancy, and none has come into the hands of such guardian, and no rents have been received, the fact shall be stated in the application.

**Ratification by ward.** — A partition of property may be voluntary, and if the act of the guardian in proceedings therein, and in making a sale of the allotted part, is not disaffirmed by the ward within a reasonable time after attaining majority, he will be deemed to have ratified it: *Brazee v. Schofield*, 2 Wash. 209.

**Parol partition,** consummated by possession and dominion in severalty, confirmed by long continued acquiescence and many changes of title, will not be disturbed in equity: *Brazee v. Schofield*, 2 Wash. 209.

*Manner and terms of sale to be fixed by court.*

§ 1146. [1622.] If it shall appear to the court from such petition, and from the hearing thereon, that it is necessary or would be beneficial to the ward that such real estate or some part of it should be sold, the court may authorize the said guardian to sell the same at public sale, on the same terms and notice required for sales of real estate by executors and administrators.

**Order of sale.** — An order of court for the sale of the land of a minor by his guardian must contain in itself a definite and certain description of the land to be sold. The descrip-

tion contained in the order cannot be helped out by reference to documents not contained in the order itself: *Hill v. Wall*, 66 Cal. 130.

*Provisions regulating sales made by guardian.*

§ 1147. [1623.] All the provisions of the chapter regulating sales by executors and administrators shall be applicable to sales made by guardians.



*Guardian to make report of sale, etc.*

§ 1148. [1624.] At the term of the court next after such sale, such guardian shall make report thereof to such court, and produce the proceeds of such sale, and the notes or obligations or other securities taken to secure the payment of the purchase-money.

A statute reported to conform this section to the courts as now organized failed to pass the legislature.

*Confirmation of sale.*

§ 1149. [1625.] The court, in confirming such sale and directing a conveyance, shall be governed by the law regulating the confirming of sales of real estate made by executors or administrators, and the making of conveyances on such sales.

*Powers of guardian in partition of real property.*

§ 1150. [1626.] The guardian of any minor may join in and assent to the partition of the real estate of such minor, under the direction of the court, upon a petition for partition.

*Compensation and expenses allowed to guardian.*

§ 1151. [1627.] Every guardian shall be allowed by the court, on settling his accounts, the amount of all reasonable expenses incurred in the execution of his trust, and also such compensation for his services as the court shall deem reasonable.

*Removal of property from this state by non-residents.*

§ 1152. [1628.] When the guardian and ward are both non-residents, and the ward is entitled to property in this state, which may be removed to another state or territory, without conflict to any restriction or limitation thereupon, or impairing the right of the ward thereto, such property may be removed to the state or territory in which such ward may reside, upon the application of the guardian to the judge of the superior court of the county in which the estate of the ward, or the principal part thereof, may be, in the manner following: The guardian so applying must produce a transcript from the records of a court of competent jurisdiction, certified according to the laws of this state, showing his appointment as guardian of the ward in the state or territory in which he and the said ward reside; that he has qualified as such according to the laws thereof, and given bond, with sureties, for the performance of his trust; and must also give thirty days' notice to the resident executor, administrator, guardian, agent, or trustee, if there be such, of the applications. Thereupon, if no objection be made, or if no good cause be shown to the contrary, the judge of the court shall make an order granting such guardian

leave to remove the property of said ward to the state or territory in which he or she may reside; which order shall be full and complete authority to said guardian to sue for and receive the same in his own name, for the use and benefit of said ward.

**Ward may compel accounting against executor of foreign guardian** by an action in the superior court, where both ward and guardian were originally residents of the state of Indiana, where the guardian, before discharge and accounting to his ward, removed to this state and died here, and where the partner of the guardian here was appointed as his executor: *Ong v. Whipple*, 3 Wash. 233.

*Discharge of sureties on guardian's bond.*

§ 1153. [1629.] Sureties in the bond of any guardian may be discharged from liability therein, under the same rule and regulation prescribed for the discharge of the sureties in the bond of executors and administrators, and the provisions of this act regulating the same shall apply to guardians, and guardians' bonds and sureties.

## CHAPTER XV.

### OF THE GUARDIANSHIP OF IDIOTS AND INSANE PERSONS.

- § 1154. Court may appoint guardians for idiots, insane, etc.
- § 1155. Court to appoint guardian for estate of insane person.
- § 1156. Costs to be taxed to prosecuting witness when.
- § 1157. Bond of guardian.
- § 1158. Guardian shall cause notice to be published.
- § 1159. Guardian to take charge of ward's estate.
- § 1160. Guardian to file inventory.
- § 1161. Inventory to be witnessed and verified.
- § 1162. Guardian to prosecute and defend actions for ward.
- § 1163. Guardian to collect dues and to pay debts of ward.
- § 1164. Power of court as to person, property, and family of insane.
- § 1165. Real estate of ward may be subjected to debts, etc., when.
- § 1166. Order of sale and proceedings.
- § 1167. Written instruments to be executed by guardian.
- § 1168. Proceedings may be set aside by court.
- § 1169. Guardian to account as often as required by court.
- § 1170. Bail — Service of process — Execution, issuance of.
- § 1171. Proceedings in case ward recovers his reason.
- § 1172. Death of ward, effect of.
- § 1173. Court may remove guardian for dereliction of duty.

*Court may appoint guardians for idiots, insane, etc.*

§ 1154. [1631.] The several superior courts shall have power to appoint guardians to take the care, custody, and management of all idiots, insane persons, and all who are incapable of conducting their own affairs; and of their estates, real and personal; the maintenance of themselves and families, and the education of their children.

**Guardian, who may be appointed.** — Cal. 594. If the insane person be a wife, the court may appoint a person other than the husband, if he is not fit: *In re Feyan*, 45 Cal. 177. The court may appoint any proper person guardian, though he may not be the person asked in the petition: *Hallett v. Patrick*, 49

*Court to appoint guardian for estate of insane person.*

§ 1155. [1635.] If it be found by the court that the person so brought before the court is of unsound mind and incapable of managing his own affairs, the court shall appoint a guardian for the estate of such insane person.

*Costs to be taxed to prosecuting witness when.*

§ 1156. [1637.] If the person alleged to be insane shall be discharged, and it shall be thought by the court that there were no grounds for such impression of insanity, then the cost shall be paid by the person at whose instance the proceeding was had, and execution may issue for the same.

*Bond of guardian.*

§ 1157. [1638.] Every such guardian so appointed shall, before entering upon the duties assigned him, enter into bond to the board of county commissioners, in such sum and with such security as the court shall approve, conditioned that he will take proper care of such insane person, and manage and minister his effects to the best advantage, according to law; and that he will faithfully discharge all duties as such guardian which may by law, or by the order, sentence, or decree of any court of competent jurisdiction, devolve upon him; which bond shall be filed in the office of the clerk of the superior court. A copy thereof, duly certified, shall be evidence in all respects as the original.

*Guardian shall cause notice to be published.*

§ 1158. [1639.] It shall be the duty of every such guardian, within twenty days after his appointment, to cause notice thereof to be published in some newspaper printed in this state, or otherwise publish such notice, at such time and place and in such manner as the court shall decide.

*Guardian to take charge of ward's estate.*

§ 1159. [1640.] It shall be the duty of such guardian to collect and take into his possession the goods, chattels, moneys, effects, and other evidences of debt, and all writings touching the estate, real and personal, of the person under his guardianship.

*Guardian to file inventory.*

§ 1160. [1641.] Within forty days after his appointment, such guardian shall make out, and file in the office of the clerk of the superior court by which he was appointed, a just and true inventory of the real and personal estate of his ward, stating the income and profits thereof, and the debts, credits, and effects, as the same shall have come to his



knowledge. And if, after having filed such inventory, it shall be found that there is other property belonging to said estate, it shall be the duty of such guardian to make out and file an additional inventory, containing a just and full account of the same, from time to time, as the same may be discovered

*Inventory to be witnessed and verified.*

§ 1161. [1642.] All such inventories shall be made in the presence of and attested by two credible witnesses in the neighborhood, and shall be verified by the oath of the guardian.

*Guardian to prosecute and defend actions for ward.*

§ 1162. [1643.] It shall be the duty of every such guardian to prosecute all actions commenced at the time of his appointment, or thereafter to be commenced, by or on account of his ward, and to defend all actions which may be brought against such ward.

*Guardian to collect dues, and to pay debts of ward.*

§ 1163. [1644.] Every such guardian is authorized and required to collect all debts due to his ward, and give acquittances and discharges thereof, and adjust, settle, and pay all demands due and becoming due from his ward, so far as his estate and effects will extend.

*Power of court as to person, property, and family of insane.*

§ 1164. [1645.] The superior court shall have power to make orders for the restraint, support, and safe-keeping of such person, for the management of his estate, and the support and maintenance of his family, and education of his children, out of the proceeds of his estate; to set apart and reserve, for the use of such family, all property, real or personal, not necessary to be sold for the payment of debts; and to let, sell, or mortgage any part of such estate, real or personal, when necessary for the payment of debts, the maintenance of such insane person or his family, or the education of his children.

*Real estate of ward may be subjected to debts, etc., when.*

§ 1165. [1646.] Whenever the personal estate of such person shall be found to be insufficient to meet the foregoing requisitions, it shall be the duty of such guardian to lay the same before the superior court by whom he was appointed, setting forth the particulars relative to the estate, real and personal, of such person, and the debts by him owing, accompanied by a correct and true account of his doings therewith; whereupon it shall be the duty of such court to make an order directing the mortgage, lease, or sale, at his discretion, of the whole or such part of the real estate as may be necessary.

*Order of sale and proceedings.*

§ 1166. [1647.] The court making such order shall direct the time and terms of such sale, mortgage, or lease of such estate, and the manner in which the proceeds shall be applied; and shall give due notice thereof, together with a full description of the property to be thus disposed of, at which time and place it shall be the duty of the guardian to execute the order of said court, and to make a full report of his doings therein, which report shall be accompanied by the affidavit of the guardian verifying the report, and stating that such guardian did not directly or indirectly become the purchaser thereof; or if otherwise disposed of, that he is not directly or indirectly interested personally in the agreement.

*Written instruments to be executed by guardian.*

§ 1167. [1648.] When any such sale, mortgage, or lease is approved by the court ordering the same, as having been performed according to law, and not under such circumstances as to operate prejudicial[ly] to the interest of such ward, it shall be the duty of the guardian to execute a deed, mortgage, or other instrument of writing, which shall be as valid and effective in law as if executed by such ward when of sound mind and discretion.

*Proceedings may be set aside by court.*

§ 1168. [1649.] If such proceedings be disapproved by said court, the court may set them aside, and proceed in like manner as if no sale had been made.

*Guardian to account as often as required by court.*

§ 1169. [1650.] Every such guardian, as often as required by the court appointing him, shall render a true and perfect account of his guardianship.

*Bail—Service of process—Execution, issuance of.*

§ 1170. [1651.] No such ward shall be held to bail, or his body be taken in execution, in any civil action; and in all actions commenced against him the process shall be served upon his guardian, and in all judgments against such ward (or his guardian as such) the execution shall be against the property of the ward only, and in no case against his body, nor against that of his guardian, nor the property of said guardian, unless he shall have rendered himself liable thereunto.

*Proceedings in case ward recovers his reason.*

§ 1171. [1652.] Whenever the court shall receive information that such ward has recovered his reason, he shall immediately inquire into the facts, and if he finds that such ward is of sound mind, he shall

forthwith discharge such person from care and custody; and the guardian shall immediately settle his accounts and restore to such person all things remaining in his hands belonging or appertaining to such ward.

*Death of ward, effect of.*

§ 1172. [1656.] In case of the death of any such ward while under guardianship, the power of the guardian shall cease, and the estate descend and be disposed of in the same manner as if said ward had been of sound mind; the guardian shall immediately settle his accounts and deliver the estate and the effects of his ward to his legal representatives.

*Court may remove guardian for dereliction of duty, etc.*

§ 1173. [1657.] The several superior courts shall have the power to remove any such guardian at any time, for neglect of duty, mismanagement, or of disobedience to any lawful order, and appoint another in his place, whereupon such guardian shall immediately settle his account and render to his successor the estate and effects of his ward.



## CHAPTER XVI.

## OF PRIVATE SALES OF REAL PROPERTY BELONGING TO ESTATES.

- § 1174. Estate of decedent, etc., may be sold at private sale.
- § 1175. Order of sale to be made on petition.
- § 1176. The order of sale, and its enforcement.
- § 1177. Manner of making the sale.
- § 1178. Confirmation only in case property sells for fair value.
- § 1179. Security required for deferred payments.
- § 1180. Return of sale, and proceedings thereon.
- § 1181. Objections to sale, and hearing thereof.
- § 1182. Order directing conveyance.
- § 1183. Applicability of other statutes to such sales.

*Estate of decedent, etc., may be sold at private sale.*

§ 1174. Real property belonging to the estates of decedents, minors, idiots, and insane persons may be sold at private sale according to the following provisions. [*March 6, 1891, § 1.*]

The act of March 6, 1891, which constitutes this chapter, is entitled: "An act relating to private sales of real property belonging to estates of decedents, minors, and insane persons." The provisions of the act are not confined to private sales. See constitution, article 2, section 19, as to the relation of the title to

the act, and as to its application: *Mahomet v. Quackenbush*, 117 U. S. 508; *Matter of the Mayor*, 99 N. Y. 569; *Astor v. New Arcade R'y Co.*, 113 N. Y. 93; *Mills v. Charleton*, 29 Wis. 400; *Stewart v. Father Matthew Society*, 41 Mich. 67; *Stiefel v. Maryland Institute*, 61 Md. 144.

*Order of sale to be made on petition.*

§ 1175. When the court is satisfied, after a full hearing upon the petition and an examination of the proofs and allegations of the parties interested, that a sale of the whole or some portion of the real estate is necessary for any of the causes specified in the laws of the state of Washington, or if such sale be assented to by all the persons interested in a decedent estate, an order must be made to sell the whole or so much and such parts of the real estate described in the petition as the court shall judge necessary or beneficial, at either public or private sale. [*March 6, 1891, § 2.*]

See note to § 1174.

*The order of sale, and its enforcement.*

§ 1176. The order of sale must describe the lands to be sold and the terms of sale, which may be for cash or on a credit not exceeding one year, payable in gross or in installments, and in such kind of money, with interest, as the court may direct. The land may be sold in one parcel or in subdivisions as the executor, administrator, or guardian shall judge most beneficial to the estate, unless the court otherwise specially directs. Every such sale must be ordered to be made at public auction, unless in the opinion of the court it would benefit the estate to sell the whole or some part of such real estate at private sale. The court may, if the same is asked for in the petition,

order or direct such real estate or any part thereof to be sold at either public or private sale, as the executor, administrator, or guardian shall judge most beneficial for the estate. If the executor, administrator, or guardian rejects or refuses to make a sale under the order, and as directed therein, he may be compelled to sell by order of the court made on motion after due notice by any party interested.

[*March 6, 1891, § 3.*]

See note to § 1174.

*Manner of making the sale.*

§ 1177. When a sale of real estate is ordered to be made at private sale, notice of the same must be posted up in three of the most public places in the county in which the land is situated, and published in a newspaper if there is one printed in the same county; if none, then in such paper as the court or a judge thereof may direct, for two weeks successively next before the day on which the sale is to be made, in which the lands and tenements to be sold must be described with common certainty. The notice must state a day on or after which the sale will be made, and a place where offers or bids will be received. The day last referred to must be at least fifteen days from the first publication of notice, and the sale must not be made before that day, but must be made with six months thereafter. The bids or offers must be in writing, and may be left at the place designated in the notice, or delivered to the executor or administrator personally, or may be filed in the office of the clerk of the court to which the return of sale must be made, at any time after the first publication of the notice and before the making of the sale. If it be shown that it will be for the best interest of the estate, the court or judge may, by an order, shorten the time of notice, which shall not, however, be less than one week, and may provide that the sale may be made on or after a day less than fifteen, but not less than eight days from the first publication of the notice of sale, and the sale may be made to correspond with such order. [*March 6, 1891, § 4.*]

See note to § 1174.

*Confirmation only in case property sells for fair value.*

§ 1178. No sale of real estate at private sale shall be confirmed by the court unless the sum offered is at least ninety per cent of the appraised value thereof, nor unless such real property has been appraised within one year of the time of such sale. If it has not been so appraised, or if the court is satisfied that the appraisement is too high or low, appraisers must be appointed, and they must make an appraisement thereof in the same manner as in case of an original appraisement of an estate; this may be done at any time before the sale or the confirmation thereof. [*March 6, 1891, § 5.*]

See note to § 1174.

*Security required for deferred payments.*

§ 1179. The executor, administrator, or guardian must, when the sale is made upon a credit, take the notes of the purchaser for the purchase-money, with a mortgage on the property to secure their payment. [March 6, 1891, § 6.]

See note to § 1174.

*Return of sale, and proceedings thereon.*

§ 1180. The executor, administrator, or guardian, after making such sale of real property, must make a return of his proceedings to the court, which must be filed in the office of the clerk at any time subsequent to the sale. A hearing upon the return of the proceedings may be asked for by any interested party by petition, and thereupon the court or judge must fix the day for the hearing, of which notice of at least ten days must be given by the clerk, by notices posted in three public places in the county, or by publication in a newspaper, or both, as the court or judge shall direct, and must briefly indicate the land sold, the sum for which it was sold, and must refer to the return for further particulars. Upon the hearing the court must examine the return and witnesses in relation to the same, and if the proceedings were unfair or the sum bid disproportionate to the value, and if it appear that a sum exceeding such bid at least ten per cent, exclusive of the expenses of a new sale, may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given and the sale in all respects conducted as if no previous sale had taken place; if an offer of ten per cent more in amount than that named in the return be made to the court in writing by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale. [March 6, 1891, § 7.]

See note to § 1174.

*Objections to sale, and hearing thereof.*

§ 1181. When the return of the sale is made and filed, any person interested in the estate may file written objections to the confirmation thereof, and may be heard thereon when the return is heard by the court or judge, and may produce witnesses in support of his objections. [March 6, 1891, § 8.]

See note to § 1174.

*Order directing conveyance.*

§ 1182. If it appears to the court that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, and that a greater sum, as above specified, cannot be obtained, or if the increased bid in section seven



of this chapter be made and accepted by the court, the court must make an order confirming the sale and directing conveyances to be executed. [*March 6, 1891, § 9.*]

See note to § 1174.

“This chapter” substituted for “this act,” the act and chapter being identical.

*Applicability of other statutes to such sales.*

§ 1183. In all other respects such sales shall be governed by the laws of the state of Washington now in force governing the sale of real property belonging to such estates. [*March 6, 1891, § 10.*]

See note to § 1174.

## TITLE XIII.

### OF PROCEDURE IN CRIMINAL ACTIONS.

#### CHAPTER I.—PRELIMINARY PROVISIONS.

II.—OF THE TIME OF COMMENCING CRIMINAL ACTIONS.

III.—OF PARTIES TO PUBLIC OFFENSES.

IV.—OF THE VENUE OF CRIMINAL ACTIONS.

V.—OF THE FORMS OF CRIMINAL ACTIONS.

VI.—OF THE GRAND JURY.

VII.—OF THE FINDING AND PRESENTATION OF THE INDICTMENT.

VIII.—OF THE REQUISITES OF INDICTMENTS AND INFORMATIONS.

IX.—OF PROCEEDINGS BEFORE THE ARRAIGNMENT OF THE DEFENDANT.

X.—OF THE ARRAIGNMENT OF THE DEFENDANT, AND PROCEEDINGS THEREON.

XI.—OF THE TRIAL OF CRIMINAL ACTIONS.

XII.—OF NEW TRIAL AND ARREST OF JUDGMENT.

XIII.—OF JUDGMENT, AND THE ENFORCEMENT THEREOF.

XIV.—OF FORFEITED RECOGNIZANCES IN CRIMINAL ACTIONS.

XV.—MISCELLANEOUS PROVISIONS RELATING TO CRIMINAL ACTIONS.

XVI.—OF SEARCH-WARRANTS.

XVII.—OF PROCEEDINGS IN RELATION TO FUGITIVES FROM JUSTICE.

## CHAPTER I.

### PRELIMINARY PROVISIONS.

§ 1184. Public offenses classified — Felonies and misdemeanors defined.

§ 1185. Common-law offenses triable.

§ 1186. Willful neglect of public duty is an offense.

§ 1187. Prohibited act is a misdemeanor.

*Public offenses classified — Felonies and misdemeanors defined.*

§ 1184. [781.] Public offenses are divided into,—1. Felonies; and 2. Misdemeanors. A felony is punishable by death or imprisonment in the penitentiary. All other offenses are misdemeanors.

**Felonies and misdemeanors.** — Although an offense may, in a particular case, be punishable by a fine, yet if the offense is one which is punishable or may be punished by imprisonment in the state prison, it must be prosecuted with the forms and solemnities of a crime of the grade of a felony: *People v. War*, 20 Cal. 119; *People v. Van Steenburgh*, 1 Park. Cr. 39. A misdemeanor is an act or omission not punishable by death or imprisonment in the state prison: *Pillsbury v. Brown*, 47 Cal. 477.

*Common-law offenses triable.*

§ 1185. For all offenses at common law which are not hereinafter defined by statute, the offender may be tried in the superior courts of this state. [February 24, 1891, § 1.]

**Common-law offense of conspiracy** *tory*, 3 Wash. 265. Conspiracy to defraud a person is indictable at common law: *Id.* That an indictment which contains sufficient to charge conspiracies to commit crimes are indictable, the crime as at common law will support a judgment of conviction: *Bradshaw v. Terri-* see extended note to *People v. Richards*, 51 Am. Dec. 90-94.

*Willful neglect of public duty is an offense.*

§ 1186. [783.] When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision has been made for the punishment of such delinquency, is a misdemeanor.

*Prohibited act is a misdemeanor.*

§ 1187. [784.] When the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor.

**When act is prohibited by law, but no punishment is provided, the doing of the act** cannot be punished as a misdemeanor: *State v. Gaunt*, 13 Or. 115.

## CHAPTER II.

### OF THE TIME OF COMMENCING CRIMINAL ACTIONS.

§ 1188. No limitation in case of murder — Periods for other actions.

*No limitation in case of murder — Periods for other actions.*

§ 1188. Prosecutions for the offenses of murder and arson, where death ensues, may be commenced at any period after the commission of the offense; for offenses the punishment of which may be imprisonment in the penitentiary, within three years after their commission; and for all other offenses, within one year after their commission; *provided*, that any length of time during which the party charged was not usually and publicly resident within this state shall not be reckoned within the one and three years respectively; *and further provided*, that where an indictment has been found, or an information filed, within the time limited for the commencement of a criminal action, if the indictment or information be set aside, the time of limitation shall be computed from the setting aside of such indictment or information. [February 24, 1891, § 2.]



**No limitation for prosecutions for murder.** — As against the crime of murder, there is no limitation, whether it be of the first or second degree: *People v. Haun*, 44 Cal. 96.

The statute excludes from computation the time the defendant may be out of the state; but the rule is, that this exception must be stated in the pleading. *Prima facie* lapse of time is a good defense, and if the statutory exception is relied upon, the state should set

it up: *People v. Miller*, 12 Cal. 295; *State v. Bockwith*, 1 Stew. 318; *Shelton v. State*, 1 Stew. & P. 208; 1 Chitty's Crim. Law, 253; *People v. Montejo*, 18 Cal. 38.

**Indictment must show that offense is not barred.** — The indictment must show that the offense charged is not barred by lapse of time; and if such offense is one capable of being divided into degrees, the indictment should show that no degree is barred: *People v. Miller*, 12 Cal. 291.

## CHAPTER III.

### OF PARTIES TO PUBLIC OFFENSES.

§ 1189. **Distinction between accessory before fact and principal abolished** — The former is to be tried as principal.

§ 1190. **Accessory after fact, who deemed to be.**

§ 1191. **All persons committing offenses against the laws of the state may be tried and punished.**

*Distinction between accessory before fact and principal abolished* — The former is to be tried as principal.

§ 1189. [956.] No distinction shall exist between an accessory before the fact and a principal, or between principals in the first and second degree, and all persons concerned in the commission of an offense, whether they directly counsel the act constituting the offense, or counsel, aid, and abet in its commission, though not present, shall hereafter be indicted, tried, and punished as principals.

**Certain distinctions abrogated.** — The distinction between an accessory before the fact and a principal is abrogated, and an accessory must now be prosecuted, tried, and punished as a principal. It is sufficient to charge the accessory directly with having himself committed the act, and the acts constituting him an accessory may be proved under such charge; but if the information charges facts sufficient to constitute the defendant such accessory at common law, it sufficiently charges

him as principal under the statute, and need not allege further matter which might be proved without pleading, if the defendant had been charged directly as principal: *People v. Rozelle*, 78 Cal. 84.

**Joint assault.** — Where two persons assist in committing an assault upon another, and inflict injuries upon him resulting in death, they are equally liable therefor as principals: *People v. Weber*, 66 Cal. 391.

*Accessory after fact, who deemed to be.*

§ 1190. [957.] Every person not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity, to the offender, who, after the commission of any felony, shall harbor, conceal, or maintain, or assist any principal felon or accessory before the fact, or shall give the offender any other aid, knowing that he had committed a felony, or had been accessory thereto before the fact, with intent that he shall avoid or escape from detection, arrest, trial, or punishment, shall be deemed accessory after the fact, and shall, on conviction thereof, be imprisoned in the county jail not more than one year, or be fined in any sum not exceeding five hundred dollars.

As to punishment of accessory after the fact, see Penal Code.

**Accessory after the fact.** — Any assistance given to one known to be a felon, in order to hinder his apprehension, trial, or punishment, is sufficient to make a man accessory after the fact; as that he concealed him in his house, or shut the door against his pursuers, until he should have an opportunity to escape; or took money from him to allow him to escape; or supplied him with money, a horse, or other necessities, in order to enable him to escape; or that the principal was in prison, and the jailer was bribed to let him escape; or conveyed instruments to him to enable him to break prison. This and like assistance to one known to be a felon will constitute one an accessory after the fact: 2 Hale P. C. 619, 621; 2 Hawk. P. C., c. 29, sec. 26; 1 Wharton's Crim. Law, 8th ed., sec. 241; *Wren v. Commonwealth*, 26 Gratt. 956. Merely permitting a felon to escape is not sufficient to impute guilt to the party so doing: 2 Hale P. C. 619. So if a person agree for money not to prosecute the felon; or if, knowing of a felony, fails to make it known to the proper authorities, he will not be

punishable as an accessory after the fact: *Wren v. Commonwealth*, 26 Gratt. 957; 1 Wharton's Crim. Law, 8th ed., sec. 242. Neither will a person who receives stolen property, and aids in the disposition of it, knowing it to be stolen, be chargeable as such: *People v. Stokes*, 40 Cal. 599. "The true test whether one is accessory after the fact is to consider whether what he did was done by way of personal help to his principal, with the view of enabling his principal to elude punishment; the kind of help appearing to be unimportant": 1 Bishop's Crim. Law, 6th ed., sec. 695. In order to charge a person as accessory after the fact, the felony must be completed; he must know the felon to be guilty, and he must receive, relieve, comfort, or assist him: 1 Chitty's Crim. Law, 264; 1 Wharton's Crim. Law, 8th ed., sec. 241; *Wren v. Commonwealth*, 26 Gratt. 952; *Tully v. Commonwealth*, 11 Bush, 154; *People v. Hawkins*, 34 Cal. 182. Knowledge of the commission of the felony must be brought home to the accused; and whether he had such knowledge is always a question of fact for the jury: *Wren v. Commonwealth*, 26 Gratt. 956.

*All persons committing offenses against the laws of this state may be tried and punished.*

§ 1191. Every person, whether an inhabitant of this state, or of any other state, territory, or country, may be tried and punished under the laws of this state for an offense committed by him therein, except when such offense is cognizable exclusively in the courts of the United States. [February 24, 1891, § 3.]

**Jurisdiction.** — Penal laws are generally local in their operation, and are only intended to punish such offenses as are committed within the sovereignty in which they are enacted: See the note to *Molynaux v. Seymour*, 76 Am. Dec. 672; *State v. Knight*, Tayl. 65; *The Antelope*, 10 Wheat. 66; *Scoille v. Canfield*, 14 Johns. 348; 7 Am. Dec. 467. They do not operate extraterritorially, and a sentence of attainder of one state will not operate as a disability to sue in another: *Folliot v. Ogden*, 1 H. Black. 135; *Wolff v. Oxholm*, 6 Maule & S. 99. One sovereignty has no jurisdiction over and will not undertake to punish crimes committed in another, nor carry into effect a judgment on a criminal prosecution from another state, where the offense was committed: *Commonwealth v. Green*, 17 Mass. 515; *Western T. Co. v. Kildershouse*, 87 N. Y. 430. Certain well-settled exceptions exist to this rule, however. Where a criminal act, perpetrated in one state or foreign sovereignty, by continuity of operation takes effect in another, the courts of the latter have jurisdiction to punish the crime as if all the *res gestæ* had taken place within its territory: *Commonwealth v. Macloon*, 101 Mass. 1; *Tyler v. People*, 8 Mich. 320; 1 Bishop's Crim. Law, secs. 114 et seq. A man need not be actually

present in a country or state, to render himself amenable to its laws. If crime is the immediate result of his act, he may be made to answer for it in the courts of the place where it is consummated, though he is not actually present in such place at the time. In contemplation of law he is present. Thus if a man stand in one state, and by firing a gun kill a man in another, he would be answerable to the laws of the latter if ever he should come within their jurisdiction: *People v. Adams*, 3 Denio, 207; 45 Am. Dec. 468; *People v. Rathbun*, 21 Wend. 509; *State v. Chapin*, 17 Ark. 561; 65 Am. Dec. 452; *Adams v. People*, 1 N. Y. 173; *United States v. Davis*, 2 Sum. 482. So if a man who resides in one country should by means of an innocent agent commit a crime in another, he is liable to punishment under the laws of the latter when found within the jurisdiction of such laws: *Jones v. State*, 19 Ind. 421. So if a person residing in one country should send poison by means of a letter to another residing in a different country, for the purpose of poisoning such other, and should succeed, he would be liable to punishment under the laws of the latter country: *People v. Rathbun*, 21 Wend. 509; *Regina v. Garrett*, 22 Eng. L. & Eq. 607.

## CHAPTER IV.

## OF THE VENUE OF CRIMINAL ACTIONS.

- § 1192. All criminal actions commenced in county where crime committed, except, etc.
- § 1193. Venue is in either one of two or more counties.
- § 1194. Venue is in either county, where offense is committed near boundary line.
- § 1195. Venue is in either county, when property stolen, etc., is taken from one county to another.
- § 1196. Jurisdiction in case of homicide is in either county when.
- § 1197. Venue of action against accessory after the fact.
- § 1198. Affidavit and other evidence to obtain change of venue.
- § 1199. Change of venue may be granted in court's discretion — Duty of clerk.
- § 1200. Venue may be changed by court upon written consent of both parties, etc.
- § 1201. If change of venue is ordered, defendant and witnesses are to be recognized.

*All criminal actions commenced in county where crime committed, except, etc.*

§ 1192. Except as otherwise specially provided by statute, all criminal actions shall be commenced and tried in the county where the offense was committed. [February 24, 1891, § 4.]

See § 1316.

*Venue in either one of two or more counties.*

§ 1193. [959.] When a public offense has been committed partly in one county and partly in another, or the act or effects constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county.

**Offense committed partly in one county and partly in another.** — A person who receives property in one county, and takes it into another, and there embezzles it, cannot be tried under this section in the former county, unless when he received the property there he had the intent to fraudulently convert it to his own use: *People v. Murphy*, 51 Cal. 376.

the facts, so as to bring the case within the statute: *People v. Ah Oon*, 39 Cal. 604. Indictment for arson, which charges that the defendant, at a time named, was in the county where the indictment was found, and then and there feloniously burned a building, sufficiently shows that the offense was committed within the jurisdiction of court: *People v. Wooley*, 44 Cal. 494.

**Indictment.** — The indictment should state

*Venue is in either county, where offense is committed near boundary line.*

§ 1194. Offenses committed on the boundary line of two counties, or within one hundred rods of the dividing line between them, may be alleged in the indictment or information to have been committed in either of them, and may be prosecuted and punished in either county. [February 24, 1891, § 5.]

**Boundary line, or "within one hundred rods," etc.** — Jurisdiction of offense committed on boundary line of two counties, or within one hundred rods of the dividing line between them, is in either county: *People v. Davis*, 36 N. Y. 77; *People v. Salorse*, 62

Cal. 139, 143. Where the line is somewhat indefinite, hearsay evidence is admissible for the purpose of establishing it, as the question is one of common interest: *People v. Velarde*, 59 Cal. 457.

*Venue is in either county, when property stolen, etc., is taken from one county to another.*

§ 1195. [961.] When property taken in one county by burglary,



robbery, larceny, or embezzlement has been brought into another county, the jurisdiction is in either county.

**“Jurisdiction is in either county.”**— In cases of larceny, where property has been stolen in one county and taken into another, it is proper to charge the thief with having committed the offense in the latter county; and evidence showing the property to have been taken from the other county may be admitted without any averment of facts showing the property to have been so taken: *People v. Mellon*, 40 Cal. 648; *People v. Murphy*, 51 Cal. 376; *State v. Brown*, 8 Nev. 212. But in cases

of burglary, the indictment or information must charge the facts as they existed, viz., that the burglary was committed in one county, and that the property taken was carried into another: *Haskins v. People*, 16 N. Y. 344; *People v. Scott*, 74 Cal. 94. When so pleaded, evidence is admissible when defendant is being tried in one county as to the offense committed by him in the other county: *People v. Scott*, 74 Cal. 94.

*Jurisdiction in cases of homicide is in either country when.*

§ 1196. [962.] If any mortal wound is given or poison administered in one county, and death, by means thereof, ensue in another, the jurisdiction is in either.

**Venue in assault to murder is where the act is committed:** *People v. Lock Wing*, 61 Cal. 380.

*Venue of action against accessory after the fact.*

§ 1197. An accessory after the fact to a felony may be tried either in the county in which he shall have become an accessory, or in the county in which the felony shall have been committed. [February 24, 1891, § 6.]

This section is section 958 of the code of 1881, so far as that section relates to venue.

*Affidavit and other evidence to obtain change of venue.*

§ 1198. The defendant may show to the court, by affidavit, that he believes he cannot receive a fair trial in the county where the action is pending, owing to the prejudice of the judge, or to excitement or prejudice against the defendant in the county, or some part thereof, and may thereupon demand to be tried in another county. The application shall not be granted on the ground of excitement or prejudice other than prejudice of the judge, unless the affidavit of the defendant be supported by other evidence; nor in any case unless the judge is satisfied the ground upon which the application is made does exist. [February 24, 1891, § 7.]

**Venue, change of.**— The allowance or refusal of a motion to change the venue in a criminal case is largely discretionary in the trial court: *McAllister v. Territory*, 1 Wash. 360; *People v. Fisher*, 6 Cal. 154; *People v. Mahoney*, 18 Cal. 180; *People v. Congleton*, 44 Cal. 92; *People v. Perdue*, 49 Cal. 425; *People v. Yoakum*, 53 Cal. 566. Such motion is addressed to a sound judicial discretion, to be disposed of in furtherance of substantial justice, and an order refus-

ing a change will not be reviewed on appeal, except in cases of gross abuse of discretion: *McAllister v. Territory*, 1 Wash. 360; *People v. Fisher*, 6 Cal. 154; *People v. Congleton*, 44 Cal. 92. The decision of the trial court denying a change of venue must be warranted by the facts disclosed by the record; if not, it will be reversed: *People v. Yoakum*, 53 Cal. 566. A motion for a change of venue after the jury has been impaneled comes too late: *People v. Cotta*, 49 Cal. 166.

*Change of venue may be granted in court's discretion — Duty of clerk.*

§ 1199. When the affidavit is founded on prejudice of the judge, the court may, in its discretion, grant a change of venue to some other county, or may continue the cause until such time as it can be

tried by another judge in the same county; if the affidavit is founded upon excitement or prejudice in the county against the defendant, the court may, in its discretion, grant a change of venue to the most convenient county. The clerk must, upon the granting of a change of the place of trial, make a transcript of the proceedings and order of court, and, having sealed up the same with the original papers, deliver them to the sheriff, who must without delay, deposit them in the clerk's office of the proper county, and make his return accordingly. [February 24, 1891, § 8.]

**Affidavits upon motion to change, sufficiency of.** — Affidavits upon a motion for a change of venue must state facts and circumstances from which the court may deduce the conclusion that a fair and impartial trial cannot be had. Such conclusion is to be drawn by the court, and not by the defendant and his witnesses, and the court must be satisfied, from the facts and circumstances positively sworn to in the affidavits, and not from the general conclusion to which the defendant may swear, or which his witnesses may depose they verily believe to be true: *People v. Fisher*, 6 Cal. 154; *People v. Yoakum*, 53 Cal. 566. An affidavit that a jury cannot be selected from a certain portion of the county is insufficient: *People v. Baker*, 1 Cal. 403. Nor is the affidavit of defendant alone sufficient: *People v. Mahoney*, 18 Cal. 180; *People v. Graham*, 21 Cal. 261. A statement generally that the people of the

county are prejudiced against the defendant will not be sufficient: *People v. Shuler*, 28 Cal. 490. Nor is it sufficient that thirty or forty persons contributed to pay counsel to assist the district attorney, to show such general prejudice as to require a change of venue: *People v. Graham*, 21 Cal. 261; *People v. Lee*, 5 Cal. 353. Mere belief or opinion of the persons who make the affidavits in support of such a motion that the defendant cannot have a fair trial owing to the popular prejudice against him is not sufficient: *People v. Congleton*, 44 Cal. 95; see *People v. Perdue*, 49 Cal. 425. The consideration of such a motion may be postponed until an attempt has been made to impanel a jury: *People v. Plummer*, 9 Cal. 298. The legislature may consent to a change of venue on behalf of the state, when applied for by the defendant: *People ex rel. Smith v. Twelfth District Judge*, 17 Cal. 547.

*Venue may be changed by court upon written consent of parties, etc.*

§ 1200. [1075.] The court may, at its discretion, at any time, order a change of venue or place of trial to any county in the state, upon the written consent or agreement of the prosecuting attorney and the defendant.

*If change of venue is ordered, defendant and witnesses are to be recognized.*

§ 1201. When a change of venue is ordered, if the offense be bailable, the court shall recognize the defendant, and in all cases the witnesses, to appear at the court to which the change of venue was granted. [February 24, 1891, § 9.]

**Second arraignment, when venue is changed.** — Where a defendant has been once arraigned, and subsequently the place of trial is changed, it is unnecessary to repeat the arraignment: *Davis v. State*, 39 Md. 384.

## CHAPTER V.

## OF THE FORMS OF CRIMINAL ACTIONS.

§ 1202. Pleadings — Forms abolished — Sufficiency of, how determined.

§ 1203. Criminal actions must be by information or indictment.

§ 1204. Cases in which prosecution may be upon information.

*Pleadings — Forms abolished — Sufficiency of, how determined.*

§ 1202. [1002.] All the forms of pleading in criminal actions heretofore existing are abolished; and hereafter, the forms of pleading, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed herein.

**Pleadings, criminal.** — The test of sufficiency of pleadings is found in the code itself: *People v. Murphy*, 39 Cal. 52; *People v. Dick*, 37 Cal. 277; *People v. Ah Woo*, 28 Cal. 205. See also *People v. Cronin*, 34 Cal. 191; *People v. Sandford*, 43 Cal. 29. But in construing indictments, forms of expression are not to be utterly disregarded, and things are not to be understood as intended to be expressed, for which there appears no adequate or sensible form of expression: Per Greene, C. J., in *Leonard v. Territory*, 2 Wash. 381, 393.

*Criminal action must be by information or indictment.*

§ 1203. No person shall be held to answer in any court for an alleged crime or offense, unless upon an information filed by the prosecuting attorney, or upon an indictment by a grand jury, except in cases of misdemeanor before a justice of the peace, or before a court-martial. [*February 24, 1891, § 10.*]

*Cases in which prosecution may be upon information.*

§ 1204. All public offenses may be prosecuted in the superior courts by information in the following cases: 1. Whenever any person is in custody or on bail on charge of felony or misdemeanor, and the court is in session, and the grand jury is not in session, or has been discharged; 2. Whenever an indictment presented by a grand jury has been quashed, and the grand jury returning the same is not in session, or has been discharged; 3. When a cause has been appealed to the supreme court, and reversed on account of any defect in the indictment; 4. Whenever a public offense has been committed, and the party charged with the offense is not already under indictment therefor, and the court is in session, and the grand jury is not in session, or has been discharged; 5. Whenever the court is in session, or not in session, and any person has been committed by any committing magistrate for any felony or misdemeanor not within



the exclusive jurisdiction of a justice's peace court. [March 7, 1891, § 1.]

**Offenses, how prosecuted.** — "Offenses indictment, as shall be prescribed by law": heretofore required to be prosecuted by indictment may be prosecuted by information or by See Const., sec. 25, art. 1.

## CHAPTER VI.

### OF THE GRAND JURY.

- § 1205. Challenge to panel of grand jurors.
- § 1206. Individual juror may be challenged when.
- § 1207. Panel to be discharged, if challenge to it is allowed.
- § 1208. Juror to be discharged and panel filled, if challenge is allowed.
- § 1209. Oath of grand jury.
- § 1210. Foreman of grand jury, and his powers — Clerk.
- § 1211. Grand jury shall be charged by court, and may ask its advice.
- § 1212. Prosecuting attorney may examine witnesses and advise grand jury.
- § 1213. Duties of grand juror.
- § 1214. Juror must disclose his personal knowledge of public offense to be acted upon by his fellow-jurors.
- § 1215. Complainant shall not be present at or vote for finding of indictment.
- § 1216. Grand jury to find whether prosecution was malicious — Costs.
- § 1217. Special duty of grand jury.
- § 1218. Duty of grand jury as to hearing evidence — Not bound to hear defendant.
- § 1219. Grand jury shall not disclose fact of indictment found until arrest.
- § 1220. Grand jury must not disclose votes given or opinions expressed.
- § 1221. Grand jury may be resummoned after dismissal.

#### *Challenge to panel of grand jurors.*

§ 1205. Challenges to the panel of grand jurors shall be allowed to any person in custody or held to answer for an offense, when the clerk has not drawn from the jury-box the requisite number of ballots to constitute a grand jury, or when the drawing was not done in the presence of the proper officers; and such challenges shall be in writing and verified by affidavit, and proved to the satisfaction of the court. [February 24, 1891, § 11.]

See §§ 51-66.

**Challenge to panel.** — See note to *Commonwealth v. Green*, 12 Am. St. Rep. 905. A challenge to the panel must be interposed before the grand jury is made up and sworn, provided the defendant has, prior to that time, been held to answer: *Blanton v. State*, 24 Pac. Rep. 439 (Wash.); *People v. Freeland*, 6 Cal. 96; *People v. Roberts*, 6 Cal. 214; *People v. Beatty*, 14 Cal. 566; *People v. Moice*, 15 Cal. 329; *People v. Arnold*, 15 Cal. 476; *People v. Colmere*, 23 Cal. 631; *People v. Henderson*, 28 Cal. 465. So a person who is under arrest at the time the grand jury is impaneled, although he may not have been held to answer, must, if an opportunity is given to him, exercise his right of challenge at that time or he will be precluded from so doing after he is indicted: *People v. Geiger*, 49 Cal. 643; and see *Blanton*

*v. State*, 24 Pac. Rep. 439 (Wash.). An indictment found against a person who is refused the privilege of challenging the grand jury is invalid and worthless; but to have this effect, the prisoner must have applied for leave or requested permission to appear and challenge the jury: *People v. Romero*, 18 Cal. 89, 94. A defendant who has not been held to answer before the grand jury is made up and sworn may challenge the panel on his arraignment: *People v. Beatty*, 14 Cal. 566. It is no objection to the panel of the grand jury that it was summoned by special order of the court: *People v. Quintano*, 15 Cal. 327. Unless the contrary appear, it will be presumed that certain persons who had been drawn as grand jurors and excused by the court were legally excused: *People v. Millsaps*, 35 Cal. 47.

*Individual juror may be challenged when.*

§ 1206. [978.] Challenges to individual grand jurors may be made by such person for reason of want of qualification to sit as such juror, and when, in the opinion of the court, a state of mind exists in the juror, such as would render him unable to act impartially and without prejudice.

**Challenge to individual grand juror.** — Objections to juror where an opportunity to challenge is given are waived unless made at the time the grand jury is impaneled; *Clarke v. Territory*, 1 Wash. 68; *Blinton v. State*, 24 Pac. Rep. 439 (Wash.). After waiving his right to object to the jury, the defendant has no right to raise the objection by motion to quash the indictment, if he is substantially in the position of one contemplated by § 1209, *post*: See case last cited. The law as to challenges for cause generally is stated in the note to *Commonwealth v. Green*, 12 Am. St. Rep. 906-919.

*Panel to be discharged, if challenge to it is allowed — Venire.*

§ 1207. If a challenge to the panel be allowed, the panel shall be discharged, and the court may order the sheriff to summon from the by-standers and the body of the county a sufficient number of persons to act as grand jurors. [February 24, 1891, § 12.]

**Court should terminate proceedings at any stage of the case when it is discovered that the impaneling of the grand jurors was null and void:** *Yelm Jim v. Territory*, 1 Wash. 63; *Clarke v. Territory*, 1 Wash. 68. Temporary absence from the state does not disqualify one from acting as a juror: *Clarke v. Territory*, 1 Wash. 68.

**Order of court to summon from by-standers to fill the panel is good, if the**

*Juror to be discharged and panel filled, if challenge is allowed.*

§ 1208. [980.] If a challenge to an individual juror be allowed, he shall be discharged, and the panel filled.

*Oath of grand jury.*

§ 1209. The following oath shall be administered to the grand jury: "You, as grand jurors for the body of the county of —, do solemnly swear (or affirm) that you will diligently inquire into and true presentment make of all such matters and things as shall come to your knowledge, according to your charge; the counsel of the state, your own counsel, and that of your fellows, you shall keep secret; you shall present no person through envy, hatred, or malice; neither will you leave any person unpresented through fear, favor, affection, or reward, or the hope thereof; but that you will present things truly as they come to your knowledge, according to the best of your understanding, and according to the laws of this state. So help you God." [February 24, 1891, § 13.]

*Foreman of grand jury, and his powers — Clerk.*

§ 1210. [982.] A foreman of the grand jury shall be appointed by the court, who may remove him and appoint another at any time, and such foreman shall have power to administer all oaths and affirmations to witnesses who shall appear before such grand jury, and the jury may appoint one of their number as clerk to keep a minute of their proceedings.

**Order appointing foreman.** — Order appointing need not be entered in the minutes, if the indictment is indorsed by the foreman, and returned to the court: *People v. Roberts*, 6 Cal. 214.

*Grand jury shall be charged by court, and may ask its advice.*

§ 1211. [983.] The grand jury shall be charged by the court as to the nature of their duties, and may at any reasonable time ask the advice of the court as to any legal questions upon which they may desire information.

*Prosecuting attorney may examine witnesses and advise grand jury.*

§ 1212. The prosecuting attorney shall attend on the grand jury for the purpose of examining witnesses and giving them such advice as they may ask. [February 24, 1891, § 14.]

*Duties of grand jury.*

§ 1213. The grand jury shall inquire into the cases of parties in custody or under bail, charged with commission of offenses against the laws of this state, and duly returned by a committing magistrate, or upon a complaint sworn to before an officer authorized to administer oaths and presented by the prosecuting attorney, or under the instructions of the court. [February 24, 1891, § 15.]

**Grand jury, powers of.** — The grand jury should inquire into all offenses committed within the county not barred by the statute of limitations: *People v. Beatty*, 14 Cal. 566. If a witness swears falsely before them, they may, of their own motion and knowledge, indict him for the perjury: *State v. Terry*, 30 Mo. 368. A grand jury constitutes a part of the court by which it is convened, and is under its control: *State v. Cowan*, 1 Head, 280. It cannot dissolve itself: *Clem v. State*, 33 Ind. 418-424. An indictment may be legally found without the accused being present or notice being given to him: *State v. Wolcott*, 21 Conn. 272.

*Grand juror must disclose his personal knowledge of public offense to be acted upon by his fellow-jurors.*

§ 1214. [986.] If a member of a grand jury knows, or has reason to believe, that a public offense, triable within the county, has been committed, he must declare the same to his fellow-jurors, who may thereupon investigate the same, if a majority so order.

**Personal knowledge.** — Grand jurors may act on their personal knowledge, to find an indictment without further testimony: 1 Bishop's Criminal Procedure, sec. 864; *Regina v. Russell*, Car. & M. 247; Proffatt on Jury Trials, sec. 51.

*Complainant shall not be present at or vote for finding of indictment.*

§ 1215. [987.] No complainant who may institute a prosecution shall be competent to be present at the deliberations of a grand jury, or vote for the finding of an indictment.

*Grand jury to find whether prosecution was malicious — Costs.*

§ 1216. [988.] Where a grand jury ignore a bill of indictment, they shall also find whether the prosecution is malicious and frivolous, and find whether the complainant or county shall pay the costs, which shall be returned with their proceedings into open court.



*Special duty of grand jury.*

§ 1217. [989.] The grand jury shall especially inquire as to the offense of any person confined in prison on a criminal charge; into the condition and mismanagement of the public prisons in the county; into the willful misconduct in office of public officers; and shall in their discretion examine the public records of the county.

**Grand jury must inquire into cases of all persons under arrest.** — It is the duty of the grand jury to inquire into cases of persons under arrest: *People v. Geiger*, 49 Cal. 651.

*Duty of grand jury as to hearing evidence—Not bound to hear defendant.*

§ 1218. [990.] The grand jury are not bound to hear evidence for the defendant; but it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they should order such evidence to be produced, and for that purpose may cause process to issue for the witnesses.

**Defendant** may voluntarily testify before a grand jury: *People v. King*, 28 Cal. 266.

**What evidence grand jury should receive.** — The rule of the present day as to what evidence should be received by a grand jury in its deliberations is thus stated by Field, J.: "You will receive all the evidence presented which may throw light upon the matter under consideration, whether it tend to establish the innocence or the guilt of the accused; and more, if in the course of your inquiries you have reason to believe that there is other evidence, not presented to you, within your reach, which would qualify or explain away the charge under investigation, it would be your duty to order such evidence to be produced. Formerly,

it was held that an indictment might be found if evidence were produced sufficient to render the truth of the charge probable. But a different and a more just and merciful rule now prevails. To justify the finding of an indictment, you must be convinced, so far as the evidence before you goes, that the accused is guilty; in other words, you ought not to find an indictment unless, in your judgment, the evidence before you, unexplained and uncontradicted, would warrant a conviction by a petit jury": Charge to the Grand Jury, 2 Saw. 667, 670; *People v. Tinder*, 19 Cal. 543. In finding an indictment, it is not the duty of the grand jury to determine the degree of the crime: *People v. King*, 27 Cal. 507; *People v. Nichol*, 34 Cal. 211.

*Grand jury shall not disclose fact of indictment found until arrest.*

§ 1219. [991.] No grand jury shall disclose the fact that an indictment for a felony has been found against any person not in custody or under recognizance until such person has been arrested.

*Grand juror must not disclose votes given or opinions expressed.*

§ 1220. [992.] No grand juror shall be allowed to state or to testify in any court in what manner he or any member of the jury voted on any question before them, or what opinion was expressed by any juror in relation to such question, or what question was before them; and in charging the grand jury the court shall remind them of the provisions of this and the preceding sections.

*Grand jury may be resummoned after dismissal.*

§ 1221. [993.] Whenever the grand jury shall have been dismissed at any term of the court for which they shall have been impaneled, before the final adjournment, they may be summoned to attend again at the same term, if necessary; and if a full jury do not attend, the number may be completed from the by-standers.

An act reported by the commissioner conforming this section to the present organization of the courts failed to pass.

## CHAPTER VII.

### OF THE FINDING AND PRESENTATION OF THE INDICTMENT.

- § 1222. Twelve jurors must concur to find an indictment — Indorsement.
- § 1223. Indictment must contain names of witnesses — Defendant is entitled to copy of.
- § 1224. Indorsement where indictment is found at instance of private prosecutor — Award of costs.
- § 1225. Custody and inspection of indictment.
- § 1226. Secrecy as to indictment.
- § 1227. Indictment found “not a true bill,” when to be filed and when destroyed.
- § 1228. Effect of finding “not a true bill.”
- § 1229. Presentment, how made — Not to be preserved.
- § 1230. Filing, etc., of informations.
- § 1231. Verification, etc., of informations.
- § 1232. Duty of prosecuting attorney.

#### *Twelve jurors must concur to find an indictment — Indorsement.*

§ 1222. [994.] An indictment cannot be found without the concurrence of at least twelve grand jurors, and when so found, it must be indorsed “a true bill,” and such indorsement signed by the foreman of the jury.

**Grand jurors — Number present to find indictment.** — Although it is absolutely necessary, in order to put a defendant on trial, that an indictment should be concurred in by at least twelve grand jurors, it is equally as well settled in this state that the whole number required by law to form a grand jury need not be present at the finding of an indictment. It is sufficient if twelve concur in the finding, although less than the statutory number composing the grand jury were present at the time: *People v. Roberts*, 6 Cal. 214; *People v. Butler*, 8 Cal. 435; *People v. Gatewood*, 20 Cal. 147; *People v. Hunter*, 54 Cal. 65. Where the grand jury come into open court and present a bill duly indorsed and signed by their foreman, it is evidence of the most satisfactory kind that twelve of their number concurred in finding the bill: *Watts v. Territory*, 1 Wash. 409.

**“A true bill.”** — Every indictment should be certified to be a true bill by an indorsement thereon in those words, signed by the foreman. An indictment not so indorsed is invalid, and will be set aside on motion: See § 1208, *post*: *People v. Lawrence*, 21 Cal. 368; *People v. Johnston*, 48 Cal. 549. Objection to juror is waived unless it is made at the time the jury is

impaneled: *Clarke v. Territory*, 1 Wash. 68; *Blanton v. State*, 24 Pac. Rep. 439 (Wash.). Where the indorsement was “true bill,” instead of “a true bill,” it was held sufficient: *State v. Elkins*, Meigs, 109; *State v. Davidson*, 12 Vt. 300. So where there was no indorsement on the indictment, but those words were written on a paper in which the indictment was folded, it was held sufficient: *Burgess v. Commonwealth*, 2 Va. Cas. 483.

**Foreman must sign.** — In many of the states an indictment, to be valid, must be signed by the foreman of the grand jury: *Commonwealth v. Sargent*, Thach. C. C. 116; *State v. Davidson*, 12 Vt. 300; *State v. Squire*, 10 N. H. 558; *Gardiner v. People*, 3 Scam. 83. It is a sufficient signing if the foreman, in affixing his signature, makes use of only the initials of his christian name: *State v. Taggart*, 38 Me. 298. So where an indictment was signed “A B,” the foreman, and the letters “F. G. J.” were added, they were held sufficient to indicate that he acted as foreman, it appearing from the record that A B was in fact foreman of the grand jury when the bill was found: *State v. Chandler*, 2 Hawks, 439.

#### *Indictment must contain names of witnesses — Defendant is entitled to copy of.*

§ 1223. [995.] When an indictment is found, the names of the witnesses examined before the grand jury must be inserted at the foot of the indictment, or indorsed thereon, before it is presented to the court, and the clerk of the court must, within one day after demand made, furnish the defendant, or his counsel, a copy thereof without charge, or permit the defendant’s counsel, or the clerk of such counsel, to take a copy.

**Indorsement of names of witnesses on indictment.** — Unless the names of the witnesses examined before the grand jury are indorsed on or inserted at the foot of the indictment, it will be set aside on motion: § 1208, *post*; *People v. Freeland*, 6 Cal. 96; *People v. Symonds*, 22 Cal. 348; *People v. Lopez*, 26 Cal. 112; *People v. King*, 28 Cal. 266; *People v. Stacy*, 34 Cal. 307. A person may be sworn and examined as a witness on the trial, although his name is not indorsed on the indictment, and

although he may have been a witness before the grand jury: *People v. Freeland*, 6 Cal. 96; *People v. Lopez*, 26 Cal. 112; *People v. Symonds*, 22 Cal. 348. So a person who was not examined before the grand jury, and whose name is not indorsed on the indictment, may be a witness for the prosecution on the trial: *People v. Jocelyn*, 29 Cal. 562. The name indorsed was F. Diefenbach, while the witness was G. Diefenbach. *Held*, that the court did not err in refusing to set aside the indictment: *People v. Crowley*, 56 Cal. 36.

*Indorsement where indictment is found at instance of private prosecutor — Award of costs.*

§ 1224. [996.] When an indictment is found at the instance of a private prosecutor, the following must be added to the indorsement required by the preceding section: "Found at the instance of" (here state the name of the person); and in such case, if the prosecution fails, the court trying the cause may award costs against the private prosecutor, if satisfied, from all circumstances, that the prosecution was malicious or without probable cause.

*Custody and inspection of indictment.*

§ 1225. [997.] An indictment, when found by the grand jury, must be presented by their foreman, in their presence, to the court and filed by the clerk, and remain in his office as a public record; but if the defendant has not been held to answer the charge, neither the indictment, nor any order or process in relation thereto, must be inspected by any person other than the judge of the court, or an officer thereof in the discharge of a duty concerning the same, until after the arrest of the defendant.

**Presented to court.** — It will be presumed that an indictment was presented to the court by the foreman of the grand jury, and in their presence, although that fact is not indorsed upon it, unless the contrary appear from the record of the court: *People v. Blackwell*, 27 Cal. 65. The conclusion of the grand jury is evidenced by the presentation to the court of an indictment, or by a return of the papers from the committing magistrate, if any have been delivered to them, with an indorsement that the charge is dismissed: *People v. Lawrence*, 21 Cal. 373. If no papers from the committing magistrate have been in their hands, their judgment upon the complaint is indicated by the fact that no indictment is returned: *People v. Lawrence*, 21 Cal. 373. If an indictment is

not presented in the manner prescribed in this code, it may be set aside on motion: § 1208, *post*; *People v. Southwell*, 46 Cal. 148. The manner of presenting an indictment to the court is prescribed by this section: *People v. Colby*, 54 Cal. 38.

**Defendant not in custody.** — Courts have no jurisdiction over persons charged with crime, unless in custody, actual or constructive. It would be a farce to proceed in a criminal cause unless the court had control over the person charged, so that its judgment might be made effective. An indictment may, however, be found against one not in custody, but unless an arrest is effective, the cause can proceed no further: *People v. Redinger*, 55 Cal. 298.

*Secrecy as to indictment.*

§ 1226. [998.] No grand juror or officer of the court must disclose any fact concerning such indictment while it is not subject to public inspection; and a violation of this section or the foregoing section is punishable as a contempt.

*Indictment found "not a true bill," when to be filed and when destroyed.*

§ 1227. [999.] When a person has been held to answer a criminal



charge, and the indictment in relation thereto is not found "a true bill," it must be indorsed "not a true bill," which indorsement must be signed by the foreman, and presented to the court and filed with the clerk, and remain a public record; but in the case of an indictment not found "a true bill," against a person not so held, the same, together with the minutes of the evidence in relation thereto, must be destroyed by the grand jury.

*Effect of finding "not a true bill."*

§ 1228. When an indictment indorsed "not a true bill" has been presented in court and filed, the effect thereof is to dismiss the charge; and the same cannot be again submitted to or inquired of by the grand jury, or made the cause of an information, unless the court so order. [February 24, 1891, § 16.]

**Resubmission of charge.** — A defendant who has been held to answer upon a criminal charge, and who is not indicted by the next grand jury after his commitment, is entitled to be discharged, unless good cause be shown for his further detention. A mere recommendation by the grand jury that his case be submitted to the next is not sufficient cause for his detention: *Ex parte Bull*, 42 Cal. 196; *Ex parte Clarke*, 54 Cal. 412. His discharge by the court, however, does not prevent him from being again arrested and examined for the same offense: *Ex parte Cahill*, 52 Cal. 463. Such dismissal is in the nature of a judgment of nonsuit, and as the defendant in such case has never been put in jeopardy, within the meaning of the constitution, he may be again prosecuted for the same offense: *Ex parte Clarke*, 54 Cal. 412.

*Presentment, how made — Not to be preserved.*

§ 1229. A presentment is an informal statement of facts, for the purpose of obtaining the advice of the court as to the law thereon. It is made by the foreman, in the presence of the grand jury, and with the concurrence of twelve of their number. A presentment is not to be filed in court, or preserved beyond the sitting of the grand jury. [February 24, 1891, § 17.]

*Filing, etc., of informations.*

§ 1230. All informations shall be filed in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant; he shall subscribe his name thereto, and indorse thereon the names of the witnesses known to him at the time of filing the same, and at such time before the trial of any case as the court may, by rule or otherwise, prescribe he shall indorse thereon the names of such other witnesses as shall then be known to him; and said court shall possess and may exercise the same powers and jurisdiction to hear, try, and determine all such prosecutions upon information, to issue writs and process, and do all other acts therein, as it possesses and may exercise in cases of like prosecutions upon indictments. [January 29, 1890, § 2. In effect immediately.]

*Verification, etc., of informations.*

§ 1231. All informations shall be verified by the oath of the prosecuting attorney, complainant, or some other person. [February 24, 1891, § 18.]

This section is identical with the first provision in section 3 of the act of January 29, 1890. The remaining provisions of that section are embodied in the sections relating to the respective subjects in the code of 1881, as modified and arranged in this code.

*Duty of prosecuting attorney.*

§ 1232. It shall be the duty of the prosecuting attorney of the proper county to inquire into and make full examination of all the facts and circumstances connected with any case of preliminary examination, as provided by law, touching the commission of any offense, wherein the offender shall be committed to jail, or become recognized or held to bail; and if the prosecuting attorney shall determine, in any such case, that an information ought not to be filed, he shall make, subscribe, and file with the clerk of the court a statement in writing containing his reasons, in fact and in law, for not filing an information in such case, and that such statement shall be filed at and during the session of court at which the offender shall be held for his appearance; *provided*, that in such case, such court may examine such statement, together with the evidence filed in the case, and if, upon such examination, the court shall not be satisfied with such statement, the prosecuting attorney shall be directed by the court to file the proper information, and bring the case to trial. [*January 29, 1890, § 6. In effect immediately.*]

## CHAPTER VIII.

### OF THE REQUISITES OF INDICTMENTS AND INFORMATIONS.

- § 1233. First pleading on part of state.
- § 1234. Contents of indictment or information.
- § 1235. Form of indictment.
- § 1236. Indictment or information must be direct and certain.
- § 1237. True name of defendant may be inserted when.
- § 1238. But one crime to be charged, and in one form only — Exception.
- § 1239. Precise time of commission of offense need not be stated.
- § 1240. Erroneous allegation as to person is immaterial when.
- § 1241. Animal may be described by common name of its class.
- § 1242. Words and phrases in indictment, etc., how construed.
- § 1243. Language of statute need not be strictly followed in charging offense.
- § 1244. Indictment, etc., is sufficient when — Requisites of.
- § 1245. Indictment, etc., not to be affected by certain defects.
- § 1246. Presumptions and matters of judicial notice need not be pleaded.
- § 1247. Judgment, how pleaded.
- § 1248. Private statute, how pleaded.
- § 1249. Charge of libel, when sufficient.
- § 1250. Misdescription of destroyed instrument alleged to have been forged is immaterial when.
- § 1251. Indictment, etc., for perjury, sufficiency of.
- § 1252. One defendant may be convicted or acquitted upon an indictment, etc., against several.
- § 1253. Stolen money, bank notes, etc., need not be specifically described.
- § 1254. Indictment, etc., charging exhibition of lewd or obscene literature is sufficient when.
- § 1255. Ownership of property, how stated — No variance unless defendant is owner.

*First pleading on part of state.*

§ 1233. The first pleading on the part of the state is the indictment or information. [*February 24, 1891, § 19.*]

**Information.** — “Offenses heretofore required to be prosecuted by indictment may be prosecuted by information or by indictment, as shall be prescribed by law”: See Const., sec. 25, art. 1. And this provision is not in conflict with section 1, article 14, of the constitution of the United States: *Kulloch v. Superior Court*, 56 Cal. 229. After the accused has

been examined before a committing magistrate, and held to answer, it is optional with the district attorney to prosecute either by indictment or information: *People v. Carlton*, 57 Cal. 559. The name of the district attorney may be subscribed by his deputy: *People v. Darr*, 61 Cal. 554.

*Contents of indictment or information.*

§ 1234. The indictment or information must contain,—1. The title of the action, specifying the name of the court to which the indictment or information is presented, and the names of the parties; 2. A statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended. [*February 24, 1891, § 20.*]

**Name of parties.** — Omitting the name of the county in the title is a technical defect not affecting the substantial rights of the defendant: *People v. Biggins*, 3 West Coast Rep. 678. If defendant be not indicted by his true name, he must declare his true name when arraigned, and if he do not, he may properly be proceeded against by the name in the indictment: § 1272, *post*. The addition “Jr.” is no part of a name proper; and when it does not appear that there were two persons of the name, or that the party was misled, its insertion in a criminal complaint is immaterial: *City and County of San Francisco v. Randall*, 54 Cal. 408. Where the indictment was against James B. Boggs, and the verdict pronounced “the defendant J. M. Boggs” guilty, *held*, that the error in the initial of the middle name of defendant in the verdict was immaterial: *People v. Boggs*, 20 Cal. 432.

The mere omission of the initial of the middle name of the defendant is immaterial, it not in any way prejudicing him: *People v. Ferris*, 56 Cal. 442, citing *People v. Boggs*, 20 Cal. 432, and *People v. Lockwood*, 6 Cal. 205.

**Venue, statement of.** — The indictment must allege that the offense was committed within the county in which it is found: *People v. O’Neil*, 48 Cal. 257. The venue of a crime is sufficiently stated as being in King County, by charging the same as having been committed in the city of Seattle; the court will take judicial notice that that city is in that county: *Schilling v. Territory*, 2 Wash. 283. Where the offense consists of a transaction occurring partly in one county and partly in another, the indictment should show that fact: *People v. Ah Oon*, 39 Cal. 604. See notes to §§ 1193, 1195, *ante*. In an indictment for larceny, the venue may be laid in any county into which the stolen property may be conveyed: See notes to §§ 1193, 1195, *ante*; *People v. Mellon*, 40 Cal. 648; *People v. Garcia*, 25 Cal. 531; *People v. Robles*, 29 Cal. 421. Where the offense charged was committed on a vessel on the inland waters of this state, the indictment should set forth all the facts to show

that the court has jurisdiction: *People v. Dougherty*, 7 Cal. 395. Where it is charged that the offense was committed within a certain city and county which are within the jurisdiction of the court, the venue is sufficiently stated: *People v. Lafuente*, 6 Cal. 202; see *People v. Robinson*, 17 Cal. 363. The prosecution must prove the venue as laid in the indictment: *People v. Roach*, 48 Cal. 382. Although no witness testifies in so many words to the venue of a crime, yet if the whole testimony, taken together, leaves no room for reasonable doubt on that point, the venue is sufficiently proved: *People v. Manning*, 48 Cal. 335; see also *People v. Williams*, 18 Cal. 187; *People v. Hodges*, 27 Cal. 340; *People v. Valenzuela*, 6 Pac. C. L. J. 561. See *People v. Lock Wing*, 61 Cal. 380, for evidence sufficient to support the venue.

**Statement of acts constituting the offense.** — The substantial facts necessary to constitute the offense must be stated with such reasonable certainty as to enable a person of ordinary understanding to know what was intended, and to enable the court to pronounce judgment; but the facts need not be stated with the particularity required at common law: *People v. Dolan*, 9 Cal. 516; *People v. Ah Woo*, 28 Cal. 205; *People v. Rodriguez*, 10 Cal. 50. The indictment is sufficient if it charges the offense in the language of the statute: *Schilling v. Territory*, 2 Wash. 283; *Watts v. Territory*, 1 Wash. 409; and in following the language of the statute, the omission of the word “feloniously” in charging a homicide is not error: See case last cited. See also § 1243, *post*, note. If the indictment is certain as to the person and offense charged, and states all the acts necessary to constitute a complete offense, it contains all that is required: *People v. Murphy*, 39 Cal. 52; § 1236, *post*. If in the charging part of the indictment language capable of two interpretations is used, only one of which imports that defendant is guilty, the indictment will be held insufficient: *People v. Williams*, 35 Cal. 671. The indictment need not state in terms that the offense charged is



a felony or misdemeanor: *People v. War*, 20 Cal. 117. If the facts constituting the offense are sufficiently stated, it is immaterial whether the legal appellation or any appellation of the offense is stated: *People v. Phipps*, 39 Cal. 326. It is not absolutely essential that the term "feloniously" be used: *Watts v. Territory*, 1 Wash. 409; *People v. Olivera*, 7 Cal. 403; *People v. Parsons*, 6 Cal. 487. It is held that a bare negative qualification need not be averred in an indictment, but must be relied on as a matter of defense at the trial: *People v. Nugent*, 4 Cal. 341; *People v. Vanard*, 6 Cal. 562; *People v. English*, 30 Cal. 214. If the statute, in defining an offense, enumerates a series of acts, all of which, when taken together, constitute the offense, all such acts may be charged in a single count: *People v. Frank*, 28 Cal. 507; *People v. Murphy*, 39 Cal. 52.

### *Form of indictment.*

§ 1235. The indictment may be substantially in the following form:—

The State of Washington,	}	Superior Court of the State of Washington,
v.		for the county of —.
A—— B——.		

A B is accused by the grand jury of the —, by this indictment, of the crime of (here insert the name of the crime, if it have one, such as treason, murder, arson, manslaughter, or the like; or if it be a crime having no general name, such as libel, assault and battery, and the like, insert a brief description of it as given by law), committed as follows:—

The said A B, on the — day of —, 18—, in the county of —, aforesaid (here set forth the act charged as a crime).

Dated at —, in the county aforesaid, the — day of —, A. D. 18—.

(Signed)

C D, Prosecuting Attorney.

(Indorsed) A true bill.

(Signed)

E F, Foreman of the Grand Jury.

[February 24, 1891, § 21.]

**Caption omitting county:** See note to next preceding section.

**Conclusion sufficient:** See *People v. Biggins*, 3 West Coast Rep. 678, where the objection that the information stated the deceased to have died *contra formam*, etc., and

not that the acts of the defendant were contrary, etc., was held hypercritical.

**Form of indictment suitable for use by grand juries and prosecuting attorneys:** *Leonard v. Territory*, 2 Wash. 381, 400; approved in *Timmerman v. Territory*, 3 Wash. 445, 451.

### *Indictment or information must be direct and certain.*

§ 1236. The indictment or information must be direct and certain, as it regards:—

1. The party charged;

2. The crime charged; and

3. The particular circumstances of the crime charged, when they are necessary to constitute a complete crime. [Feb. 24, 1891, § 22.]

**Indictment, when sufficient:** See § 1244, note. If the indictment be direct and certain as to the party charged, the offense charged, and states the particular circumstances which

constitute the offense in ordinary and concise language, and in such a way that a person of ordinary understanding can know what was intended, it is sufficient: *People v. Saviers*, 14 Cal. 29. If the indictment does not state the particular circumstances, when they are necessary to constitute a complete offense, the defendant may demur on that ground; but if he

fails to demur, a motion in arrest of judgment will be denied: *People v. Swenson*, 49 Cal. 388. But see *People v. Martin*, 52 Cal. 201. Where the offense charged admits of degrees, the indictment should charge the offense generally, and leave the degree to be determined by the verdict: *People v. Jefferson*, 52 Cal. 452.

**Names of parties:** See note to § 1234, *ante*.

*True name of defendant may be inserted when.*

§ 1237. When a defendant is designated in the indictment or information by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered, it may be inserted in the subsequent proceedings, referring to the fact of his being indicted or informed against by the name mentioned in the indictment or information. [*February 24, 1891, § 23.*]

**Indictment by wrong name.** — In *People v. Kelly*, 6 Cal. 210, it was urged in argument that the above section was in violation of the constitution; that in ordering the true name to be inserted upon the minutes the court altered the indictment in a material part, so that it was no longer an indictment found and presented by a grand jury. The court, however,

held the section to be constitutional, the particular name by which defendant is designated being immaterial. See also *People v. Jim Ti*, 32 Cal. 60; *People v. Ah Kim*, 34 Cal. 189; note to § 1234, *ante*.

*Inserting true name*, illustration of this practice: *People v. Le Roy*, 3 West Coast Rep. 785.

*But one crime to be charged, and in one form only — Exception.*

§ 1238. The indictment or information must charge but one crime, and in one form only, except that where the crime may be committed by use of different means, the indictment or information may allege the means in the alternative. [*February 24, 1891, § 24.*]

**Indictments charging more than one offense:** See note to *Ben v. State*, 58 Am. Dec. 238-240. An indictment which charges the defendant with the murder of three persons charges three offenses: *People v. Alibez*, 49 Cal. 452. Where an indictment charged an officer of a corporation with concurring in the making of a statement of its condition which was false, and also with concurring in the publication of such false statement, a demurrer that the indictment charged more than one offense was sustained: *People v. Cooper*, 53 Cal. 647. So, also, an indictment which charges burglary mixed with larceny was held to charge two offenses: *People v. Garnett*, 29 Cal. 622. And where it is charged that one person stole the goods, and another feloniously received them, knowing them to be stolen, two offenses are charged, and against different persons: *People v. Hawkins*, 34 Cal. 181. An indictment which charged both burglary and house-breaking was held to charge two offenses: *People v. Taggart*, 43 Cal. 81.

**Indictments charging one offense only.** — Indictment charging the defendant with stealing one horse, the property of "Mary," and at the same time and place another horse the property of —, charges but one offense; but if it were bad for duplicity, objection on this ground, if not made until after verdict, comes too late: *Territory v.*

*Heywood*, 2 Wash. 180. The name given in the indictment to the offense charged is not of itself a charge of the offense, and a mistake in regard to it is not fatal. Where the indictment recited that defendant was accused therein of the crime of "assault with intent to commit murder," and then proceeded to state facts which showed that defendant had administered poison with intent to kill, it was held that the indictment did not charge two offenses: *People v. Cuddihi*, 54 Cal. 53. Nor does an indictment which charges defendant with having feloniously assaulted B, and with having murdered B: *People v. Weaver*, 47 Cal. 106. Nor does an indictment which charges the same person with the crime of rape, and also of an assault with intent to commit rape: *People v. Tyler*, 35 Cal. 553. Where the indictment charged defendant with having forged an indorsement on a draft, and also with having uttered the draft, knowing the indorsement to be forged, it was held to charge but one offense: *People v. Frank*, 28 Cal. 507. An indictment which charges a tax-collector with having in his possession, with intent to circulate, and with actually putting in circulation, licenses other than those authorized by law, does not charge two offenses: *People v. De la Guerra*, 31 Cal. 459; see also *People v. Valencia*, 43 Cal. 552; *People v. Ah Own*, 39 Cal. 604; *People v. Montejo*, 18 Cal. 38.

*Precise time of commission of offense need not be stated.*

§ 1239. The precise time at which the crime was committed need not be stated in the indictment or information; but it may be alleged



to have been committed at any time before the finding of the indictment or the filing of the information, and within the time in which an action may be commenced therefor, except where the time is a material ingredient in the crime. [February 24, 1891, § 25.]

**Averment of time.** — The time of the commission of the offense is sufficiently certain if it is stated to be prior to the finding of the indictment: *People v. Littlefield*, 5 Cal. 355; *People v. Kelly*, 6 Cal. 210. Evidence showing the crime of receiving stolen goods to have been committed three months before the time stated in the information is not a material variance under this section: *People v. Rice*, 14 Pac. Rep. 851 (Cal.). And when it is charged that the offense was committed on a particular day, which was prior to the finding of the indictment,

there is no need of an averment that it was prior to such time: *People v. Lafuente*, 6 Cal. 202. An indictment for murder used as a substitute for an indictment for manslaughter must show that the prosecution of the latter offense is not barred by lapse of time. *Prima facie*, lapse of time is a good defense; if there is any matter which exempts the case from the general rule, it should be stated in the indictment: *People v. Miller*, 12 Cal. 291; *People v. Montejo*, 18 Cal. 38; see also *People v. Burgess*, 35 Cal. 115; *People v. Beatty*, 14 Cal. 566.

*Erroneous allegation as to person is immaterial when.*

§ 1240. [1010.] When the crime involves the commission of or an attempt to commit a private injury, and is described with sufficient certainty in other respects to indentify the act, an erroneous allegation as to the person injured or intended to be injured is not material.

**Name of person injured.** — At common law, a substantial variance between the name of the party injured, as laid in the indictment, and as given in evidence, was fatal; but this rule is modified by the above section: *People v. Potter*, 35 Cal. 110; see also *People v. Dick*, 37 Cal. 277. When, on the trial for assault with intent to inflict great bodily injury, the proof shows a misnomer of the person injured, such variance will be held material, unless there be other circumstances sufficient to identify the offense: *People v. McNealy*, 17 Cal. 332. Describing the party injured by several *aliases*, of which one is her true name, is sufficient: *People v. De Cleer*, 60 Cal. 382. So giving the name by which the party injured is commonly known, although he may have another name, is sufficient: *People v. Leong Quong*, 60 Cal. 107. So charging that the property was stolen from "the store of one S. Loupe," when the store was known as "Loupe's store," and belonged to three persons of the name of Loupe, the variance is immaterial: *People v. Edwards*, 59 Cal. 359. An indictment for robbery, which fails to state that the property taken was the property of some person other than the defend-

ant, is fatally defective: *People v. Vice*, 21 Cal. 344. If stolen property belonged to a partnership, the indictment should state the individual names of the partners; if it belonged to a corporation, the indictment should state the corporate name: *People v. Boyart*, 36 Cal. 245. An indictment for forgery need not necessarily charge that the banking-house whose bills were forged was in fact an incorporated company: *People v. Ah Sam*, 41 Cal. 645. So in an indictment for arson committed with intent to defraud an insurance company, a variance between the name of the company as charged in the indictment and as proved on the trial is no ground for the arrest of the judgment: *People v. Hughes*, 29 Cal. 257; but such indictment should aver that the company is a corporation, if such be the fact, or that it is a partnership composed of certain individuals, naming them, if such be the fact. Mere averment of a company named in such an indictment amounts, in a legal sense, to an entire absence of any averment as to the party intended to be injured, and not to an "erroneous allegation" as to such party: *People v. Schwartz*, 32 Cal. 160.

*Animal may be described by common name of its class.*

§ 1241. When the crime involves the taking of or injury to an animal, the indictment or information is sufficiently certain in that respect if it describes the animal by the common name of its class. [February 24, 1891, § 26.]

*Words and phrases in indictment, etc., how construed.*

§ 1242. The words used in an indictment or information must be construed in their usual acceptation, in common language, except words and phrases defined by law, which are to be construed according to their legal meaning. [February 24, 1891, § 27.]



**Rule of construction:** See *People v. Littlefield*, 5 Cal. 355; *People v. Thompson*, 4 Cal. 238; *People v. Saviers*, 14 Cal. 29; *People v. Cronin*, 34 Cal. 191; *People v. Murphy*, 39 Cal. 52; *People v. Phipps*, 39 Cal. 326.

*Language of statute need not be strictly followed in charging offense.*

§ 1243. Words used in a statute to define a crime need not be strictly pursued in the indictment or information, but other words, conveying the same meaning, may be used. [*February 24, 1891, § 28.*]

**Manner of charging the offense.** — Where the acts constituting the offense are sufficiently stated to give explicit information of the offense charged, the indictment, though it may be liable to criticism as to form, will nevertheless be held sufficient, even if the language of the statute be not strictly followed: *People v. Potter*, 35 Cal. 110; *People v. Phipps*, 39 Cal. 326. As, however, a long line of decisions has established that if the offense be charged in the language of the statute it is sufficient, that would appear to be the better and safer practice, unless the circumstances of a particular case furnish a reason for doing otherwise: See *People v. Thompson*, 4 Cal. 238; *People v. Parsons*, 6 Cal. 487; *People v. Dolan*, 9 Cal. 576; *People v. Murray*, 10 Cal. 309; *People v. McGuire*, 26 Cal. 635; *People v. White*, 34 Cal. 183; *People v. Cronin*, 34 Cal. 191; *People v. Martin*, 32 Cal. 91; *People v. Burke*, 34 Cal. 661; *People v. Lewis*, 61 Cal. 366; *People v. De la Cour Soto*, 63 Cal. 165; see also note to § 1234, *supra*.

*Indictment, etc., is sufficient when — Requisites of.*

§ 1244. The indictment or information is sufficient if it can be understood therefrom, —

1. That it is entitled in a court having authority to receive;
2. That it was found by a grand jury of the county in which the court was held;
3. That the defendant is named, or if his name cannot be discovered, that he is described by a fictitious name, with the statement that his real name is to the jury unknown;
4. That the crime was committed within the jurisdiction of the court, except where, as provided by law, the act, though done without the county in which the court is held, is triable therein;
5. That the crime was committed at some time previous to the finding of the indictment, or filing of the information, and within the time limited by law for the commencement of an action therefor;
6. That the act or omission charged as the crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended;
7. [That] the act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case. [*Feb. 24, 1891, § 29.*]

**Sufficiency of indictment or information.** — It is a general rule that an information or indictment is sufficient if it describes the offense in the words of the statute: *People v. Roger*, 81 Cal. 209; *People v. Russell*, 81 Cal. 616; *People v. Savercool*, 81 Cal. 650; *People v. Mahlman*, 82 Cal. 585; as the rules with relation to the framing of indictments and informations are in this state purely matters of statutory control, and their sufficiency is to be tested by the terms of the statutes pertaining thereto: See § 1234, *ante*; *People v. Mahlman*,

82 Cal. 585. But the above rule is subject to the qualification that the accused must be apprised with reasonable certainty of the nature of the accusation, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense: *People v. McKenna*, 81 Cal. 158.

**Accessory.** — An indictment against one as accessory must contain, in addition to other matters, all the averments necessary in an indictment against the principal: *People v. Thrall*, 50 Cal. 415.

**Arson.** — An indictment charging that defendant did, etc., "burn, and cause to be burned," a certain dwelling-house is good, where the statute enumerates the two acts disjunctively: *People v. Myers*, 20 Cal. 76; see also *People v. Tomlinson*, 35 Cal. 503, 508. The indictment may charge the ownership of the burned property to be in a tenant: *People v. Wooley*, 44 Cal. 494. Or it may describe it as the property of the owner, though it is occupied by a tenant: *People v. Fisher*, 51 Cal. 319; 1 Wharton's *Precedents of Indictments*, 361; see also *People v. Schwartz*, 32 Cal. 160. It is sufficient that the information charge the offense in the language of the statute defining the offense: *People v. Russell*, 81 Cal. 616.

**Assault with deadly weapon.** — The indictment should charge that the weapon used was deadly, or state such facts as necessarily show that it was deadly: *People v. Jacobs*, 29 Cal. 579; *People v. Congleton*, 44 Cal. 92. An information charging the ultimate facts constituting the offense as defined by statute is sufficient: *People v. Savercool*, 81 Cal. 650. An averment that defendant was armed with a deadly weapon, and made an assault, will not support a judgment for a felonious assault: *People v. Vierra*, 52 Cal. 451.

A demurrer was improperly sustained to an information charging defendant with having committed the crime of "an assault by means likely to produce great bodily injury, to wit, with a brickbat weighing about five pounds": *People v. Fahey*, 64 Cal. 342. So a demurrer was improperly sustained to an indictment for throwing a Chinaman out of a third-story window: *People v. Emmons*, 61 Cal. 487.

**Burglary.** — The indictment or information should charge burglary generally: *People v. Jefferson*, 52 Cal. 452; *People v. Barnhart*, 59 Cal. 381. Charging the offense in the language of the statute is sufficient: *People v. Lewis*, 61 Cal. 366, 367; *People v. Rogers*, 81 Cal. 209. It need not state the value of the property which defendant intended to steal: *People v. Ah Ye*, 31 Cal. 451. Nor is it necessary to charge whose goods defendant intended to steal, or that there were any goods in the house which he could steal: *People v. Shaber*, 32 Cal. 36. The ownership of the burglarized room may be charged to be in one who lodges therein: *People v. St. Clair*, 38 Cal. 136. The indictment should not charge burglary mixed with larceny. The larceny, if it has been committed, should be made the foundation of a separate indictment: *People v. Garnett*, 29 Cal. 622; see also *People v. Long*, 43 Cal. 444. A charge that defendant burglariously entered a store, "occupied by Jones and Harding, with intent to commit larceny," etc., is sufficient without alleging that the persons named were partners, or that they were the owners of the building or of its contents. And the omission of the word "feloniously," in the information, is not a ground of demurrer: *People v. Rogers*, 81 Cal. 209. The nature of the "misdemeanor or felony" should be stated in the indictment or information: *People v. Nelson*, 58 Cal. 104.

**Embezzlement.** — The information or indictment should state the description of the property embezzled with the same particularity as is required in an indictment for larceny: *People v. Cox*, 40 Cal. 275; see also *People v.*

*Bailey*, 23 Cal. 577; *People v. Garcia*, 25 Cal. 531; *Ex parte Hedley*, 31 Cal. 108; *People v. De la Guerra*, 31 Cal. 416; *People v. Hust*, 49 Cal. 653; *People v. Flores*, 64 Cal. 426.

**Forgery.** — To constitute forgery, the forged instrument must be one which, if genuine, may injure another; and the indictment should show that such is its legal character, either from its description of the instrument itself, or by averment of matter *aliunde* which will show it to be of that character: *People v. Tomlinson*, 35 Cal. 503; see also *People v. Frank*, 28 Cal. 507; *People v. Ah Woo*, 28 Cal. 205; *People v. Ah Sam*, 41 Cal. 645; 1 Wharton's *Precedents of Indictments*, 266.

An indictment for forgery need not set out the figures cut in the draft alleged to be forged, and the allegation that defendant uttered and published as true a certain false and forged writing, etc., is sufficient to cover the case of a draft raised in amount: *White v. Territory*, 24 Pac. Rep. 447 (Wash.).

In the indictment a word in the original was copied as "shipped," but in the original offered in evidence the word was spelled "shiped"; *held*, an immaterial variance: *People v. Cummings*, 57 Cal. 88.

**Gaming.** — A "banking game" is a game conducted by one or more persons where there is a fund against which everybody has a right to bet, the owner of the bank being responsible for the payment of all the funds, taking all that is won, and paying out all that is lost; and under the section named the information must charge that the game was not only "conducted," etc., but that it was "played," for money: *People v. Carroll*, 80 Cal. 153. Under the section named an information for carrying on and conducting a game of "tan" need not allege that the defendant did so as an owner or employee, nor is evidence to that effect necessary to sustain a conviction of the offense: *People v. Sam Lung*, 70 Cal. 515. An indictment under said section charging defendant with "unlawfully and feloniously carrying on a swindling game called twenty-one or top-and-bottom dice," without other or further description, is too indefinite and insufficient: *Harkind v. Territory*, 3 Wash. 131.

**Larceny.** — An indictment for larceny which charges the stealing of several articles of property, and states the value of all in the aggregate, but does not give the value of each article by itself, contains a sufficient averment of the value of the stolen property: *People v. Robles*, 34 Cal. 591; *People v. Green*, 15 Cal. 512. The indictment should state the ownership of the stolen property: *People v. Hughes*, 41 Cal. 234; *People v. Bogart*, 36 Cal. 245; and to be in some other person than the one charged with stealing it; as an omission of such averment is fatally defective: *People v. Hanselman*, 76 Cal. 460; and allege the ownership as of the day when the offense was committed: *People v. Lewis*, 64 Cal. 404. Where the larceny charged is of that class of property the stealing of which is grand larceny, without regard to its value, no averment of the value is necessary: *People v. Townsley*, 39 Cal. 405. Under an indictment for robbery, the jury may find the defendant guilty of the crime of larceny: *People v. Jones*, 53 Cal. 58; see also *People v. Jim Ti*, 32 Cal. 60; *People v. Smith*, 15 Cal.



408; *People v. Jersey*, 18 Cal. 337; *People v. Broen*, 27 Cal. 500; *People v. Linn*, 23 Cal. 150; *People v. Strong*, 46 Cal. 302; 1 Wharton's *Precedents of Indictments*, 381-399. An indictment for larceny which is capable, in the charging part, of two interpretations without doing violence to its terms is bad: *People v. Williams*, 35 Cal. 671.

**Misconduct in office.** — An indictment against officers who constitute a "board" is defective if it does not charge that the act complained of was done by defendants as a "board"; and if it does not give the name of the party with whom the improper contract was made: *People v. Kalloch*, 60 Cal. 113.

**Murder, indictment for.** — Any indictment charging murder as at common law is sufficient to sustain a verdict of murder in the first degree under our statutes. The peculiar circumstances distinguishing murder in the first degree need not be set out; and the jury are to determine, from the evidence, the degree of the murder: *Leschi v. Territory*, 1 Wash. 13. To sustain a sentence of murder in the first degree, it is not sufficient that an indictment charges the assault and shooting to have been done purposely and of deliberate and premeditated malice; it should aver that the killing was done purposely, etc., otherwise it only charges manslaughter. Nor does the conclusion, "And so the jurors do say the said A. L. . . . feloniously and of deliberate malice did kill and murder," etc., supply this essential averment: *Leonard v. Territory*, 2 Wash. 381; *Blanton v. State*, 24 Pac. Rep. 439 (Wash.); *State v. So Ho Ge*, 24 Pac. Rep. 442; *State v. So Ho Me*, 24 Pac. Rep. 443. The indictment or information need not aver the means by which the homicide was committed, or the nature and extent of the wound, or the part of the body upon which it was inflicted. Nor should the degree of the murder be stated; but if it is stated, the indictment is not for that reason vitiated. The statement of the degree may be treated as surplusage: *People v. King*, 27 Cal. 507; *People v. Nichol*, 34 Cal. 211; *People v. Dolan*, 9 Cal. 576; *People v. Vance*, 21 Cal. 400. An indictment charging that defendant, on the day named, "did feloniously and unlawfully, and of their malice aforethought, kill and murder one" J. R., contrary, etc., is good: *People v. Alviso*, 55 Cal. 230. So is one charging the offense in the language of the statute: *Leschi v. Territory*, 1 Wash. 13; *People v. De la Cour Soto*, 64 Cal. 165. The indictment is sufficient if a person of ordinary

intelligence can understand from it that under such circumstances as showed a felonious intent a mortal wound was inflicted by the defendant upon the deceased, of which wound deceased died within a year and a day from its infliction: *People v. Dolan*, 9 Cal. 576; *People v. Cronin*, 34 Cal. 191; *People v. Martin*, 47 Cal. 101. That it is not necessary to set forth and describe the weapons used, or the wound inflicted, see *People v. Hong Ah Duck*, 61 Cal. 387; *People v. King*, 27 Cal. 511; *People v. Cronin*, 34 Cal. 191; *People v. Martin*, 47 Cal. 101. Malice aforethought is a necessary ingredient in the crime of murder, and should therefore be alleged in the indictment: *People v. Urias*, 12 Cal. 325; *People v. Bonilla*, 38 Cal. 699. But this term may be omitted, provided terms are employed which in their import are equivalent: *Leschi v. Territory*, 1 Wash. 13, and next preceding section; *People v. Vance*, 21 Cal. 400. See *People v. Schmidt*, 63 Cal. 28, where words of equivalent import were not used. If the indictment is certain as to the person and offense charged, and states all the acts necessary to constitute a complete offense, it is sufficient; See § 1244, *ante*; *People v. Murphy*, 39 Cal. 52.

**Perjury.** — An indictment for perjury, charging that the accused in a certain proceeding, describing it, "did willfully, corruptly, and falsely swear," etc., but not alleging that the perjury was committed "feloniously," is nevertheless sufficient: *People v. Parsons*, 6 Cal. 487. See also *People v. Perazzo*, 64 Cal. 106; *People v. Kelly*, 59 Cal. 372; *People v. Barry*, 63 Cal. 62.

**Rape.** — If the indictment or information follows the statute it is sufficient: *People v. Burke*, 34 Cal. 661.

**Robbery.** — If the indictment fails to allege that the property taken was the property of some person other than defendant, it is fatally defective: *People v. Vice*, 21 Cal. 344. The indictment is not bad because it charges that the property was forcibly and violently taken from one person and against his will, and that another person was the owner of it, though it does not allege that it was taken against the will of the owner: *People v. Shuler*, 28 Cal. 490. The indictment should state that the property was taken from the person or immediate presence of another. To allege that it was taken from "another person" is not sufficient: *People v. Beck*, 21 Cal. 385. See also *People v. Jones*, 53 Cal. 58; *People v. Nelson*, 56 Cal. 77; *People v. Boyle*, 64 Cal. 153.

*Indictment, etc., not to be affected by certain defects.*

§ 1245. No indictment or information is insufficient, nor can the trial, judgment, or other proceedings thereon be affected, by reason of any of the following matters, which were formerly deemed defects or imperfections: —

1. For want of an allegation of the time or place of any material fact, when the time and place have been once stated;

2. For the omission of any of the following allegations, namely: "With force and arms," "contrary to the form of the statute or the statutes," or "against the peace and dignity of the state";



3. For the omission to allege that the grand jury was impaneled, sworn, or charged;

4. For any surplusage or repugnant allegation, or for any repetition, when there is sufficient matter alleged to indicate clearly the offense and the person charged; nor

5. For any other matter which was formerly deemed a defect or imperfection, but which does not tend to the prejudice of the substantial rights of the defendant upon the merits. [*Feb. 24, 1891, § 30.*]

**Formal defect insufficient.** — Where the district attorney signed the indictment officially, but did not specify the county of which he was district attorney, the defect was held immaterial: *People v. Ashnauer*, 47 Cal. 98; see also *People v. Dick*, 37 Cal. 277; *People v. Clarke*, 7 Pac. C. L. J. 177; *People v. Dalton*, 58 Cal. 226. The omission in an indictment of the initial letter of the defendant's middle name cannot prejudice: *People v. Ferris*, 56 Cal. 442. A section of law substantially simi-

lar to the above was cited in *People v. Hong Ah Duck*, 61 Cal. 387, to support the ruling that in an information for murder, the weapons used need not be set forth, nor the wound described. So, also, in overruling an objection to an indictment for grand larceny, in which the concluding words of the statutory form had been misplaced: *People v. O'Brien*, 64 Cal. 53. Surplusage in information, not affecting defendant's right, does not affect the pleading: *People v. Flores*, 64 Cal. 426.

*Presumptions and matters of judicial notice need not be pleaded.*

§ 1246. Neither presumptions of law nor matters of which judicial notice is taken need be stated in an indictment or information. [*February 24, 1891, § 31.*]

*Judgment, how pleaded.*

§ 1247. In pleading a judgment or other determination of or proceeding before a court or officer of special jurisdiction, it is not necessary to state in the indictment or information the facts conferring jurisdiction; but the judgment, determination, or proceeding may be stated to have been duly given or made. The facts conferring jurisdiction, however, must be established on the trial. [*Feb. 24, '91, § 32.*]

*Private statute, how pleaded.*

§ 1248. In pleading a private statute, or right derived therefrom, it is sufficient to refer, in the indictment or information, to the statute by its title and the day of its passage, and the court must thereupon take judicial notice thereof. [*February 24, 1891, § 33.*]

*Charge of libel, when sufficient*

§ 1249. An indictment or information for libel need not set forth any extrinsic facts, for the purpose of showing the application to the party libeled, of the defamatory matter on which the indictment or information is founded; but it is sufficient to state generally that the same was published concerning him; and the fact that it was so published must be established on the trial. [*February 24, 1891, § 34.*]

*Misdescription of destroyed instrument alleged to have been forged is immaterial when.*

§ 1250. When an instrument which is the subject of an indictment

or information for forgery has been destroyed or withheld by the act or procurement of the defendant, and the fact of the destruction or withholding is alleged in the indictment or information, and established on the trial, the misdescription of the instrument is immaterial [February 24, 1891, § 35.]

*Indictment, etc., for perjury, sufficiency of.*

§ 1251. In an indictment or information for perjury, or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the crime was committed, and in what court or before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment or information need not set forth the pleadings, record or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed. [February 24, 1891, § 36.]

**Indictment or information for perjury:** See notes to § 1244, *ante*. As to correct form of information, and references to various statutes bearing upon the subject, see *People v. Kelly*, 59 Cal. 372.

*One defendant may be convicted or acquitted upon an indictment, etc., against several.*

§ 1252. Upon an indictment or information against several defendants, any one or more may be convicted or acquitted. [February 24, 1891, § 37.]

*Stolen money, bank notes, etc., need not be specifically described.*

§ 1253. In an indictment or information for larceny or embezzlement of money, bank notes, certificates of stock, or valuable securities, or for a conspiracy to cheat or defraud a person of any such property, it is sufficient to allege the larceny or embezzlement, or the conspiracy to cheat and defraud, to be of money, bank notes, certificates of stock, or valuable securities, without specifying the coin, number, denomination, or kind thereof. [February 24, 1891, § 38.]

**Sufficient information.** — The above section clearly dispenses with strict proof of the character of the money stolen: *People v. Nelson*, 56 Cal. 77, 81; but the omission to state any description or character whatever of the stolen money would be a fatal objection at any stage of the case: *People v. Cox*, 40 Cal. 275.

*Indictment, etc., charging exhibition of lewd or obscene literature is sufficient when.*

§ 1254. An indictment or information for exhibiting, publishing, passing, selling, or offering to sell, or having in possession with such intent, any lewd or obscene book, pamphlet, picture, print, card, paper, or writing, need not set forth any portion of the language used or figures shown upon such book, pamphlet, picture, print, card, paper, or writing, but it is sufficient to state generally the fact of the lewdness or obscenity thereof. [February 24, 1891, § 39.]

*Ownership of property, how stated — No variance unless defendant is owner.*

§ 1255. In prosecutions under the provisions of the Penal Code, sections fifty-two, sixty and ninety one, where the owner of the property is unknown, such property shall, for the purpose of this code, be deemed and held to be owned by the state of Washington; and in all cases where the indictment or information alleges the state to be the owner of such property, and the proof on the trial discloses the name of the actual owner, it shall not be deemed a variance, or failure of proof, unless the defendant is the actual owner. [Feb. 24, 1891, § 40.]

## CHAPTER IX.

### OF PROCEEDINGS BEFORE THE ARRAIGNMENT OF THE DEFENDANT.

§ 1256. Warrant of arrest to issue when.

§ 1257. Amount of bail to be indorsed on warrant.

§ 1258. Service of criminal process.

§ 1259. Officer to show warrant in making arrest when.

§ 1260. Force may be used to effect arrest when.

§ 1261. Person making arrest may pursue and retake escaped prisoner and command assistance.

§ 1262. Recognizances may be taken in open court.

§ 1263. Certain officers may take recognizances, examine bail, etc.

§ 1264. Recognizance taken by peace-officer to be certified, recover, and filed. — Effect of.

§ 1265. Defendant may deposit money instead of giving bail.

§ 1266. Forfeiture of bail.

§ 1267. Rights of defendant indicted, etc., for capital crime.

§ 1268. Person charged with felony is entitled to copy of indictment, etc., without fee.

*Warrant of arrest to issue when.*

§ 1256. When an indictment is found or an information filed, the court may direct the clerk to issue a warrant for the arrest of the defendant, returnable forthwith; if no order is made, the clerk must issue a warrant within ten days after the indictment is returned into court or the information filed. [February 24, 1891, § 41.]

*Amount of bail to be indorsed on warrant.*

§ 1257. The court must, at the time of directing the clerk to issue the warrant, fix the amount in which persons charged by indictment are to be held to bail, and the clerk must indorse the amount on the warrant. If no order fixing the amount of bail has been made, the sheriff may present the warrant to the judge of the court, and such judge must thereon indorse the amount of bail to be required; or if there is no such judge in the county, the clerk may fix the amount of bail. [February 24, 1891, § 42.]

*Service of criminal process.*

§ 1258. [1027.] All criminal process issuing out of the superior



court shall be directed to the sheriff of the county in which it is to be served, and be by him executed according to law. When there is no sheriff of a county, or he is disqualified from any cause from discharging any particular duty, it shall be lawful for the officer or person commanding or desiring the discharge of that duty to appoint some suitable person, a citizen of the county, to execute the same; *provided*, that final process shall in no case be executed by any other person than the legally authorized officer, or in case he is disqualified, some suitable person appointed by the court, or judge thereof, out of which the process issues, who shall make such appointment in writing, and before such appointment shall take effect, the person so appointed shall give surety to the party interested for the faithful performance of his duties, which bonds of suretyship shall be in writing and approved by the court or judge making the appointment, and be placed on file with the papers in the case.

*Officer to show warrant in making arrest when.*

§ 1259. The officer making an arrest must inform the defendant that he acts under authority of a warrant, and must also show the warrant if required. [February 24, 1891, § 43.]

*Force may be used to effect arrest when.*

§ 1260. [1031.] If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest.

*Person making arrest may pursue and retake escaped prisoner and command assistance.*

§ 1261. [1032.] If a person arrested escape or be rescued, the person from whose custody he made his escape or was rescued may immediately pursue and retake him at any time and within any place in the state. To retake the person escaping or rescued, the person pursuing has the same power to command assistance as given in cases of arrest.

**Arrest.** — As to help which may be required by by-standers, and as to killing to prevent escape or when resistance is offered, see note to *Hawkins v. Commonwealth*, 61 Am. Dec. 151-164.

*Recognizances may be taken in open court.*

§ 1262. [1033.] Recognizances in criminal proceedings may be taken in open court, and entered on the order-book.

*Certain officers may take recognizances, examine bail, etc.*

§ 1263. [1034.] Any officer authorized to execute a warrant in a criminal action may take the recognizance, and justify and approve the bail; he may administer an oath, and examine the bail as to its sufficiency.

**Bail bond may be received and approved at chambers:** *Ainsworth v. Territory*, 3 Wash. 270.

*Recognizance taken by peace-officer to be certified, recorded, and filed — Effect of.*

§ 1264. [1035.] Every recognizance taken by any peace-officer must be certified by him forthwith to the clerk of the court to which the defendant is recognized. The clerk must thereupon record the recognizance in the order-book, and from the time of filing it has the same effect as if taken in open court.

*Defendant may deposit money instead of giving bail.*

§ 1265. [1036.] The defendant may, in the place of giving bail, deposit with the clerk of the court to which he is held to answer the sum of money mentioned in the order; and upon delivering to the sheriff the certificate of deposit, he must be discharged from custody.

*Bail to be forfeited if defendant fail to appear without sufficient excuse.*

§ 1266. [1037.] If, without sufficient excuse, the defendant neglect to appear for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, according to the condition of his recognizance, the court must direct the default to be entered upon its minutes, and the recognizance of bail, or money deposited as bail, as the case may be, is thereupon forfeited.

**Action on forfeited bail bond** may be brought in the name either of the people or of the county: *People v. De Pelanconi*, 63 Cal. 409; *People v. Penniman*, 37 Cal. 271; *Mendocino Co. v. Lamar*, 30 Cal. 628; *San Francisco v. Randall*, 54 Cal. 408. And the district attorney is authorized to bring the action: See § 1360, *post*.

*Rights of defendant indicted, etc., for capital crime.*

§ 1267. As soon as may be after the finding of an indictment or the filing of an information for a capital crime, the party charged shall be served with a copy thereof by the sheriff or his deputy, at least twenty-four hours before trial, and shall, on demand upon the clerk by himself or counsel, have a list of the petit jurors returned delivered to him at least twenty-four hours before trial, and shall also have process to summon such witnesses as are necessary to his defense, at the expense of the county. [February 24, 1891, § 44.]

**Accused is entitled to compulsory process** for witnesses in his own behalf, without advancing money or fees therefor: See Const., sec. 22, art. 1.

*Person charged with felony is entitled to copy of indictment, etc., without fee.*

§ 1268. Every person indicted or informed against for an offense for which he may be imprisoned in the penitentiary, if he be under recognizance or in custody to answer for such offense, he or his attorney shall be furnished with a copy of the indictment or information, and of all indorsements thereof, without paying any fees therefor. [February 24, 1891, § 45.]

**Rights of accused.** — The party charged is entitled to a copy of the indictment or information against him, without paying any fees therefor: See Const., art. 1, secs. 22, 25.

## CHAPTER X.

### OF THE ARRAIGNMENT OF THE DEFENDANT, AND PROCEEDINGS THEREON.

- § 1269. Arraignment of defendant.
- § 1270. Defendant may appear by counsel when.
- § 1271. Defendant's right to have counsel.
- § 1272. If defendant does not declare his true name, he may be proceeded against by name stated in indictment.
- § 1273. Entry of defendant's true name, and reference to name by which he is indicted.
- § 1274. Motion to set aside indictment, etc. — Defendant's pleadings after arraignment.
- § 1275. Grounds of motion to set aside indictment.
- § 1276. Grounds of motion to set aside information.
- § 1277. Defendant must demur or plead, if his motion to set aside indictment, etc., is denied.
- § 1278. If case be resubmitted, defendant may be required to answer new indictment, etc.
- § 1279. Order to set aside indictment, etc., is no bar to future prosecution.
- § 1280. Grounds upon which defendant may demur.
- § 1281. Judgment upon demurrer is final when — Defendant to be discharged.
- § 1282. Effect of defendant's failure to plead after demurrer overruled.
- § 1283. The three pleas to indictment or information stated.
- § 1284. Form in which pleas may be entered on record.
- § 1285. Plea of guilty must be put in by defendant himself in open court.
- § 1286. Plea of guilty may be withdrawn and other pleas substituted.
- § 1287. Plea of not guilty, effect of.
- § 1288. Conviction or acquittal is bar to another prosecution when.
- § 1289. Judgment for defendant on demurrer is no bar to another prosecution — Exception.
- § 1290. Plea of not guilty must be entered by court, if defendant fails or refuses to answer.
- § 1291. Upon plea of guilty to charge of murder, jury must be impaneled — In other cases the court may hear case.
- § 1292. Misdemeanor may be compromised when.
- § 1293. Compromise of criminal action by order in minutes.
- § 1294. Offenses not to be compromised, etc., except as provided by statute.

#### *Arraignment of defendant.*

§ 1269. When the indictment or information has been filed the defendant, if he has been arrested, or as soon thereafter as he may be, shall be arraigned thereon before the court. [*February 24, 1891, § 46.*]

#### *Defendant may appear by counsel when.*

§ 1270. If the indictment or information be for a misdemeanor punishable by fine only, the defendant may appear upon arraignment by counsel. [*February 24, 1891, § 47.*]

**Personal attendance:** See *People v. Budd*, 57 Cal. 349, as to when condition of undertaking is broken, and § 1305, *post*, note.

#### *Defendant's right to have counsel.*

§ 1271. [1063.] If the defendant appear without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and he shall be asked if he desire the aid of counsel, and if it appear that he is unable to employ counsel, by reason of poverty, counsel shall be assigned to him by the court.



**Right to have counsel:** Article 6 of the amendments to the constitution of the United States; art. 1, sec. 22, state constitution. In *Rowe v. Yuba County*, 17 Cal. 62, approved in *Lamont v. Solano County*, 49 Cal. 158, it was held "part of the general duty of counsel to render professional services to persons accused of crime, who are destitute of means, upon the appointment of the court, when not inconsistent

with their obligations to others," and that attorneys who render such services cannot recover any compensation therefor from the county.

The accused ought to be informed of his right to counsel at the commencement of the proceedings of arraignment; yet the arraignment will not be void if he is so informed in the course of the arraignment: *People v. Villarino*, 4 West Coast Rep. 693.

*If defendant does not declare his true name, he may be proceeded against by name stated in indictment.*

§ 1272. When the defendant is arraigned, he shall be interrogated; if the name by which he is indicted be not his true name, he shall then declare his true name, or be proceeded against by the name in the indictment or information. [February 24, 1891, 48.]

**Name of defendant:** See § 1237, *ante*.

*Entry of defendant's true name, and reference to name by which he is indicted.*

§ 1273. If he alleges that another name is his true name, it must be entered in the minutes of the court, and the subsequent proceedings on the indictment or information may be had against him by that name, referring also to the name by which he is indicted or informed against. [February 24, 1891, § 49.]

**Reference to name:** See note to next preceding section.

*Motion to set aside indictment, etc. — Defendant's pleadings after arraignment.*

§ 1274. In answer to the arraignment, the defendant may move to set aside the indictment or information, or he may demur or plead to it, and is entitled to one day after arraignment in which to answer thereto if he demand it. [February 24, 1891, § 50.]

**Arraignment consists of three parts:** 1. Calling the prisoner to the bar by his name, and requesting him to hold up his hand or do some other act of identification; 2. Reading the indictment to him in such language as to convey to his mind the nature of the charge against him; 3. Demanding of him whether he is guilty or not guilty: *Elick v. Territory*, 1 Wash. 136. A prisoner unacquainted with the English language should be arraigned through a sworn interpreter, and the evidence should be made known to him in the same way: *Elick v. Territory*, 1 Wash. 136. In misdemeanor cases punishable by fine only, the defendant may appear upon arraignment by counsel: See § 1270, *ante*; but in other cases, arraignment cannot be waived, and the prisoner must personally enter his plea, unless incapacitated. Consent of counsel to entry of

plea of not guilty will not dispense with arraignment: *Elick v. Territory*, 1 Wash. 136; see § 1285, *post*.

The defendant is entitled to a copy of the indictment or information, but if upon his arraignment he asks for time to plead, he thereby waives any defect in the statutory detail of the proceedings which constitute an arraignment, such as a failure to deliver a copy of the indictment: *People v. Lightner*, 49 Cal. 226. There must, however, be an arraignment and plea: *People v. Corbett*, 28 Cal. 328; *People v. Gaines*, 52 Cal. 479; *Grigg v. People*, 31 Mich. 471; because if there is no plea there is no issue to try, and there can be no judgment: *People v. Corbett*, 28 Cal. 538. If defendant fail to plead, the court will order a plea of not guilty to be entered: See § 1270, *post*.

*Grounds of motion to set aside indictment.*

§ 1275. [1046, 1047.] The motion to set aside the indictment can be made by the defendant on one or more of the following grounds, and must be sustained:—

1. When it is not indorsed "a true bill," and the indorsement signed by the foreman of the grand jury as prescribed by this code;

2. When the names of all the witnesses examined before the grand jury are not indorsed thereon;

3. When it has not been presented, and marked "filed," as prescribed by this code;

4. When any person, other than the grand jurors, was present before the grand jury when the question was taken upon the finding of the indictment, or when any person, other than the grand jurors, was present before the grand jury during the investigation of the charge, except as required or permitted by law;

5. That the grand jury were not selected, drawn, summoned, impaneled, or sworn as prescribed by law.

The ground of the motion to set aside the indictment mentioned in the fifth subdivision of this section is not allowed to a defendant who has been held to answer before indictment.

**Setting aside indictment or information.** — The grounds here enumerated are the only ones upon which an indictment or information may be set aside on motion: *People v. Southwell*, 46 Cal. 141; *People v. Schmidt*, 64 Cal. 260. This motion must be made before demurrer or plea: See § 1274, *supra*; and if not so made, the defendant is precluded from afterwards availing himself of the objections which he is allowed to present on such motion: *People v. Freeland*, 6 Cal. 98; *People v. Lawrence*, 21 Cal. 368; *People v. Lopez*, 26 Cal. 112; *People v. King*, 28 Cal. 272; *People v. Stacey*, 34 Cal. 307. The grounds upon which the motion may be based go to matters occurring prior to

the finding of the indictment or filing the information, as well as to their presentation and indorsement. The ruling of the lower court, upon a motion to set aside an indictment or information, will not be disturbed where the evidence is conflicting: *People v. Ah Chung*, 54 Cal. 398.

**Motion to quash** on the ground mentioned in the fifth subdivision of this section is properly overruled, where, after the grand jury was discharged, defendant committed murder, and was in custody when the jury was resummoned, and declined to challenge the panel or the individuals: *Blanton v. State*, 24 Pac. Rep. 439 (Wash.).

### *Grounds of motion to set aside information.*

§ 1276. A motion to set aside an information can be made by the defendant on one or more of the following grounds, and must be sustained:—

1. When it is not signed by the prosecuting attorney;

2. When it is not verified;

3. When it has not been marked "filed" by the clerk;

4. When the names of the witnesses are not indorsed upon it as required by section twelve hundred and thirty of this code. [February 24, 1891, § 51.]

*Defendant must demur or plead if his motion to set aside is denied.*

§ 1277. If the motion to set aside the indictment [or information] be denied, the defendant must immediately answer the indictment or information, either by demurring or pleading thereto. [February 24, 1891, § 52.]

*If case be resubmitted, defendant may be required to answer.*

§ 1278. If the court direct that the case be resubmitted, the defend-

ant, if already in custody, must so remain, unless he be admitted to bail; or if already admitted to bail, or money has been deposited instead thereof, the bail or money is answerable for the appearance of the defendant to answer a new indictment or information. [*February 24, 1891, § 53.*]

*Order to set aside indictment, etc., is no bar to future prosecution.*

§ 1279. An order to set aside the indictment or information as provided in this chapter shall be no bar to a future prosecution for the same offense. [*February 24, 1891, § 54.*]

*Grounds upon which defendant may demur.*

§ 1280. The defendant may demur to the indictment or information when it appears upon its face either, —

1. That it does not substantially conform to the requirements this code;
2. More than one crime is charged;
3. That the facts charged do not constitute a crime;
4. That the indictment or information contains any matter which if true would constitute a defense or other legal bar to the action. [*February 24, 1891, § 55.*]

**Demurrer to indictment or information.** — A demurrer upon either of the grounds above enumerated presents an objection to the sufficiency of the indictment or information. It must be in writing, distinctly specifying the grounds of objection, and must be interposed prior to the joinder of issue of fact by plea. Unless so interposed, any of the objections mentioned that appear upon the face of the indictment or information are waived, and cannot be taken advantage of upon the trial or in arrest of judgment; excepting, however, the objection to the jurisdiction of the court, and that a public offense has not been charged,

which may be taken advantage of at any time: *People v. Josephs*, 7 Cal. 129; *People v. Apple*, 7 Cal. 289; *People v. Shotwell*, 27 Cal. 394; *People v. Garnett*, 29 Cal. 622; *People v. Jim Ti*, 32 Cal. 60; *People v. Burgess*, 35 Cal. 115; *People v. Turner*, 39 Cal. 370; *People v. Sincerson*, 49 Cal. 388. The grounds of demurrer enumerated in the above section are the only grounds upon which a demurrer to an information or indictment will lie: *People v. Schmidt*, 64 Cal. 260. As to charging more than one offense, see § 1238, *ante*; note to *Ben v. State*, 58 Am. Dec. 238-240.

*Judgment upon demurrer is final when — Defendant to be discharged.*

§ 1281. If the demurrer is sustained because the indictment or information contains matter which is a legal defense or bar to the action, the judgment shall be final, and the defendant must be discharged. [*February 24, 1891, § 56.*]

**Conclusiveness of judgment on demurrer:** See § 1289, *post*.

*Effect of defendant's failure to plead after demurrer overruled.*

§ 1282. [1053.] If the demurrer is overruled, the defendant has a right to put in a plea. If he fails to do so, judgment may be rendered against him on the demurrer, and if necessary, a jury may be impaneled to inquire and ascertain the degree of the offense.

**Refusal to plead after demurrer overruled.** — Where a demurrer is overruled, and the defendant refuses to plead, judgment may be pronounced against him as upon a plea of guilty: *People v. King*, 28 Cal. 266; *People v.*

*Jocelyn*, 29 Cal. 562. No constitutional right of the defendant is violated by the entry of a judgment against him, if he refuses to plead after demurrer overruled: *Id.*



*The three pleas to indictment or information stated.*

§ 1283. There are but three pleas to the indictment or information: a plea of,—

1. Guilty; 2. Not guilty; 3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded with or without the plea of not guilty. [February 24, 1891, § 57.]

*Form in which pleas may be entered on record.*

§ 1284. The plea may be entered on the record substantially in the following form:—

1. A plea of guilty: The defendant pleads that he is guilty of the offense charged in the indictment (or information, as the case may be).

2. A plea of not guilty: The defendant pleads that he is not guilty of the offense charged in the indictment (or information, as the case may be).

3. A plea of former conviction or acquittal: The defendant pleads that he has formerly been convicted (or acquitted, as the case may be) of the offense charged in the indictment (or information, as the case may be), by the judgment of the court of (naming it), rendered on the — day of —, A. D. 18— (naming the time). [February 24, 1891, § 58.]

**Plea must be oral.**—In criminal cases every plea must be oral and entered in the minutes of the court, or judgment will be reversed: *Palmer v. United States*, 1 Wash. 5. It cannot be in writing: *People v. Johnson*, 47 Cal. 122; *People v. Redinger*, 55 Cal. 298.

**Verdict in case where there has been neither an arraignment nor plea is a nullity,** and no valid judgment can be rendered thereon: *People v. Corbett*, 28 Cal. 328; *People v. Gaines*, 52 Cal. 479; *Douglass v. State*, 3 Wis. 820; *State v. Saunders*, 53 Mo. 234; *State v. Montgomery*, 63 Mo. 296. See § 1274, ante, note.

**Former conviction or acquittal.**—Where there is a plea of not guilty and also a plea of former conviction, the defendant is entitled to a verdict on each plea. A verdict of guilty is insufficient: *People v. Kinsey*, 51 Cal. 278; *People v. Helbing*, 59 Cal. 567; *People v. Fuqua*, 61 Cal. 377. And where the record is silent, showing no finding by the jury upon

the plea of former acquittal, the court will not presume that that defense was withdrawn: *People v. Fuqua*, 61 Cal. 377.

The pleas of former acquittal may be entered after a new juror had been sworn to take the place of one taken sick during the trial, and before the commencement of the trial anew: *People v. Stewart*, 64 Cal. 60.

But cannot be interposed on a new trial ordered by the supreme court upon a reversal for insufficiency of evidence to justify the verdict of guilty: *People v. Hardisson*, 61 Cal. 378. Where a judgment of conviction of murder has been reversed on appeal by defendant, and remanded for further proceedings because of a defective information, and the action is dismissed under § 1372, post, and a new information filed for the same offense, the defendant cannot plead former conviction as a bar: *People v. Schmidt*, 64 Cal. 260.

*Plea of guilty must be put in by defendant himself in open court.*

§ 1285. [1056.] The plea of guilty can only be put in by the defendant himself in open court.

See § 1270.

**Plea of guilty.**—Though no judgment is pronounced upon such a plea, it is a good defense if pleaded to another indictment for the same offense: *People v. Goldstein*, 32 Cal. 432.

If a defendant pleads guilty to an indictment which charges an offense which is divided into degrees, the court, before passing sentence, must ascertain the degree: *People v. Jefferson*, 52 Cal. 452.

*Plea of guilty may be withdrawn and other pleas substituted.*

§ 1286. [1057.] At any time before judgment, the court may per-

mit the plea of guilty to be withdrawn and other plea or pleas substituted.

**Withdrawal of plea of guilty.** — When it appears that a plea of guilty has been entered through inadvertence and without due deliberation, or ignorantly, and mainly from the hope that the punishment to which the accused would otherwise be exposed may be mitigated, great indulgence should be shown in permitting such plea to be withdrawn. Refusal to allow the defendant to withdraw his plea of guilty under such circumstances will amount to an abuse of the discretion vested in the trial court: *People v. McCrory*, 41 Cal. 458. So where there was doubt of the sanity of the accused at the time his plea of guilty was entered, the court ought to have allowed him to withdraw it and plead not guilty: *People v. Scott*, 59 Cal. 341.

*Plea of not guilty, effect of.*

§ 1287. The plea of not guilty is a denial of every material allegation in the indictment or information; and all matters of fact may be given in evidence under it, except a former conviction or acquittal. [February 24, 1891, § 59.]

**Plea of not guilty.** — Under this plea the insanity of the prisoner at the time of the commission of the offense may be shown: *People v. Olcott*, 28 Cal. 456. So the fact of drunkenness at the time the crime was committed may be given in evidence under this plea, not as a defense, but to determine the state or condition of the mind and its capacity to form an intent: *People v. King*, 27 Cal. 507; *People v. Ferris*, 55 Cal. 588. The prosecution must prove the *locus delicti* upon a plea of not guilty: *People v. Evans*, 52 Cal. 470.

*Conviction or acquittal is bar to another prosecution when.*

§ 1288. A conviction or acquittal by a judgment upon a verdict shall bar another prosecution for the same offense, notwithstanding a defect in form or substance in the indictment or information on which the conviction or acquittal took place. [Feb. 24, 1891, § 60.]

**Conviction or acquittal as bar to another prosecution:** See § 1365, *post*, note.

*Judgment for defendant on demurrer is no bar to another prosecution — Exception.*

§ 1289. The judgment for the defendant on a demurrer to the indictment or information, except where it is otherwise provided, or for an objection taken at the trial to its form or substance, or for variance between the indictment or information and the proof, shall not bar another prosecution for the same offense. [February 24, 1891, § 61.]

*Plea of not guilty must be entered by court, if defendant fails or refuses to answer.*

§ 1290. If the defendant fail or refuse to answer the indictment or information by demurrer or plea, a plea of not guilty must be entered by the court. [February 24, 1891, § 62.]

*Upon plea of guilty to charge of murder, jury must be impaneled — In other cases the court may hear case.*

§ 1291. [1062.] If, on the arraignment of any person, he shall plead guilty, if the offense charged be not murder, the court shall, in its discretion, hear testimony, and determine the amount and kind of punishment to be inflicted; but if the defendant plead guilty to a charge of murder, a jury shall be impaneled to hear testimony, and determine the degree of murder and the punishment therefor.

*Misdemeanor may be compromised when.*

§ 1292. [1040.] When a defendant is prosecuted in a criminal action for a misdemeanor, for which the person injured by the act constituting the offense has a remedy by a civil action, the offense may be compromised as provided in the next section, except when it was committed, —

1. By or upon an officer while in the execution of the duties of his office;
2. Riotously; or
3. With an intent to commit a felony.

**Compromising offenses.** — No agreement founded on the consideration of stilling a prosecution is valid if the offense is of a public nature; nor can such an agreement be made valid by the court consenting that the prosecution may be compromised: *Keir v. Leeman*, 6 Q. B.

308; 2 Ben. & H. Lead. Crim. Cas. 216. There can be no compromise of a criminal charge where the person charged has not been arrested or in any way held to answer the charge: *Saxon v. Conger*, 6 Or. 389.

*Compromise of criminal action by order in minutes.*

§ 1293. In such case, if the party injured appear in the court in which the cause is pending at any time before the final judgment therein, and acknowledge in writing, that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs incurred, order all proceedings to be discontinued and the defendant to be discharged. The reasons for making the order must be set forth therein and entered in the minutes. Such order is a bar to another prosecution for the same offense. [February 24, 1891, § 63.]

*Offenses not to be compromised, etc., except as provided by statute.*

§ 1294. No offense can be compromised, nor can any proceedings for the prosecution or punishment thereof be stayed upon a compromise, except as provided in this chapter. [February 24, 1891, § 64.]



## CHAPTER XI.

## OF THE TRIAL OF CRIMINAL ACTIONS.

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- § 1298. Number of peremptory challenges allowed to defendant — Defendants must join in challenges when.
- § 1299. Number of peremptory challenges allowed to prosecuting attorney.
- § 1300. Challenges to panel, when allowed, and requisites of.
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- § 1319. Jury may find any degree of the offense charged.
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- § 1321. Jury may render verdict as to one or more, where several are charged.
- § 1322. Reconsideration of verdict where jury have mistaken law.
- § 1323. Defendant acquitted by reason of insanity may be committed or put under bonds.
- § 1324. Rendition of verdict.
- § 1325. Form of verdict — Punishment to be fixed by the court, not by the jury.

*Entry of cases in the docket for trial.*

§ 1295. The clerk shall, in preparing the docket of criminal cases, enumerate the indictments and informations pending according to the date of their filing, specifying opposite to the title of each action whether it be for a felony or misdemeanor, and whether the defendant be in custody or on bail; and shall, in like manner, enter therein all indictments and informations on which issues of fact are joined, all cases brought to the court on change of venue from other counties, and all cases pending upon appeal from inferior courts. [*February 24, 1891, § 65.*]

*Continuance, grounds for — What affidavit for, must contain.*

§ 1296. [1077.] A continuance may be granted in any case on the ground of the absence of evidence, on the motion of the defendant, supported by affidavit showing the materiality of the evidence ex-

pected to be obtained, and that due diligence has been used to procure it, and also the name and place of residence of the witness or witnesses, and the substance of the evidence expected to be obtained; but if the prosecuting attorney admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the continuance shall not be granted.

**Continuance, court's discretion as to.**

—Applications for the continuance of the trial of an action are addressed largely to the discretion of the trial court, and its decision upon such motion will not be disturbed on appeal, unless there has been a gross abuse of such discretion: *Thompson v. Territory*, 1 Wash. 547; *People v. Gaunt*, 23 Cal. 157; *People v. Williams*, 24 Cal. 31; *People v. Jocelyn*, 29 Cal. 562. If the facts show the application to be made in bad faith, the court is justified in denying the motion: *People v. Mortimer*, 46 Cal. 114.

**Affidavits, what must contain.** — When a motion for a continuance is made on the ground of the absence of a material witness, it should appear by affidavit that the testimony of such witness is not cumulative, and that the facts sought to be proved by him cannot be proved by any other witness within the reach of the process of the court; that his testimony is material, and that due diligence has been used to obtain it, setting forth the character of the diligence that has been used, whether by exhausting the process of the court, or otherwise. The facts which such witness will testify to should also be set out, to enable the court to judge of their materiality: *People v. Baker*, 1 Cal. 403; *People v. Thompson*, 4 Cal. 241; *People v. Diaz*, 6 Cal. 248; *People v. Quincy*, 8 Cal. 89; *People v. Gaunt*, 23 Cal. 156; *People v. Williams*, 24 Cal. 31; *People v. Jocelyn*, 29 Cal. 562; *People v. Francis*, 38 Cal. 183; *People v. Mellon*, 40 Cal. 648; *People v. Ashnauer*, 47 Cal. 98; *People v. Ah Fat*, 48 Cal. 63. That due diligence to procure the attendance of the witness has been used, see *People v. Jenkins*, 56 Cal. 4. Facts also should be set out from which the court can judge whether there is reasonable ground to believe that the attendance of the absent witness or his testimony can be procured at a future day: *People v. Francis*, 38 Cal. 183; *People v. Ashnauer*, 47 Cal. 98; *Peo-*

*ple v. Ah Fat*, 48 Cal. 63. It should also appear that the absent witness cannot be readily reached by attachment: *People v. Weaver*, 47 Cal. 106. If the testimony of the absent witness would be no defense to the action, the motion should be denied: *People v. Williams*, 43 Cal. 344. On motion for a new trial on the ground of error in denying a motion for a continuance, the affidavits of the absent witnesses should be obtained, showing that they will testify to the facts sought to be proved, or good reason should be shown for not obtaining such affidavits: *People v. De Lacey*, 28 Cal. 589; *People v. Jocelyn*, 29 Cal. 562. For a sufficient affidavit for continuance by the district attorney, see *People v. Gannon*, 61 Cal. 476.

**Counsel, sickness of,** sufficient ground for a continuance: *People v. Logan*, 4 Cal. 188; see *Lightner v. Menzel*, 35 Cal. 452.

**Absence of witness** for the defense is not sufficient ground for a continuance, when that which is expected to be proved by him is admitted by the district attorney: *People v. Brown*, 59 Cal. 345.

In criminal actions, it is the policy of the law to allow the defendant to have his witnesses personally present at the trial, if they can be obtained without unreasonable delay, and a motion on his part for a continuance on account of absent witnesses, it appearing that their testimony is material, and that due diligence has been used to obtain it, but without success, should be granted, particularly if it be the first application: *People v. Diaz*, 6 Cal. 248; *People v. Dodge*, 28 Cal. 445; *People v. McCrory*, 41 Cal. 458.

So a continuance was properly refused where it did not seem that the attendance of the alleged absent witness could have been procured in a reasonable time: *People v. Lewis*, 64 Cal. 401; citing *People v. Cleveland*, 49 Cal. 580; *People v. Ah Yute*, 53 Cal. 613.

*Issues of fact to be tried by jury — Rules of trial.*

§ 1297. Except as otherwise specially provided, issues of fact joined upon an indictment or information shall be tried by a jury of twelve persons, and the law relating to the drawing, retaining, and selecting jurors, and trials by jury in civil cases, shall apply to criminal cases. [February 24, 1891, § 66.]

See § 1304.

**Trial by jury.** — In justices' courts the jury shall consist of six persons, unless the parties agree upon a number less than six: See § 52, *ante*; Const., sec. 21, art. 1. But in other criminal cases there must be a trial by a jury of twelve men: See Const., sec. 21, art. 1. The defendant cannot consent to be tried by a less number: *People v. Scoggins*, 37 Cal.

676; *People v. Russell*, 46 Cal. 121; *People v. O'Neil*, 48 Cal. 257. The action of a police magistrate in committing a minor child to an industrial school for his training and reformation is not a criminal prosecution which entitles such minor to a jury trial: *Ex parte Ah Peen*, 51 Cal. 280. Aliens accused of crime are not entitled to be tried by a jury composed of one half aliens: *People v. Chin Mook Sow*, 51 Cal. 597.



*Number of peremptory challenges allowed to defendant—Defendants must join in challenges when.*

§ 1298. [1079.] In prosecution for capital offenses, the defendant may challenge peremptorily twelve jurors; in prosecution for offenses punishable by imprisonment in the penitentiary, six jurors; in all other prosecutions, three jurors. When several defendants are on trial together, they must join in their challenges.

Joinder in challenges applies as well to preemptory as to challenges for cause: *People v. McCulla*, 8 Cal. 301.

*Number of peremptory challenges allowed to prosecuting attorney.*

§ 1299. [1080.] The prosecuting attorney, in capital cases, may challenge peremptorily six jurors; in all other cases, three jurors.

*Challenges to panel, when allowed, and requisities of.*

§ 1300. [1081.] Challenges to the panel shall only be allowed for a material departure from the forms prescribed by law for the drawing and return of the jury, and shall be in writing, sworn to, and proved to the satisfaction of the court.

**Challenge to the panel.** — On the trial of a challenge to the panel, the defendant cannot offer his *ex parte* affidavit in support of the challenge: *People v. Brown*, 48 Cal. 253.

**Challenge sufficient when.** — Where the sheriff who summoned the special panel is sworn and examined, and by his testimony dis-

closes that he has formed or expressed an opinion that defendant is guilty, the challenge to the panel on the ground of the bias of the sheriff should be allowed: *People v. Coyne*, 40 Cal. 592; see also *People v. Welch*, 49 Cal. 174; *People v. Rodriguez*, 10 Cal. 50.

*Challenges for cause, when and for what causes allowed.*

§ 1301. [1082.] Challenges for cause shall be allowed for such cause as the court may, in its discretion, deem sufficient, having reference to the causes of challenge prescribed in civil cases, as far as they may be applicable, and to the substantial rights of the defendant.

**Trial of challenges by court** is discretionary to a great extent: *White v. Territory*, 3 Wash. 397; *Blanton v. State*, 24 Pac. Rep. 439 (Wash.). And unless an exception is taken to the ruling of the court in admitting or rejecting evidence, a challenge to a juror for actual bias will not be considered at all by the supreme court: *People v. Cotta*, 49 Cal. 166; *People v. Vasquez*, 49 Cal. 560; *People v. Taing*, 53 Cal. 602. Newspaper opinion not preventing the giving of an impartial verdict is no cause for challenge: *People v. Cochran*, 61 Cal. 548.

**Exemption from service—Privilege of the party.** — A party who accepts a juror, knowing him to be disqualified, is estopped from afterwards availing himself of such disqualification: *People v. Stonecipher*, 6 Cal. 411. So a defendant who receives a juror whose name is upon the poll-tax list only cannot, after the verdict, object that he was not a competent juror: *Id.*; *People v. Sanford*, 43 Cal. 31. An exemption from service on a jury is a personal privilege, and such persons

are not disqualified from serving as jurors. If they fail to exercise their privilege, the parties cannot complain: Proffatt on Jury Trial, sec. 119; *State v. Wright*, 53 Me. 328; *State v. Forshner*, 43 N. H. 89; *State v. Adams*, 20 Iowa, 486.

**Challenge, how taken.** — A challenge must state the specific grounds upon which it is taken; otherwise it will be disregarded. A challenge which merely states that "the juror is challenged for cause," "for actual bias," or "for implied bias," is no challenge: *People v. Cotta*, 49 Cal. 166; *People v. Buckley*, 49 Cal. 241; *People v. Walsh*, 43 Cal. 447; *People v. McGungill*, 41 Cal. 429; *People v. Hardin*, 37 Cal. 258; *People v. Dick*, 37 Cal. 277; *People v. Reynolds*, 16 Cal. 128. "I challenge the juror," is not sufficient: *People v. Cochran*, 61 Cal. 548. In *White v. Territory*, 24 Pac. Rep. 447 (Wash.), where a juror having said on examination that he had impressions as to the merits of the case, it was held, notwithstanding the provisions of § 346, *ante*, that he could not be asked whether those impressions were



favorable to defendant. Upon the examination of a juror who has stated that he has formed a qualified opinion as to the guilt or innocence of the defendant, the juror cannot, in the absence of a challenge for actual bias, be asked whether he believes the defendant to be guilty or not guilty. Upon a challenge for actual bias, such a question might properly be asked, as tending to show an exist-

ence of actual bias: *People v. Hamilton*, 62 Cal. 377.

**Order of challenges:** See § 349, *ante*.

**Challenges, when taken.** — The time when a peremptory challenge may be interposed rests largely in the sound discretion of the court: *People v. Ah You*, 47 Cal. 121; *People v. Montgomery*, 53 Cal. 576.

*One having scruples against capital punishment not to serve as juror.*

§ 1302. No person whose opinions are such as to preclude him from finding any defendant guilty of an offense punishable with death shall be compelled or allowed to serve as a juror on the trial of any indictment or information for such an offense. [February 24, 1891, § 67.]

*Form of oath to be administered to jury.*

§ 1303. The jury shall be sworn or affirmed well and truly to try the issue between the state and the defendant, according to the evidence; and in capital cases, to well and truly try, and true deliverance make between the state and the prisoner at the bar, whom they shall have in charge, according to the evidence. [February 24, 1891, § 68.]

**Oath to jurors.** — It is sufficient if the substance of the oath administered to the jurors is in consonance with the statute; yet it is better to follow the prescribed formula: *Leonard v. Territory*, 2 Wash. 381, 395; *Hartigan v. Territory*, 1 Wash. 447.

*Except in capital cases, trial may be submitted to court.*

§ 1304. [1085.] The defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court, except in capital cases.

*Defendant must be personally present during trial.*

§ 1305. [1086.] No person prosecuted for an offense punishable by death, or by confinement in the penitentiary or in the county jail, shall be tried unless personally present during the trial.

**Personal attendance at trial.** — In all cases amounting to a felony, the defendant must be personally present during the whole of his trial: *People v. Kohler*, 5 Cal. 72; *People v. Higgins*, 59 Cal. 357. If, pending a trial for grand larceny, the defendant flees, and cannot be found, the jury may be discharged, and no jeopardy attaches: *Id.* During the progress of the trial, the defendant is in the custody of the court, and under the immediate control of and subject to the orders of the court: *People v. Harrington*, 42 Cal. 168. Viewing the premises by the jury where the offense is alleged to have been committed is not a portion of the

trial at which the defendant must be present: *People v. Bonney*, 19 Cal. 426. The mere fact that the record on appeal recites that the defendant was absent during a portion of the trial (for murder) is not sufficient to justify a reversal of the judgment: *People v. Bealoba*, 17 Cal. 389. The defendant must be present when the verdict is rendered, and the court, in all trials for felonies, should promptly order him into actual custody at the commencement of the trial, or immediately upon the retirement of the jury to consider their verdict, regardless of his previous admission to bail: *People v. Beauchamp*, 49 Cal. 41.

*Trial in absence of defendant may be had when.*

§ 1306. [1087.] No person prosecuted for an offense punishable by a fine only shall be tried without being personally present, unless some responsible person, approved by the court, undertakes to be bail for stay of execution and payment of the fine and costs that may be

assessed against the defendant. Such undertaking must be in writing, and is as effective as if entered into after judgment.

*Compelling attendance of witnesses — Defendant as witness in his own behalf.*

§ 1307. Witnesses may be compelled to attend and testify before the grand jury; and witnesses on behalf of the state, or of the defendant in a criminal prosecution, may be compelled to attend and testify in open court, if they have been subpoenaed, without their fees being first paid or tendered, unless otherwise provided by law; the court may recognize witnesses, with or without sureties, to attend and testify at the same or the next session of the court, or at the term of a court within the state, and any person accused of any crime in this state by indictment, information, or otherwise, may, in the examination or trial of the cause, offer himself or herself as a witness in his or her own behalf, and shall be allowed to testify as other witnesses in such case, and when accused shall so testify, he or she shall be subject to all the rules of law relating to cross-examinations of other witnesses; *provided*, that nothing in this act shall be construed to compel such accused persons to offer himself or herself as a witness in such case; *and provided further*, that it shall be the duty of the court to instruct the jury that no inference of guilt shall arise against the accused if the accused shall fail or refuse to testify as a witness in his or her own behalf. [February 24, 1891, § 69.]

**Instruction when defendant fails or refuses to testify.** — The spirit of this provision is, that such failure shall not operate to defendant's disadvantage in any branch or aspect of the case: *Leonard v. Territory*, 2 Wash. 381, 399.

**If defendant testifies**, he subjects himself to the rules controlling the cross-examination of other witnesses: *Thompson v. Territory*, 1 Wash. 547, 555. The truth or falsity of his testimony in chief may be tested by the cross-examination in any proper way: *People v. Rozelle*, 78 Cal. 84. The fact that defendant becomes a witness in his own behalf does not change or modify the rules of practice with reference to the proper limits of cross-examination, and does not make him a witness for the state against himself: *People v. McGungill*, 41 Cal. 429. Where defendant is examined as a witness in his own behalf, the prosecution is entitled to cross-examine him respecting an occurrence about which he testifies in chief, — 1. For the purpose of showing express malice; and 2. In order to lay a foundation to impeach his credibility: *People v. Dennis*, 39 Cal. 625. If he become a witness in his own behalf, he has the same, and no greater, privileges than any other witness. He may refuse to answer

a question when the answer would tend to degrade his character: *People v. Reinhart*, 39 Cal. 449; *People v. Johnson*, 57 Cal. 571. His general reputation for truth, honesty, and integrity may be shown: *People v. Beck*, 58 Cal. 212. A defendant who becomes a witness in his own behalf, and undertakes to state all that transpired between two points of time, may be asked on cross-examination if he has omitted anything pertinent to the case, and his attention may be directed to the precise point by asking him if some specified thing did not occur: *People v. Russell*, 46 Cal. 121. If defendant, at the preliminary examination, voluntarily becomes a witness in his own behalf, and if it appear that his testimony there given was free from undue influence, it may be used against him on his subsequent trial: *People v. Kelley*, 47 Cal. 125; *People v. Hong Ah Duck*, 61 Cal. 387, 394.

**Court commenting on defendant's becoming a witness.** — That the court may call the attention of the jury to the defendant's position, and tell them to consider it in determining his credibility: *People v. Morrow*, 60 Cal. 142, 147; *People v. Cronin*, 34 Cal. 195, 203; *People v. Nichols*, 62 Cal. 518, 522; and see same case 34 Cal. 211.

*Confession as evidence.*

§ 1308. [1070.] The confession of a defendant made under inducement, with all the circumstances, may be given as evidence



against him, except when made under the influence of fear produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony.

**Confessions and admissions.**—The rules of evidence are in both cases the same: 1 Greenl. Ev., sec. 170. The admission of a fact in open court, during the progress of a trial, by a defendant's attorney, in his presence, and not objected to by him, is presumed to be with his consent, and may be read in evidence against him: *People v. Garcia*, 25 Cal. 531. So admissions made by the district attorney are binding upon the people: *People v. Robles*, 34 Cal. 591. Statements of a party who has been robbed, made to a third person as to the description of the person who robbed him, are hearsay and inadmissible in defendant's behalf to show that he is not the person thus described: *People v. McCrea*, 32 Cal. 98. Neither are statements of the injured party of the defendant's innocence admissible: *People v. McLaughlin*, 44 Cal. 435. Admissions cannot be shown by memoranda made at the time, though the witness who made them says they are correct: *People v. Elyea*, 14 Cal. 144.

A confession, in criminal law, is a person's declaration of his agency in a participation in a crime: *People v. Strong*, 30 Cal. 151; *People v. Parton*, 49 Cal. 637; *People v. Velarde*, 59 Cal. 457.

Whether admissible or not is for the court to determine: *People v. Ah How*, 34 Cal. 218;

*People v. Barric*, 49 Cal. 345; *People v. Mortier*, 58 Cal. 262. Admissions and confessions may be implied from the acquiescence of the party in the statements of others made in his presence, when the circumstances are such as to afford an opportunity to act or speak, and would naturally call for some action or reply from men similarly situated: *People v. McCrea*, 32 Cal. 100; *People v. Estrado*, 49 Cal. 171. Such statements are inadmissible unless accompanied with proof of his statements or conduct in response thereto: *People v. Ah Yute*, 54 Cal. 89. The fact that a crime has been committed cannot be proved by the extrajudicial confessions or statements of the defendant alone: *People v. Jones*, 31 Cal. 565; *People v. Thrall*, 50 Cal. 415. A part of a confession should not be admitted in evidence and the balance rejected: *People v. Murphy*, 39 Cal. 57. Statements made by the defendant while asleep are not evidence: *People v. Robinson*, 19 Cal. 40. A witness who has a very imperfect knowledge of the language employed in the conversation, and who did not understand the whole of the conversation in which the supposed confession was made to him by the accused, is incompetent to testify as to such confession: *People v. Gelabert*, 39 Cal. 663.

*Rules of evidence same as in civil actions.*

§ 1309. [1071.] The rules of evidence in civil actions, so far as practicable, shall be applied to criminal prosecutions.

**Evidence in criminal cases.**—The general rules of evidence are the same in both criminal and civil cases: *People v. Murphy*, 45 Cal. 137. The prosecution, on a second trial for a crime, may prove what a witness, since deceased, testified to upon a former trial: *Id.*; 1 Greenl. Ev., sec. 163. Party cannot move to strike out evidence which he did not object to when offered: See *People v. Rolfe*, 61 Cal. 542.

**Alibi.**—The commission of an offense implies the presence of the defendant at the necessary time and place: *People v. Fong Ah Sing*, 64 Cal. 253. Any evidence that goes to show that the defendant was not present is always competent. Evidence tending to establish an alibi, though insufficient of itself to establish that fact, is not to be excluded from the case: *Id.* Adducing it is termed setting up an alibi: 1 Bishop's Crim. Proc., sec. 1051; *Armstrong v. People*, 70 N. Y. 38, 49; *Commonwealth v. Choate*, 105 Mass. 451. It cannot be said, as a matter of law, that an unsuccessful attempt to prove an alibi is a circumstance of "great weight" against the prisoner: *People v. Malaspina*, 57 Cal. 628. The setting up of an alibi does not change the presumptions and burden of proof: *Toler v. State*, 16 Ohio, 583; *Fife v. Commonwealth*, 29 Pa. St. 429; *State v. Jossey*, 64 N. C. 56. And although a person who relies upon this as a defense must prove it the same as any other fact, yet if, on account of the alibi, the jury are not satisfied, beyond a

reasonable doubt, of the defendant's guilt, they must acquit him: *State v. Cameron*, 40 Vt. 555; *French v. State*, 12 Ind. 170; *Gibbs v. State*, 1 Tex. App. 12; *Otmer v. People*, 76 Ill. 149. The defendant, for the purpose of proving an alibi, may testify as to various acts which he claims to have done at and about the time of the alleged offense, but cannot give the particulars of conversations had between himself and others: *People v. Kalkman*, 72 Cal. 212. The proof of the absence of the defendant when the crime was committed should cover the whole time when his presence was required: *West v. State*, 43 Ind. 483; *Briceland v. Commonwealth*, 47 Pa. St. 463. But evidence that does not cover the whole time will not for that reason be rejected: *Kaufman v. State*, 48 Ind. 483. Any competent evidence to disprove an alibi is admissible: *Brown v. People*, 17 Mich. 429; *Commonwealth v. Williams*, 105 Mass. 62. The defendant's admissions are admissible for such purpose: *Rex v. Findon*, 5 Car. & P. 132.

**Burglarious tools.**—After the fact of burglary having been committed is shown, that similar tools were used to commit it, and that defendant was in the vicinity at or about the time, the tools found in his possession may be offered in evidence as a link in the chain of circumstances, etc.: *People v. Winters*, 29 Cal. 658.

**Character:** See *infra*, "Reputation," etc., in this note. Evidence of the dangerous char-



acter of the deceased in a murder case is not admissible, where there is no evidence to show an assault or threatened assault on his part: *Smith v. United States*, 1 Wash. 262. The good character of defendant, like all other facts in the case, should be considered by the jury, and if a reasonable doubt is raised in their minds, they must acquit: *Territory v. Klehn*, 21 Pac. Rep. 31 (Wash.). That defendant's good character may be used to create a reasonable doubt of his guilt, see *People v. Velarde*, 59 Cal. 547; *People v. Doggett*, 62 Cal. 27, and cases cited; *People v. De la Cour Soto*, 63 Cal. 165; *People v. Smith*, 59 Cal. 601, 607. The jury are not justified in acquitting a defendant upon proof of his good character, if the evidence, in spite of his good character, convinces them, beyond a reasonable doubt, of his guilt: *People v. Kalkman*, 72 Cal. 212. In a prosecution for burglary, a certificate of the discharge of the defendant from the United States army, certifying to his good character, is not admissible as evidence of his good character: *People v. Eckman*, 72 Cal. 582.

**Circumstantial evidence.** — In a prosecution for murder depending upon circumstantial evidence, it is error not to allow the prisoner in rebuttal to show that at the time of the killing there was a person in the neighborhood who was hostile to and had threatened to kill deceased: *Leonard v. Territory*, 2 Wash. 381. The *corpus delicti* may be proved by circumstantial evidence, as well as direct, but it must be so proved beyond a reasonable doubt: *Timmerman v. Territory*, 3 Wash. 445. Where a criminal charge is to be proved by circumstantial evidence, the proof must be consistent with the prisoner's guilt, and inconsistent with every other rational conclusion: *People v. Shuler*, 28 Cal. 490; *People v. Strong*, 30 Cal. 151; *People v. Anthony*, 56 Cal. 397, 399, containing an instruction laying down the rule correctly as to circumstantial evidence, followed in *People v. Davis*, 64 Cal. 440. So also *People v. Ramirez*, 56 Cal. 533, 538, and *People v. Morrow*, 60 Cal. 142, where the subject is considered at some length. The circumstances proved must all concur to show that the defendant committed the crime, and must exclude to a moral certainty every other hypothesis but the single one of guilt: *People v. Dick*, 32 Cal. 213. "Where the evidence is entirely circumstantial, yet is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible witnesses would have been": *People v. Cronin*, 34 Cal. 202. It is sufficient if such evidence produces nearly the same degree of certainty as that which arises from direct testimony: *People v. Cronin*, 34 Cal. 202; *People v. Padillia*, 42 Cal. 535; *People v. Eckman*, 72 Cal. 582. When independent facts and circumstances are relied upon to identify the accused as the person committing the offense charged, and, taken together, are regarded as a sufficient basis for a presumption of his guilt to a moral certainty, or beyond a reasonable doubt, each material independent fact or circumstance necessary to complete such chain or series of independent facts tending to estab-

lish a presumption of guilt should be established to the same degree of certainty as the main fact which these independent circumstances, taken together, tend to establish; that is, each essential independent fact in the chain or series of facts relied upon to establish the main fact must be established to a moral certainty or beyond a reasonable doubt: *People v. Phipps*, 39 Cal. 326, 333; *People v. Ah Chung*, 54 Cal. 398. It is unnecessary, to justify an inference of guilt from circumstantial evidence, that the existence of the inculpatory facts should be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of the defendant's guilt: *People v. Murray*, 41 Cal. 66. Where the circumstances proved leave a reasonable doubt as to one of the facts essential to establish guilt, the jury should acquit: *People v. Anthony*, 56 Cal. 397.

**Dying declarations.** — The question of admitting the dying declarations of deceased, and of the necessary evidence to lay a foundation therefor, rests very much in the sound legal discretion of the trial court: *Territory v. Klehn*, 21 Pac. Rep. 31 (Wash.). The admission of dying declarations in evidence in cases of homicide constitute one of the principal exceptions to the general rule rejecting hearsay evidence. They are admitted in evidence from necessity, and because the persons whose declarations are thus admitted are considered as standing in the same situation as if they were sworn; the danger of impending death being equivalent to the sanction of an oath: 1 Greenl. Ev., sec. 157; *People v. Glenn*, 10 Cal. 32; *People v. Lawrence*, 21 Cal. 368. It is sufficient for deceased's sense of impending death to be proved by but one witness; the others may confine their testimony to the declarations: *People v. Garcia*, 63 Cal. 19. Before such declarations are admitted in evidence, it should appear that the declarant was at the point of death; that he was conscious of approaching dissolution, and had lost all hope of a recovery, and that he made the declaration under the full belief that he was about to die: *People v. Lee*, 17 Cal. 76; *People v. Ybarra*, 17 Cal. 166; *People v. Sanchez*, 24 Cal. 17; *People v. Vernon*, 35 Cal. 49; *People v. Ah Dat*, 49 Cal. 652. If it appears that the deceased had any expectation or hope of recovery, however slight it may have been, and though death actually ensued within an hour afterwards, the declarations are not admissible: *People v. Hodgdon*, 55 Cal. 72. Where a dying declaration has been introduced in evidence by the prosecution, the defendant is entitled to prove other statements made by the deceased, contradicting his dying declarations: *People v. Lawrence*, 21 Cal. 368. The fact that a written statement of the declarations made by the deceased, *in extremis*, was at the time verified by him, and introduced in evidence at the trial of the party thereby accused of the murder, furnishes no objection to the introduction of oral evidence of the same or similar dying declarations of deceased: *People v. Vernon*, 35 Cal. 49. The rule that no person is incompetent to be a witness in this state on account of his opinions on matters of religious belief applies to dying declarations: *People v. Sanford*, 43 Cal. 29; *People v. Chiu Mook Sow*, 51 Cal. 597. Statements of the de-

ceased concerning the circumstances attending the difficulty in which he was wounded, made after he was wounded, but at a time when he did not expect to die, are not admissible on defendant's behalf: *People v. McLaughlin*, 44 Cal. 435; *People v. McCauley*, 45 Cal. 146; and see "*Res Gestæ*," *infra*, and *People v. Fong Ah Sing*, 64 Cal. 253. See, generally, *People v. McCrea*, 32 Cal. 98; *People v. Carlton*, 6 Pac. C. L. J. 917; and *People v. Taylor*, 59 Cal. 640; *People v. Gray*, 61 Cal. 164, 175.

**Flight as evidence of guilt.** — The flight of a person suspected of a crime is a circumstance to be weighed by the jury as tending in some degree to prove a consciousness of guilt, and is entitled to more or less weight according to the circumstances of the particular case. Such evidence is received, not as part of the *res gestæ* of the criminal act itself, but as indicative of a guilty mind: *People v. Stanley*, 47 Cal. 114; *People v. Collins*, 48 Cal. 277; *People v. Wong Ah Ngow*, 54 Cal. 151; *People v. Welsh*, 64 Cal. 167. *People v. Giancoli*, 74 Cal. 642; *People v. Forsythe*, 65 Cal. 101. This rule extends only to the person fleeing, and not to a case where a conspiracy to commit a crime has been entered into between two or more, and the flight of a co-conspirator is sought to be proved against another on his separate trial: *People v. Stanley*, 47 Cal. 114. Where four men jointly commit a robbery, evidence of the flight of one, on the separate trial of another who did not flee, is admissible to show that after his arrest he had an opportunity to throw away the money stolen: *People v. Collins*, 48 Cal. 277. So if a person, when arrested on a charge of larceny, and after being informed of the cause of his arrest, escapes, or attempts to escape, it is a circumstance that the jury may consider in determining his guilt or innocence: *People v. Strong*, 46 Cal. 302. It does not, however, raise a strong presumption of the defendant's guilt: *State v. Arthur*, 21 Iowa, 430.

**Hearsay evidence**, map containing much explanatory matter in nature of, should not be admitted in evidence on a criminal trial: *Leonard v. Territory*, 2 Wash. 381.

**Identity of defendant** is for the jury: *People v. Williams*, 59 Cal. 674; *People v. Rolfe*, 61 Cal. 540.

**Intent** is generally a question of fact for the jury: *People v. Soto*, 53 Cal. 415.

**Possession of stolen property.** — The mere possession of property recently stolen is not, of itself, sufficient evidence upon which to convict the possessor of the theft. It is a circumstance tending to show guilt, but not of itself sufficient to warrant a conviction: *People v. Lecison*, 16 Cal. 98; *People v. Chambers*, 18 Cal. 382; *People v. Ah Ki*, 20 Cal. 177; *People v. Kelly*, 28 Cal. 424; *People v. Rodundo*, 44 Cal. 538; *People v. Gill*, 45 Cal. 285; *People v. Norega*, 48 Cal. 123; *People v. Ah Sing*, 59 Cal. 400; *People v. Clough*, 59 Cal. 438; *People v. Velarde*, 59 Cal. 457, 463. An instruction, however, that the possession of stolen property, supported by other evidence tending to show guilt, is a strong circumstance tending to show guilt, is not erroneous by reason of the use of the word "strong": *People v. Ah Sing*, 59 Cal. 400; *People v. Titherington*, 59 Cal. 598. To justify the inference of guilt from the pos-

session of the fruits of crime, it is important that it be a recent possession, or so soon after the commission of the crime as to be at first view not perfectly consistent with innocence: 3 Greenl. Ev., sec. 33; *People v. Swinford*, 57 Cal. 86. So, to raise such presumption, it is necessary that the stolen property should be found in the exclusive possession of the prisoner. A constructive possession is insufficient: 3 Greenl. Ev., sec. 33. And to justify the inference of defendant's guilt from possession, it must also appear "that the possession was personal, and that it involved a distinct and conscious assertion of possession by him. And even then such possession may be explained": *People v. Hurley*, 60 Cal. 74. In this case the question of possession as evidence is carefully discussed.

**Res gestæ.** — Declarations and circumstances which are contemporaneous with the main fact under consideration, and which are so connected with it as to illustrate its character, are not regarded as hearsay, but they are admissible as original evidence: Wharton's Crim. Ev., sec. 263. On an indictment for murder, it is admissible to show that, immediately after shooting deceased, the defendant turned and fired at two other persons. It is part of the *res gestæ*: *Blanton v. State*, 24 Pac. Rep. 439 (Wash.).

Declarations of the deceased concerning the circumstances attending the receipt of his fatal wound, made at a time immediately subsequent to the infliction of the wound, and so soon as to preclude the idea of deliberate design, are to be regarded as contemporaneous, and therefore admissible: *People v. Vernon*, 35 Cal. 49. So where, on the trial of a person charged with an assault with intent to commit murder, evidence has been introduced tending to show that defendant was first assaulted by the injured party and several other persons, the statements of the latter at the time of the assault, illustrative of its object and the motive prompting it, are admissible as part of the *res gestæ*: *People v. Roach*, 17 Cal. 297; see also *People v. Arnold*, 15 Cal. 477. So declarations of a person who has been mortally wounded are admissible as evidence, if part of the *res gestæ*, although not made with a sense of impending dissolution: *Commonwealth v. McPike*, 3 Cush. 181; *Commonwealth v. Hackett*, 2 Allen, 136; *State v. Porter*, 34 Iowa, 131; *Jackson v. State*, 52 Ala. 305. But such is not the case when they relate to anything beyond the *corpus delicti*: Wharton's Crim. Ev., sec. 296; see *Denton v. State*, 1 Swan, 279; *Donnelly v. State*, 26 N. J. L. 463, 601; *Jackson v. State*, 52 Ala. 305; *Crookham v. State*, 5 W. Va. 510. Declarations of the deceased at the time he was shot are admissible: *People v. Brown*, 59 Cal. 350, 353; and so where declarations after deceased's poisoning, as to his belief in the cause of his death: *People v. Taylor*, 59 Cal. 640. Statements of the deceased concerning the difficulty in which he was wounded, made some time after he was wounded, but at a time he did not expect to die, are not admissible on defendant's behalf: *People v. McLaughlin*, 44 Cal. 435; *People v. McCauley*, 45 Cal. 146; *People v. Ah Lee*, 60 Cal. 85, discussing the point fully. The declarations are not required to be precisely concurrent, in point of time, with the principal



fact, if they spring out of the principal transaction, if they tend to explain it, are voluntary and spontaneous, and are made at a time so near it as to preclude the idea of deliberate design: *People v. Vernon*, 35 Cal. 51; 1 Greenl. Ev., sec. 108; *Mitchum v. State*, 11 Ga. 615; *Commonwealth v. McPike*, 3 Cush. 181. They must be contemporaneous with the act to which they are intended to give character: *Aguirre v. Alexander*, 58 Cal. 21; *Emerie v. Alvarado*, 64 Cal. 529. Declarations of the deceased, in a prosecution for manslaughter, made before the meeting with the accused, to the effect that he did not intend to assault accused, are not admissible: *People v. Carlton*, 57 Cal. 83; nor his declarations, made half an hour after the shooting, as to what he intended to do with accused: *People v. Westlake*, 62 Cal. 303. Evidence of accused's manner and conduct when arrested is admissible: *People v. Shem Ah Fook*, 64 Cal. 380. Bloody clothing worn by deceased at the time of the homicide is admissible as part of the *res gestæ*: *People v. Hong Ah Duck*, 61 Cal. 387; *People v. Majors*, 2 West Coast Rep. 580; and evidence of the condition of the body: *Id.* Possession by defendant of two bars of bullion shortly after the murder of deceased, and the loss from his person of two bars of bullion, together with evidence of defendant's known poverty, is admissible to connect defendant with the crime: *People v. Foster*, 64 Cal. 297. So it is permissible to show that the wounded man, in a trial for assault, pointed to the accused, and told witness to arrest him, and that accused thereupon ran away: *People v. Lock Wing*, 61 Cal. 80; and that the deceased, shortly after the infliction of the mortal wound, pointed to the accused, said he did it, and that there was no cause for it: *People v. Abbott*, 4 West Coast Rep. 132.

#### **Reputation and character of defendant.**

— The defendant in a criminal action is entitled to prove his previous good character for honesty and integrity. Such proof must be taken in consideration by the jury in determining the question of guilt or innocence. When proved, it is a circumstance tending in a greater or less degree to establish his innocence: *People v. Stewart*, 28 Cal. 395; *People v. Ashe*, 44 Cal. 288; *People v. Ruina*, 45 Cal. 292; *People v. Shepardson*, 49 Cal. 631; *People v. Casey*, 53 Cal. 360. Evidence on this subject must not be as to a particular fact, but with reference to the whole case then being tried: *People v. Milgate*, 5 Cal. 127. On a trial for murder, the character of the defendant for peace and quiet is involved in the issue of not guilty: *People v. Stewart*, 28 Cal. 395, overruling *People v. Josephs*, 7 Cal. 129, and *People v. Lombard*, 17 Cal. 316. The bad character of the defendant is never admissible in evidence against a defendant as foundation for presuming guilt: *State v. Lapage*, 56 N. H. 245; *State v. Hare*, 74 N. C. 591; *Harrison v. State*, 37 Ala. 154; *People v. Fair*, 43 Cal. 137. The law presumes his character good, and when this presumption is met by *prima facie* evidence of guilt, he may introduce evidence of his good character: *People v. Fair*, 43 Cal. 137. The prosecution may then, in rebuttal, show that his character is bad; but not until then can his character be impeached: *People v. Fair*, 43 Cal. 137. The failure of the defendant to introduce

evidence of his good character cannot be considered by the jury as a circumstance against him: *Ormsby v. People*, 53 N. Y. 472; *People v. White*, 24 Wend. 520.

#### **Reputation and character of deceased:**

See "Character," *supra*, in this note. The reputation of the deceased cannot be given in evidence, except where the circumstances of the case raise a doubt in regard to the question as to whether the prisoner acted in self-defense or not: *People v. Murray*, 10 Cal. 309; *People v. Lombard*, 17 Cal. 316; *People v. Anderson*, 39 Cal. 703. Whether the deceased was a dangerous man or not is immaterial; his reputation as such constitutes the legitimate subject of inquiry: *People v. Anderson*, 39 Cal. 703. Such evidence is admissible only when it tends to prove that the prisoner had some grounds, as a reasonable man, to fear that he was himself about to receive some bodily harm, and that he acted under the influence of fear: *People v. Murray*, 10 Cal. 309; *People v. Edwards*, 41 Cal. 640. Where testimony as to the character of the deceased has been introduced by the defendant, the prosecution may also introduce testimony upon the same point: *People v. Iams*, 51 Cal. 115.

#### **Reputation and character of witness.**

— Where the defendant proves that a witness called and examined for the prosecution has been convicted of a felony, it is an assault upon his character, and the prosecution may, in rebuttal, examine witnesses to prove that the reputation of the witness for truth and integrity is good in the community where he resides: *People v. Amanacus*, 50 Cal. 233. So where evidence is introduced to show that a witness has been suborned, evidence of his good character for truth and veracity is admissible: *People v. Ah Fat*, 48 Cal. 61.

**Threats.** — For the purpose of showing the intent of the accused and the state of his mind toward the person threatened, threats made by him prior to the commission of the alleged offense may be shown against him: *Aycok v. State*, 2 Tex. App. 381; *Thrasher v. State*, 3 Tex. App. 281; *Commonwealth v. Madam*, 102 Mass. 1; *Cluck v. State*, 40 Ind. 263; *Nichols v. Commonwealth*, 11 Bush, 575. But threats made by the defendant against one other than the deceased cannot be shown to have been made immediately prior to the homicide: *People v. Henderson*, 28 Cal. 466. Where the defendant, to excuse or mitigate his acts, claims they were in self-defense, the particulars of the transaction being material, he may give in evidence the prior conduct, threats, or other utterances of the person with whom he was contending, for the purpose of showing that the circumstances were such as to excite his reasonable fears, and that his life was in danger, or that he was in serious danger of bodily harm, and therefore his act justifiable: *People v. Williams*, 17 Cal. 142; *People v. Anderson*, 39 Cal. 703; *State v. Robertson*, 30 La. Ann. 340; *Holloway v. Commonwealth*, 11 Bush, 344; *State v. Turpin*, 77 N. C. 473. To be admissible, however, it should appear that the threats, etc., were known to the defendant prior to the transaction: *People v. Henderson*, 28 Cal. 466; *People v. Scoggins*, 37 Cal. 676. But in a case of homicide, where it is doubtful which party commenced the affray, threats made by the



deceased are admissible on the part of the defendant, although unknown to him at the time of the homicide, as facts tending to illustrate the question as to which was the first assailant: *People v. Scoggins*, 37 Cal. 676; *People v. Arnold*, 15 Cal. 476; *People v. Alivire*, 55 Cal. 263; *People v. Travis*, 56 Cal. 251. And as to the admissibility of threats to prove malice, see *People v. Hong Ah Duck*, 61 Cal. 387. See *People v. Henderson*, 28 Cal. 466. Without some evidence or facts relating to the homicide, threats communicated to the defendant are not necessarily admissible: *People v. Taing*, 53 Cal. 602. And see *People v. Iams*, 57 Cal. 115, where the deceased, though having made threats previously, was not in any position to carry them into effect when he was shot.

**Credibility of witnesses.** — The jury are the exclusive judges of the credibility of witnesses: *People v. Eckert*, 16 Cal. 110; *People v. Hicks*, 53 Cal. 354; *People v. Sprague*, 53 Cal. 491. This applies to the credibility of an accomplice, as well as of other witnesses: *People v. Gibson*, 53 Cal. 601. A party who calls a person as his witness indorses his credibility, and is concluded by his statement: *People v. Anderson*, 26 Cal. 130. When the defendant becomes a witness in his own behalf, the jury are to judge of his credibility the same as of other witnesses: *People v. Cronin*, 34 Cal. 192; *People v. Nichols*, 7 Pac. C. L. J. 436.

**Cross-examination.** — If the testimony of a witness is contradictory or confused, the greatest latitude should be allowed in cross-examination: *People v. Williams*, 18 Cal. 187. Disclosing part of a conversation entitles the opposite party to all: *People v. Strong*, 30 Cal. 151; *People v. Murphy*, 39 Cal. 52. For the purpose of impeaching a witness, he may be asked on cross-examination whether he has not on a former occasion given a different account of the matter: *People v. Robles*, 29 Cal. 421. The object of such examination is for the purpose of testing the credibility of the witness and the truth of his testimony: *People v. Bulard*, 51 Cal. 551. It should be confined to matters which have been elicited on direct examination: *People v. Miller*, 33 Cal. 99. A defendant who offers himself as a witness in his own behalf is subject to the same rules of cross-examination as other witnesses: *People v. McGungill*, 41 Cal. 429; *People v. McCauley*, 45 Cal. 146; *People v. Russell*, 46 Cal. 121. He may be cross-examined by the prosecution respecting an occurrence about which he has testified in chief, for the purpose of showing express malice, and in order to lay a foundation to impeach his credibility: *People v. Dennis*, 39 Cal. 625. Recalling a witness for further cross-examination rests largely in the discretion of the trial court: *People v. Parton*, 49 Cal. 632; *People v. Keith*, 50 Cal. 137. A witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence if he should deny it: *People v. McKeller*, 53 Cal. 65; *People v. Bell*, 53 Cal. 119. But when the question asked calls for a response in respect to a matter which the party asking the question would have a right to prove as an independent fact, this rule does not apply: *People v. Chin Mook Sow*, 51 Cal. 597.

**Evidence of another offense:** See notes to §§ 1238, 1244, *ante*. The test of the admissibility of evidence of other offenses than the one charged is the connection between the offenses in the mind of the criminal. When such a connection is shown, evidence of the others is admissible for the purpose of establishing identity in developing the *res gestæ*, or in making out the guilt of the defendant by a chain of circumstances connected with the crime for which he is on trial. If, however, the evidence of another offense serves in no way to identify the thing stolen, or connect the defendant with the crime for which he is on trial, it forms no part of the *res gestæ*, and as evidence of a distinct offense, unconnected in character and purpose with the offense charged, is inadmissible: *People v. Cunningham*, 66 Cal. 668.

**Impeaching adverse witness.** — Particular wrongful acts cannot be proved for the purpose of impeaching an adverse witness, but the evidence must be confined to the general reputation of the witness for truth, honesty, or integrity: *People v. Methvin*, 53 Cal. 68. The question of veracity is one of fact for the jury, and it is not essential to the successful impeachment of a witness that the impeaching witnesses should testify that they would not believe him under oath: *People v. Tyler*, 35 Cal. 553. A witness called to impeach another may answer that he would not believe such other under oath: *Stevens v. Irwin*, 12 Cal. 306. The court may in its discretion limit the number of impeaching witnesses: *People v. Murray*, 41 Cal. 67. If the defendant in a criminal case introduces evidence tending to show that an adverse witness was suborned and has been paid for his testimony, the good character of such witness for truth and veracity may be shown in rebuttal: *People v. Ah Fat*, 48 Cal. 61.

**Contradictory statements.** — Where the credibility of a witness is to be assailed by proof of something he may have said elsewhere, contradictory of his testimony as given, the witness must first be inquired of concerning it, and the time, place, and person involved in the supposed contradiction must be called to his attention: *People v. Devine*, 44 Cal. 452. When this is done, his credit may be impeached by proof of contrary statements: *People v. Lawrence*, 21 Cal. 368; *People v. Robles*, 29 Cal. 421; *People v. Nyland*, 41 Cal. 129; *People v. Donovan*, 43 Cal. 162; *People v. Doyell*, 48 Cal. 85.

**Separation and exclusion of witnesses.** — In general, the court will, on the application of either of the parties, direct that all the witnesses but the one under examination shall leave the court: Roscoe on Evidence, 162; *People v. Duffy*, 1 Wheel. C. C. 123. And the right of either party to require the unexamined witness to retire may be exercised at any period of the case: *People v. Duffy*, 1 Wheel. C. C. 123. What is sometimes called placing witnesses under the rule is to call them all to the bar of the court, swearing them, and then giving them the charge not to remain in court while any one is being examined, under penalty of contempt. Witnesses may be excluded while one is being examined, on motion, in the sound discretion of the court: *People v. Garnett*

29 Cal. 622; *People v. Sprague*, 53 Cal. 491. A witness who remains in the court-room after an order excluding him may still be a witness,

but he is liable to be punished for a contempt of court: *People v. Boscoritch*, 20 Cal. 436.

*Court shall decide questions of law — Rules governing criminal practice.*

§ 1310. The court shall decide all questions of law which shall arise in the course of the trial, and the trial shall be conducted in the same manner as in civil actions. [February 24, 1891, § 70.]

**Conduct of trial.** — The order of trial is in the discretion of the court, in the exercise of which the court is not required to state any reasons therefor; and on appeal it will be presumed to have exercised its discretion wisely: *People v. Haun*, 44 Cal. 96; *People v. Strong*, 46 Cal. 302. The trial court should adhere strictly to the provisions of the statute in respect to the mode of trial in criminal cases, rather than risk a reversal of the judgment by a deviation from the specific modes of procedure prescribed, even when the deviation does not seem to it material: *People v. Arnold*, 15 Cal. 476. A court has no right to submit to the determination of a jury questions of mere law. The pertinency of evidence is a question of law which the court should determine: *People v. Ivy*, 49 Cal. 56. The mere order in which evidence is to be introduced upon the trial rests in the discretion of the court trying the cause: *People v. Shainbold*, 51 Cal. 468. The defendant in a criminal action is as much bound to produce testimony to rebut testimony for the prosecution, which merely tends to prove his guilt, as any other testimony introduced by the prosecution: *People v. Kelly*, 28 Cal. 423. Failure of the clerk of the court to read the indictment and to state the defendant's plea to the jury is not such error as will warrant a reversal of the judgment, it appearing that the jury were, from the commencement of the trial, fully informed of the precise charge against the defendant, and of the issue raised by his plea of not guilty: *People v. Sprague*, 53 Cal. 491; followed in *People v. Gilbert*, 57 Cal. 96, 99.

**Argument:** See § 354, *ante*. The argument of the case must be made when the evidence is concluded, and not upon the case made out by the prosecution: *People v. Williams*, 43 Cal. 344. Counsel, as a general rule, are not allowed to read the law to the jury, but there are cases in which they may, by way of illustration, read to the jury reported cases or extracts from text-books, subject to the sound discretion of the court: *People v. Anderson*, 44 Cal. 65; see *People v. Keenan*, 13 Cal. 584. Courts may limit counsel to a reasonable time in presenting cases to juries. This discretion, which is necessarily an enlarged one, should be carefully exercised; and if ever done in capital cases, it should only be on very extraordinary and peculiar occasions. If the court imposes a limitation of time upon counsel against their consent, it is done at the risk of a new trial: *People v. Keenan*, 13 Cal. 581. It is irregular for counsel for the prosecution, against the objections of defendant's counsel, to comment in his argument to the jury upon the refusal of defendant to be cross-examined to the whole case; and for the court to permit it is erroneous: *People v. McGungill*, 41 Cal. 429.

That it is improper for counsel to aver and argue from facts as to which no evidence has been offered, and that such procedure by one party will not justify it on the part of the other, see *People v. Mitchell*, 62 Cal. 411. Where new juror is called to take the place of one that has been taken sick, the trial must begin anew, and "that being so, it follows that the defendant was entitled, after the change had been effected, to all the challenges which the law gave him in the first instance": *People v. Stewart*, 63 Cal. 60, 61.

**Instructions:** See § 354, *ante*. Before receiving a verdict, the court may correct its erroneous instructions, and have the jury act upon them as altered: *Doctor Jack v. Territory*, 2 Wash. 101. Objections to instructions cannot be made in appellate court, unless excepted to below: *Smith v. United States*, 2 Wash. 262. In criminal cases, instructions should not be given to the jury unless founded upon some evidence that has been adduced at the trial. They should be predicated upon some theory, logically deducible from at least some portion of the testimony: *People v. Roberts*, 6 Cal. 214; *People v. Graham*, 21 Cal. 261; *People v. Sanchez*, 24 Cal. 17; *People v. Murphy*, 47 Cal. 103; *People v. Estrado*, 49 Cal. 171; *People v. Vasquez*, 49 Cal. 560; *People v. Turley*, 50 Cal. 469; *People v. Atherton*, 51 Cal. 495; *People v. Cummings*, 57 Cal. 88; *People v. Hunt*, 59 Cal. 435; *People v. De Silvera*, 59 Cal. 592; *People v. Gilbert*, 60 Cal. 108, 111. Alleged errors upon merely abstract propositions of law, in giving instructions, will not be reviewed: *People v. Walsh*, 43 Cal. 447. A defendant who seeks a reversal of judgment on the ground of error in giving or refusing instructions must have sufficient of the facts in the case set forth in the record to show that the instructions requested are pertinent: *People v. Smith*, 57 Cal. 130; *People v. Dick*, 32 Cal. 213. If an instruction in a case is asked, which refers to facts which there is no evidence to prove, it is error to give it: *Miller v. Territory*, 3 Wash. 554. But if given, although in fact erroneous in the abstract, it will not be regarded as an error for which the judgment will be reversed, unless it be manifest that the jury were misled by it to the prejudice of the defendant: *People v. Cochran*, 61 Cal. 548, 551. If misleading, however, the judgment will be reversed: *Miller v. Territory*, 3 Wash. 554. If the action of the court in giving or refusing such instructions is erroneous under any possible state of facts, the appellate court will review it, notwithstanding there is no evidence in the record: *People v. Dick*, 32 Cal. 213; *People v. Torres*, 38 Cal. 141; *People v. Padilla*, 42 Cal. 535. If an instruction asked for by the defendant properly states the law, it should be given in the very words asked: *People v.*



*Williams*, 17 Cal. 142. But if already given, it need not be repeated: *Leonard v. Territory*, 2 Wash. 381; *People v. Kelly*, 28 Cal. 424; *People v. Strong*, 30 Cal. 154; *People v. Murray*, 41 Cal. 66; *People v. Hope*, 62 Cal. 291; *People v. Hong Ah Duck*, 61 Cal. 394. An instruction which does not correspond with law is erroneous, and should be refused: *Leonard v. Territory*, 2 Wash. 381. Nor is the court obliged to give the reason or history of the law which is given to the jury: *People v. Ramirez*, 56 Cal. 533, 536. When refused because similar instructions are already given, the court should be careful to place its refusal upon such ground, or the jury may be misled thereby: *People v. Hurley*, 8 Cal. 390; see *People v. Ramirez*, 13 Cal. 172; *People v. King*, 27 Cal. 507. But the omission to mark instruction refused because already given, if an error, is an immaterial one, not prejudicing defendant: *People v. Ramirez*, 56 Cal. 533, 538. A defendant cannot complain of an instruction unless he has been injured thereby: *People v. Nichol*, 34 Cal. 211; *People v. Ah Kong*, 49 Cal. 6; *People v. De Silveira*, 59 Cal. 592; *People v. Messersmith*, 61 Cal. 246. Neither can he complain of the failure of the court to instruct the jury upon a particular point, if he fails to ask for an instruction upon that point: *People v. Haun*, 44 Cal. 96; *People v. Ah Wee*, 48 Cal. 236. It is not error to refuse instructions that, "if two persons are engaged in a fight, and a third person assaults one of the parties, and the party assaulted thereupon kills the assaulting party, then such killing is no more than manslaughter": *McAllister v. Territory*, 1 Wash. 360; or that where one of two combatants kills a third person, who interferes, without reasonable notice, to prevent one of the contestants from killing the other, such killing cannot be murder in the first degree: *McAllister v. Territory*, 1 Wash. 360.

**Whole charge to be considered.** — In reviewing the instructions of the lower court, the whole charge will be taken together, and if, without straining any portion of the language, it harmonizes as a whole, and fairly and correctly presents the law bearing on the issues tried, the appellate court will not disturb the judgment because a separate instruction does not contain all the conditions and limitations which are to be gathered from the entire text: *White v. Territory*, 24 Pac. Rep. 447 (Wash.); *People v. Bagnell*, 31 Cal. 409; *People v. Doyell*, 48 Cal. 85; *People v. Welch*, 49 Cal. 174; *People v. Nelson*, 56 Cal. 77, 81; *People v. Gray*, 61 Cal. 164, 182; *People v. Morine*, 61 Cal. 370; *People v. De Silveira*, 59 Cal. 59; *People v. Hurtado*, 63 Cal. 289, 292; *People v. McDowell*, 64 Cal. 467; *People v. Core*, 59 Cal. 390.

*Jury must be kept together — Exceptions to the rule.*

§ 1311. [1089.] Juries in criminal cases shall not be allowed to separate, except by consent of the defendant and the prosecuting attorney, but shall be kept together, without meat or drink, unless otherwise ordered by the court, to be furnished at the expense of the county.

**Separation of jury:** See §§ 359, 362, *ante*. Defendant cannot afterwards complain if he

**Allusions to evidence and facts.** — It is not error for the judge, in charging the jury, to mention as a fact a thing which has been established in the course of the trial to be a fact beyond all controversy: *Edwards v. Territory*, 1 Wash. 195. If it becomes necessary to allude to the evidence, the court shall inform the jury that they are the exclusive judges of all questions of fact: See *ante*, § 354. Judges may determine and charge a jury whether there is any evidence with regard to an issue or tending to sustain a fact on which a judgment may depend: *People v. Welch*, 49 Cal. 174. So if testimony has been introduced to prove a certain matter, the court may instruct the jury that testimony has been introduced tending to prove such matter: *People v. Vasquez*, 49 Cal. 560.

**Oral instructions.** — The charge may be oral, if no request has been made for it to be in writing, or if no instructions have been requested: See *ante*, § 354. By mutual consent, the court may charge the jury orally; *People v. Kearney*, 43 Cal. 383. On appeal, the presumption is always that the instructions given were in writing, unless the contrary affirmatively appear: *People v. Chung Lit*, 17 Cal. 320; *People v. Garcia*, 25 Cal. 531; *People v. Shuler*, 28 Cal. 496. Where a jury has returned in court with a verdict improper in form, the court may tell them verbally that it is not in form, and direct them to retire and bring in a proper verdict: *People v. Bonney*, 19 Cal. 426.

**Miscellaneous matters.** — Courts may require instructions, that the parties desire to have given, to be handed to them before the argument of the case commences; but if it becomes necessary, from the course of the argument, to give other instructions than those requested, to prevent injustice, they should be given: *People v. Sears*, 18 Cal. 635. Irrelevant portions of an instruction may be stricken out: *People v. Cotta*, 49 Cal. 166. A judge, other than the one who tried the case, may, by consent, charge the jury and receive their verdict: *People v. Henderson*, 28 Cal. 471; see *People v. Hobson*, 17 Cal. 424. Alleged errors in giving or refusing instructions will not be reviewed unless embodied in a bill of exceptions, or indorsed by the judge, showing the action of the court thereon: *People v. Thompson*, 28 Cal. 214; *People v. Tetherow*, 40 Cal. 286. If the jury are erroneously instructed as to what the law is in one part of the charge, a correct statement of the law in another part does not cure the error: *Baxter v. Waite*, 2 Wash. 228. If contradictory in a material point, a new trial will be granted: *People v. Campbell*, 30 Cal. 312; *People v. Valencia*, 43 Cal. 552; *People v. Anderson*, 44 Cal. 65; *People v. Wong Ah Ngow*, 54 Cal. 151; *People v. Messersmith*, 57 Cal. 575.

consented to the separation of the jury in a capital case: *Hartigan v. Territory*, 1 Wash.



447. Allowing one or more jurors to retire for a necessary purpose under direct supervision of a sworn officer is not a separation of the jury: *Edwards v. Territory*, 1 Wash. 195.

**Jury may take what:** See § 364, *ante*. They may take the written charge of the judge, and a copy of the statutes: *Edwards v. Territory*, 1 Wash. 195; but taking papers or documents not allowed by court, and to the prejudice of the substantial rights of defendant, is ground for a new trial: See § 1326, *post*.

**Jury must return for information:** See § 365, *ante*. It is the duty of the jury, if there is any disagreement between them as to the testimony, or if they desire information upon any point of law arising in the cause, to return into court for the required information: *People v. Hersey*, 53 Cal. 574.

**Discharge of jury, effect of:** See § 366, *ante*. The jury in a criminal case may be dis-

charged by the consent of both parties, entered in the minutes, although they have not agreed upon a verdict: *People v. Webb*, 38 Cal. 467. Such discharge does not amount to an acquittal of the defendant: *Ex parte McLaughlin*, 41 Cal. 212; *People v. Cage*, 48 Cal. 323. The discharge of the jury on account of the sickness of a juror, etc., as stated in § 366, *ante*, does not amount to an acquittal of defendant: *Ex parte McLaughlin*, 41 Cal. 212; *People v. Cage*, 48 Cal. 323. The power conferred upon the court, however, to discharge a jury without the defendant's consent is not an absolute, uncontrolled, discretionary power. It must be exercised in accordance with established legal rules, and a sound legal discretion in the application of such rules to the facts and circumstances of each particular case, and in this state is subject to review by an appellate court: *Ex parte McLaughlin*, 41 Cal. 219.

*Court may order view by jury of place of crime.*

§ 1312. [1090.] The court may order a view by any jury impaneled to try a criminal case.

**View of place of crime.** — The court, during a trial for murder, has jurisdiction to make an order for a view by the jury, in the presence of the defendant and his counsel, of the place where the offense is charged to have been committed, or in which any material fact occurred, whether such place lies in the county

where the cause is on trial, or in any other county of the state: *People v. Bush*, 71 Cal. 602; and during the view, a person appointed by the court to show the jury the places named in its order may point out and designate such places to the jury: *People v. Bush*, 71 Cal. 602.

*Defendant has right be tried separately, where two or more are indicted jointly.*

§ 1313. When two or more defendants are indicted or informed against jointly, any defendant requiring it shall be tried separately. [February 24, 1891, § 71.]

**Separate trials.** — A defendant in a joint indictment or information has a right to demand a separate trial, or to waive this right. If tried jointly, they must all unite in their challenges, both peremptory and for cause: *People v. McCalla*, 8 Cal. 301. When a co-defendant elects to be tried separately, he is a competent witness for the other defendant charged with the same offense, the credibility

of his testimony being left to the jury: *People v. Labra*, 5 Cal. 183; *People v. Newberry*, 20 Cal. 439; see *People v. Trim*, 39 Cal. 75. Where defendants in open court waived separate trial, but afterward, before the jury were sworn, moved for separate trials, it was held within the discretion of the court to refuse the application: *People v. Alviso*, 55 Cal. 230.

*Defendant may be discharged to give evidence for state or for co-defendant*  
— *Such discharge is bar to another prosecution.*

§ 1314. [1092.] When two or more persons are included in one prosecution, the court may, at any time before the defendant has gone into his defense, direct any defendant to be discharged, that he may be a witness for the state. A defendant may also, when there is not sufficient evidence to put him on his defense, at any time before the evidence is closed, be discharged by the court, for the purpose of giving evidence for a co-defendant. The order of discharge is a bar to another prosecution for the same offense.

**Discharge of one of several defendants, etc.** — This section contemplates the case of a joint indictment of two or more persons, a joint trial under the indictment, and an appli-

cation by the district attorney to the court for the discharge of one of the defendants before he has gone into his defense. On the happening of these contingencies, the court is author-

ized to discharge the particular defendant from the indictment, that he may be a witness for the people: *People v. Bruzo*, 24 Cal. 41. Such discharge is, in legal effect, an acquittal: *Id.* Promises by a committing magistrate, with the assent and concurrence of the district attorney, to a person under arrest, that if he will become a witness for the people against other

persons under arrest for the same offense he shall be acquitted, furnish no grounds for arresting a judgment against such person if he is subsequently indicted and convicted of that offense, although, induced by such promises, he did so testify, and thereby implicated himself: *People v. Indian Peter*, 48 Cal. 250.

*Defendant not to be discharged because of mistake in charging proper offense — He may be recognized to answer offense shown.*

§ 1315. [1093.] When it appears, at any time before verdict or judgment, that a mistake has been made in charging the proper offense, the defendant shall not be discharged if there appear to be good cause to detain him in custody; but the court must recognize him to answer the offense shown, and if necessary, recognize the witnesses to appear and testify.

*Venue may be corrected.*

§ 1316. When it appears, at any time before verdict or judgment, that the defendant is prosecuted in a county not having jurisdiction, the court may order the venue of the indictment or information to be corrected, and direct that all the papers and proceedings be certified to the superior court of the proper county, and recognize the defendant and witnesses to appear at such court, on a day specified in the order, and the prosecution shall proceed in the latter court in the same manner as if it had been there commenced. [*Feb. 24, '91, § 72.*]

*Jury may be discharged without prejudice to prosecution when.*

§ 1317. When a jury has been impaneled in either case contemplated in sections thirteen hundred and fifteen and thirteen hundred and sixteen, such jury may be discharged without prejudice to the prosecution. [*February 24, 1891, § 73.*]

*When conviction or acquittal is bar to another prosecution.*

§ 1318. When the defendant has been convicted or acquitted upon an indictment or information of an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment or information for the offense charged in the former, or for any lower degree of that offense, or for an offense necessarily included therein. [*February 24, 1891, § 74.*]

*Jury may find any degree of the offense charged.*

§ 1319. Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense. [*February 24, 1891, § 75.*]

**Degrees.** — The court must not instruct the jury what degree to find; that is for the jury: *People v. Hunt*, 59 Cal. 430.

*Defendant may be found guilty of offense included in that charged.*

§ 1320. In all other cases, the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information. [February 24, 1891, § 76.]

**Greater contains the less.** — The jury may find a defendant guilty of any offense which is necessarily included in the charge in the indictment: *Clarke v. Territory*, 1 Wash. 68; *Timmerman v. Territory*, 3 Wash. 445; *People v. Davidson*, 5 Cal. 133; *Ex parte Ah Cha*, 40 Cal. 426; *People v. Congleton*, 44 Cal. 94; *People v. Nelson*, 56 Cal. 77, 80; *People v. Holland*, 59 Cal. 364. Thus a conviction for manslaughter may be had under an indictment

charging murder in the first degree: *White v. Territory*, 3 Wash. 397. Where the defendant is convicted of an offense of a lesser grade than that for which he was indicted, and the lesser offense is included in the greater, the verdict is followed by the same judgment as though the defendant had been indicted for the offense of which he was convicted: *People v. English*, 30 Cal. 215.

*Jury may render verdict as to one or more where several are charged.*

§ 1321. On an indictment or information against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly. [February 24, 1891, § 77.]

*Reconsideration of verdict where jury have mistaken law.*

§ 1322. When there is a verdict of conviction in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion, and direct the jury to reconsider the verdict; and if after such reconsideration they return the same verdict, it must be entered, but it shall be good cause for new trial. When there is a verdict of acquittal, the court cannot require the jury to reconsider it. [February 24, 1891, § 78.]

*Defendant acquitted by reason of insanity may be committed or put under bonds.*

§ 1323. When any person indicted or informed against for an offense shall, on trial, be acquitted by reason of insanity, the jury, in giving their verdict of not guilty, shall state that it was given for such cause; and thereupon, if the discharge or going at large of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the community, the court may order him to be committed to prison, or may give him into the care of his friends, if they shall give bonds, with surety to the satisfaction of the court, conditioned that he shall be well and securely kept, otherwise he shall be discharged. [February 24, 1891, § 79.]

**Insanity as defense must be proved to the satisfaction of the jury; the law presumes every man sane and possessed of his faculties** until the contrary is proved: *McAllister v. Territory*, 1 Wash. 360.

*Rendition of verdict.*

§ 1324. When the jury have agreed upon their verdict, they must be conducted into court by the officer having them in charge. Their names must then be called, and if all appear, their verdict must be



rendered in open court; and if all do not appear, the rest must be discharged without giving a verdict, and the cause must be tried again. [February 24, 1891, § 80.]

**Failure to call names of jury.** — Where the verdict is received without calling the names of the jury, the omission to call the names is an irregularity which does not prejudice the defendant, if in fact the jury were all present, and declared the verdict: *People v. Robundo*, 44 Cal. 541.

**Polling.** — The right of polling the jury may be demanded by either party, or the court may direct it on its own motion: *Harris v. State*, 31 Ark. 196; *State v. Young*, 77 N. C. 498. The proper time to demand this right is after the verdict is given and before it is filed: See § 371, *ante*. Each of the jurors should be asked, "Is this your verdict?": *State v. Boyain*, 12 La. Ann. 264; *State v. John*, 8 Ired. 330. If any juror dissent, which he may of right do, the verdict is without validity, and the jury must again be sent out: *United States v. Potter*, 6 McLean, 189. See § 371, *ante*. But if the dissenting juror agree to the verdict before the jury again retire, such verdict may be recorded without their again retiring: *Gose v. State*, 6 Tex. App. 121.

**Informal verdict.** — When the verdict returned by the jury is informal, it is the duty of the court to explain to them its defects, and direct them to put it in proper form: *People*

*v. Dick*, 34 Cal. 663; *People v. Jenkins*, 56 Cal. 4. Informality not vitiating: See *People v. Gilbert*, 57 Cal. 96.

Until the jury are discharged, a verdict may be amended, but not after: *People v. Ah Ye*, 31 Cal. 451; *People v. Jenkins*, 56 Cal. 4. The direction to the jury by the court, that there is an informality in their verdict, and that they shall retire and correct it, need not be in writing: *People v. Bonney*, 19 Cal. 426.

**Verdict, how recorded:** See *ante*, § 372. Where the verdict, after finding defendant guilty, contained a recommendation of mercy, and the court directed it to be recorded without the recommendation, it was held not to be error: *People v. Lee*, 17 Cal. 76.

**Defendant is entitled to be present at the rendition of the verdict,** and is also entitled to be present when, if the jury cannot agree, the court discharges them. In the latter case, if the defendant is not present, it is, in law, an acquittal: *State v. Wilson*, 50 Ind. 487. If the defendant runs away pending the trial of a case requiring his presence, the jury may be discharged, and the prisoner will not be deemed to have been in jeopardy: *People v. Higgins*, 59 Cal. 357.

*Form of verdict — Punishment is to be fixed by the court, not by the jury.*

§ 1325. [1103.] When the defendant is found guilty, the court, and not the jury, shall fix the amount of fine and the punishment to be inflicted. The verdict of the jury may be substantially in the following form: —

"We, the jury, in the case of the State of Washington, plaintiff, against —, defendant, find the defendant (guilty or not guilty, as case may be).

(Signed)

A B, Foreman."

**Verdict, form of.** — "We, the jury in the case of the Territory of Washington against J. H. T., find the defendant guilty," is a substantial compliance with the above section, and

is good as a verdict of guilty of murder in the first degree: *Timmerman v. Territory*, 3 Wash. 445.

## CHAPTER XII.

## OF NEW TRIAL AND ARREST OF JUDGMENT.

- § 1326. New trial, application for, and causes for which it may be granted.  
 § 1327. Facts upon which application for new trial is based to be set out by affidavit.  
 § 1328. Causes for which judgment may be arrested.  
 § 1329. Judgment may be arrested without motion when.  
 § 1330. Defendant may be recommitted after arrest of judgment.  
 § 1331. Exceptions, rules governing the taking of.

*New trial, application for, and causes for which it may be granted.*

§ 1326. An application for a new trial must be made before judgment, and may be granted for the following causes materially affecting a substantial right of the defendant:—

1. When the jury has received any evidence, paper, document, or book not allowed by the court;
2. Misconduct of the jury;
3. Newly discovered evidence material for the defendant, which he could not have discovered with reasonable diligence, and produced at the trial;
4. Accident or surprise;
5. Error of law occurring at the trial, and excepted to by the defendant;
6. When the verdict is contrary to law and evidence; but not more than two new trials shall be granted for these causes alone. [February 24, 1891, § 81.]

**New trial.** — Granting or refusing a new trial is a matter within the discretion of the lower court: *Smith v. United States*, 1 Wash. 262. It should not be granted when made apparent to the court that it would avail nothing: *Tolmie v. Dean*, 1 Wash. 46. The only grounds upon which a new trial will be granted are those specified in the above section: *People v. Bernstein*, 18 Cal. 699; *People v. Fair*, 43 Cal. 137.

**Misconduct of jury.** — Where the jury, after retiring to deliberate upon their verdict, separate without permission of the court, the irregularity is sufficient, ordinarily, to set aside the verdict of guilty rendered by them: *People v. Brannigan*, 21 Cal. 337; *People v. Backus*, 5 Cal. 275. But it must be either shown as a fact or presumed as a conclusion of law that injury resulted from misconduct before a new trial will be granted: *People v. Symonds*, 22 Cal. 348; *People v. Lyle*, 4 West Coast Rep. 349, 351; *People v. Dennis*, 39 Cal. 625; *People v. Turner*, 39 Cal. 370. The retirement of several jurors for a few moments, with permission of the sheriff, and for a necessary purpose, is not a sufficient ground for granting a new trial, no misconduct being shown: *People v. Moore*, 41 Cal. 238; *People v. Bonney*, 19 Cal. 426. A new trial will not be granted because some of the jury may have conversed with third persons while deliberating on their verdict, if it be shown that such conversations were innocent: *People v. Symonds*, 22 Cal. 348;

see also *People v. Boggs*, 20 Cal. 432. The presumption is, that jurors perform their duty in accordance with the oath they have taken: *People v. Williams*, 24 Cal. 31; *People v. Lyle*, 4 West Coast Rep. 349. Affidavits on the question of misconduct of the jury being conflicting, the ruling of the court below will not be disturbed on appeal: *People v. Dye*, 62 Cal. 523. Insufficient evidence of misconduct of juror: See *People v. Anthony*, 56 Cal. 397; that it is not misconduct warranting a new trial for one of the jurors to visit during the trial the scene of the alleged burglary: *People v. Hope*, 62 Cal. 241. Entertaining of juror by counsel during progress of trial will not warrant a new trial unless the defendant was prejudiced: See *People v. Lyle*, 4 West Coast Rep. 349. The use of intoxicating liquors by the jury, without permission of the court or the consent of the defendant, and without the knowledge of either of them, is such misconduct as to require a new trial: *People v. Gray*, 61 Cal. 164, 183. Ordinarily the affidavits of jurors will not be received to impeach their verdict, unless it was determined by chance: *People v. Gray*, 61 Cal. 164, 183; *People v. Hughes*, 29 Cal. 257; *People v. Sprague*, 53 Cal. 491; note to *Crawford v. State*, 24 Am. Dec. 475–479; but a juror's affidavit may be used in support of a verdict which has been assailed for misconduct: *People v. Hunt*, 59 Cal. 430.

**Newly discovered evidence.** — A new trial on

this ground will not be granted unless it is apparent to the court that such evidence would alter the verdict: *Leschi v. Territory*, 1 Wash. 14. A motion for a new trial on the ground of newly discovered evidence should not be granted without a satisfactory showing of diligence, nor unless sufficient reason is shown why the evidence was not produced at the trial: *People v. Ah Ton*, 53 Cal. 741. Where there is reason to doubt that defendant, at the time of the trial, was ignorant of the existence of the evidence, and no attempt is made to procure it until after the trial, and no good reason for the delay is shown, a new trial ought not to be granted on the ground of newly discovered evidence: *People v. Cummings*, 57 Cal. 88. For a case where proper diligence was shown, the moving party having been prevented from getting the evidence earlier, see *People v. Stanford*, 64 Cal. 27. The affidavit of the witness, showing what his testimony will be, should be procured, or it should be shown that it could not be had: *People v. Bealoba*, 17 Cal. 389; *People v. Voll*, 43 Cal. 166; see also *People v. Miller*, 33 Cal. 99. Newly discovered evidence simply cumulative (*People v. Anthony*, 56 Cal. 397; *People v. Chin Ah Hong*, 61 Cal. 376), or designed to contradict witnesses, will not entitle to a new trial: *People v. Anthony*, 56 Cal. 397. Applications for new trials on account of newly discovered evidence are not favored by the courts. In the well-considered case of *Berry v. State*, 10 Ga. 511, it was said that it is in-

cumbent on the party who asks for a new trial on the ground of newly discovered evidence to satisfy the court, — 1. That the evidence has come to his knowledge since the trial; 2. That it was not owing to the want of due diligence that it did not come sooner; 3. That it is so material that it would probably produce a different verdict if the new trial were granted; 4. That it is not cumulative only, viz., speaking to facts in relation to which there was evidence on the trial; 5. The affidavit of the witness himself should be produced, or its absence accounted for; 6. A new trial will not be granted if the only object of the testimony is to impeach the character or credit of a witness.

*Erroneous rulings.* — Any substantial error of the court on a question or matter arising during the course of the trial is a proper ground for granting a motion for a new trial: *People v. Turner*, 39 Cal. 370.

*Verdict contrary to evidence.* — If the judge before whom the case was tried is satisfied that the conviction was obtained on the testimony of witnesses unworthy of belief, it is his duty, on application of defendant, to grant a new trial: *People v. Baker*, 39 Cal. 686. If the verdict is clearly not sustained by the evidence, a new trial will be granted: *People v. Lewis*, 36 Cal. 531.

*Contrary to law.* — A verdict is not contrary to law which finds the lowest offense within the charge in the indictment: *People v. Jamarillo*, 57 Cal. 111.

*Facts upon which application for new trial is based to be set out by affidavit.*

§ 1327. [1106.] When the application is made for a cause mentioned in the first, second, third, and fourth subdivisions of the preceding section, the facts on which it is based shall be set out in an affidavit.

*Causes for which judgment may be arrested.*

§ 1328. Judgment may be arrested on the motion of the defendant for the following causes: —

1. No legal authority in the grand jury to inquire into the offense charged, by reason of its not being within the jurisdiction of the court;
2. That the facts as stated in the indictment or information do not constitute a crime or misdemeanor. [February 24, 1891, § 82.]

*Judgment may be arrested without motion when.*

§ 1329. [1108.] The court may also, on its view of any of these defects, arrest the judgment without motion.

*Arrest of judgment by court.* — If the evidence shows that the offense of a defendant indicted as an accessory was not committed in the county where the indictment was found,

the court should arrest the judgment without the defendant making a motion to that effect: *People v. Hodges*, 27 Cal. 340. See *Ex parte Hartman*, 44 Cal. 34.

*Defendant may be recommitted after arrest of judgment.*

§ 1330. [1109.] When judgment is arrested in any case, and there is reasonable ground to believe that the defendant can be convicted of



an offense, properly charged, the court may order the defendant to be recommitted, or admitted to bail anew, to answer a new indictment [or information].

**Effect of arresting judgment.** — The effect of an order arresting a judgment in a criminal case is to place the defendant, as nearly as other and controlling rules of law will permit, in the same situation in which he

was before the indictment was found. Upon its entry he is entitled to his discharge, unless detained by virtue of some legal process or order: *Ex parte Hartman*, 44 Cal. 32.

### *Exceptions, rules governing the taking of.*

§ 1331. [1110.] Exceptions may be taken by the defendant, as in civil cases, on any matter of law by which his substantial rights are prejudiced.

**Bill of exceptions defined.** — It is a statement in writing, settled and signed by the judge, of the ruling of the court upon a question of law, the facts in view of which it was made, and the protest of counsel: *People v. Torres*, 38 Cal. 141.

**Exceptions, generally:** See §§ 390–396, *ante*. An exception lies to acts and conduct of the court, not of its officers: *People v. Torres*, 38 Cal. 142. If the same evidence has been several times objected to and ruled out by the court, there is no need to repeat the objection on every repetition of the question: *Tolmie v. Dean*, 1 Wash. 46. The court may properly treat the objection as continuing on every repetition of the question, unless something transpires to show that it is waived: *Tolmie v. Dean*, 1 Wash. 46; *People v. Melvane*, 39 Cal. 617. If a question to which an objection is interposed, overruled, and an exception taken, is not answered, no injury can result therefrom: *People v. Williams*, 45 Cal. 25.

**Specific exception must be pointed out.** — A general objection to the admissibility of evidence is insufficient. The particular ground upon which it is objected to should be stated: *People v. Apple*, 7 Cal. 289; *People v. Glenn*, 10 Cal. 37; *People v. Manning*, 48 Cal. 338. And in the supreme court counsel will not be heard to urge an exception except on the ground specified in the court below: *People v. Nichols*, 62 Cal. 518, 521. The proper time to make an objection to evidence is when it is offered. Moving to strike out evidence on grounds which might readily have been availed of to exclude it when offered ought not to be tolerated: *People v. Long*, 43 Cal. 446. Error occurring during the trial, to be available on appeal, must be excepted to at the time: *Brown v. Forest*, 1 Wash. 36; as to instructions: *Smith v. United States*, 1 Wash. 262; and if objections be not taken to a juror at the time of impaneling the jury, it is waived: *Clark v. Territory*, 1 Wash. 68. If there is no evidence in the record showing error in the court below, its judgment should be affirmed: *Brown v. Forest*, 1 Wash. 201.

**Bill of exceptions should contain only such evidence as is deemed necessary to illustrate the points of exceptions, and no more:** See § 390, *ante*; nor need such evidence be set forth in detail: *City of Seattle v. Buzby*, 2 Wash. 25. The evidence should be set forth

in a narrative form, or by a statement of its substance, or what it tended to prove, and the questions should be stated only when it is necessary to present the point of an objection thereto: *People v. Trim*, 37 Cal. 274; *People v. Getty*, 49 Cal. 584. When settled, it is presumed to contain all the evidence given upon the trial bearing on the objections presented: *People v. English*, 52 Cal. 211. And it must show that evidence was introduced tending to prove every material issue; and if it fails to show this, it will be presumed that no evidence was introduced to prove such issue: *People v. Fisher*, 51 Cal. 319. But if a bill recites that “each party introduced evidence to sustain the issue on their parts,” it will be sufficient: *People v. Dye*, 7 Pac. C. L. J. 411. In criminal cases the particulars in which the evidence is insufficient to sustain the verdict need not be stated, but it is sufficient to state, generally, that the verdict is not sustained by the evidence: *People v. Dye*, 7 Pac. C. L. J. 411. All omissions or uncertainties in a bill are construed against the party presenting it: *People v. Williams*, 45 Cal. 25. It must affirmatively show error, every intendment being in favor of the judgment: *People v. Williams*, 45 Cal. 25; *People v. Winters*, 29 Cal. 658. Affidavits used to show the incompetency of a juror, and affidavits and other papers used upon a motion for a new trial, will not be considered on appeal unless incorporated in a bill properly authenticated: *People v. Stonecipher*, 6 Cal. 405; *People v. Price*, 17 Cal. 310; *People v. Padilla*, 42 Cal. 535.

**Settlement of bill of exceptions:** See §§ 391–395, *ante*. The time to prepare a bill may be extended by the judge who tried the case or by a justice of the supreme court, and if presented within such time, and the judge should refuse to settle it, he may be compelled to do so by a writ of mandate: *People v. Keyser*, 53 Cal. 183; see *People v. Romero*, 18 Cal. 89; *People v. Kahl*, 18 Cal. 432. After being settled, it must be signed by the judge, and filed. Signing by the district attorney, or by the attorneys who tried the case, or signing a stipulation annexed thereto that it is correct, is insufficient, and if not otherwise signed, it will be disregarded on appeal: *People v. Ferguson*, 34 Cal. 309; *People v. Trim*, 37 Cal. 274; *People v. Armstrong*, 44 Cal. 326. In moving for new trials in criminal cases, it is not necessary that a bill of exceptions should be prepared before the motion is made, but it may be

prepared after the motion has been determined, at any time within ten days after the entry of the judgment: *People v. Fisher*, 51 Cal. 319; *People v. Keyser*, 53 Cal. 184; *People v. Hewell*, 6 Pac. C. L. J. 448. If settled before the motion is made, it will be disregarded: *People v. Ah Fat*, 47 Cal. 631. Where a case was tried by one judge, and a motion for a new trial heard by his successor in office, a bill settled by the latter is properly authenticated: *People v. Hodgdon*, 55 Cal. 72.

**Reporters' notes.** — The notes of the phonographic reporter form no part of a bill of exceptions, unless embodied therein or referred to in the bill so as to identify them: *People v. Taing*, 53 Cal. 602. Before incorporating such notes in a bill, all matters should be eliminated therefrom which are not necessary to illustrate the points to be presented on appeal. Unless such matters are eliminated, it is the duty of the court not only to refuse to settle the bill, but to strike it from the files: *People v. Tetherson*, 40 Cal. 286; *People v. Padillia*, 42 Cal. 535; *People v. Getty*, 49 Cal. 584; *People v. Sprague*, 53 Cal. 423; *People v. Taing*, 53 Cal. 602.

**Exceptions to evidence.** — Where evi-

dence has been allowed to go in without objection, the court will not entertain a motion to strike it out: *People v. Rolfe*, 61 Cal. 540. An objection to the admission of evidence cannot be made for the first time in the supreme court: *People v. Salorse*, 62 Cal. 139, 145. Exceptions taken to the admission or rejection of evidence on the trial of a challenge for actual bias will be reviewed: *People v. Cotta*, 49 Cal. 166; *People v. Vasquez*, 49 Cal. 560; *People v. Taing*, 53 Cal. 602.

**Instructions, exceptions to,** should be made when they are given: *Smith v. United States*, 1 Wash. 262. The court will not review erroneous instructions upon mere abstract principles of law: *Yelm Jim v. Territory*, 1 Wash. 63. Only so much of the evidence need be stated in a bill of exceptions as is required to explain the charge to the jury: *City of Seattle v. Buzby*, 2 Wash. 25; but the action of the court below in granting or refusing instructions cannot be reviewed unless there is a statement or bill of exceptions showing the evidence to which the instructions pertain: *Thompson v. Territory*, 1 Wash. 548; chapter on Appeals, *post*.

## CHAPTER XIII.

### OF JUDGMENTS, AND THE ENFORCEMENT THEREOF.

- § 1332. Court must render judgment upon verdict of guilty.
- § 1333. Judgment for fine is lien upon defendant's real estate.
- § 1334. Defendant may have stay of execution.
- § 1335. Fines collected — How disposed of — Receipts — Penalty for neglect to pay over.
- § 1336. Judgment must be pronounced when.
- § 1337. Rendition of judgment — Defendant must be present when, and when not.
- § 1338. Warrant of arrest may issue to bring in defendant.
- § 1339. Before pronouncing judgment, court may inform defendant of verdict, etc.
- § 1340. Bench-warrant may issue to bring in defendant for judgment — Forfeiture, etc.
- § 1341. Defendant to be committed until fine and costs are paid.
- § 1342. Execution against defendant's property may issue upon judgment for fine and costs.
- § 1343. Except in cases of felony, defendant may, in addition to punishment, be recognized to keep the peace.
- § 1344. Proceedings upon breach of recognizance.
- § 1345. Stay of execution upon judgment for fine and costs.
- § 1346. Qualification and liabilities of sureties — Issuance of execution.
- § 1347. Judgment for fine and costs, how enforced.
- § 1348. Clerk to issue certified transcript — *Mittimus*.
- § 1349. Form of sentence to penitentiary, and execution of punishment.
- § 1350. "Fine and costs," how to be worked out.
- § 1351. Death-warrant, requisites of, and return.
- § 1352. Death penalty, how executed.
- § 1353. Return and filing of death-warrant — Duty of clerk.
- § 1354. Proceedings upon failure to execute death sentence on day set.
- § 1355. Final record should be made by clerk — And shall contain what.
- § 1356. Governor may commute sentence and grant pardons, etc.

*Court must render judgment upon verdict of guilty.*

§ 1332. [1104.] When the defendant is found guilty, the court shall render judgment accordingly, and the defendant shall be liable



for all costs, unless the court or jury trying the cause expressly find otherwise.

**Rendition of judgment:** See §§ 1336, 1339, *post*.

*Judgment for fine is lien upon defendant's real estate.*

§ 1333. [1111.] Judgments for fines in all criminal actions rendered are and may be made liens upon the real estate of the defendant in the same manner and with like effect as judgments in civil actions.

*Defendant may have stay of execution.*

§ 1334. [1112.] The defendant may have a stay of execution for the same length of time and in the same manner as provided by law in civil actions, and with like effect; and the same proceedings may be had therein.

*Fines collected — How disposed of — Receipts — Penalty for neglect to pay over.*

§ 1335. [1113.] All fines imposed on any person by the provisions of this code, where the same shall be collected, shall be paid to the county treasurer of the county where such conviction shall have been had, to go into the general county fund. The county treasurer shall give duplicate receipts therefor, one of which shall be filed with the county auditor; and all officers refusing or neglecting to pay over any fines within one month after they shall have been received shall, upon conviction thereof, be fined in fourfold the amount of such fines so received.

*Judgment must be pronounced when.*

§ 1336. [1114.] After verdict of guilty or finding of the court against the defendant, if the judgment be not arrested or a new trial granted, the court must pronounce judgment.

**Judgment, rendition of.** — It must be given in open court, not in the judge's chambers: *Anonymous*, T. Raym. 68. And should be on a judicial day, and not on Sunday: *Young v. State*, 39 Ala. 357. It is necessary, before pronouncing judgment, to ask the defendant if he has any legal cause to show why judgment should not be pronounced against him: See § 1339, *post*.

**Judgment, form of.** — The judgment entered in the minutes is sufficient, if it states of what offense the defendant was finally convicted and the penalty imposed. It need not recite the facts contained in the other papers constituting the record in the action: *In re Ring*, 28 Cal. 247; *Ex parte Murray*, 43 Cal. 455. Nor the time of the commencement of the imprisonment. It is sufficient if it states the duration of the imprisonment and the place of confinement: *State v. Smith*, 10 Nev. 107. Judgments of inferior criminal courts are not required to be in different form from

those of like courts of general jurisdiction: *People v. Forbes*, 22 Cal. 135.

**Judgment — Should be certain and definite.** — As a general rule, in criminal cases, a judgment should be certain and definite and complete in itself, so that what it requires to be done may be known without resort to anything outside of the record: *People v. Forbes*, 22 Cal. 135. This, however, is not universally so, and it is a common practice in criminal courts to enter judgments of imprisonment at the expiration of sentences in other cases: *Brown v. Com.*, 4 Rawle, 259; *Russell v. Com.*, 7 Serg. & R. 489; *State v. Smith*, 5 Day, 175; *King v. Wilkes*, 4 Burr. 2575. Thus a judgment that the defendant be imprisoned for a specified term, "to commence at the expiration of previous sentences," is valid: *People v. Forbes*, 22 Cal. 135. So, too, is a judgment "that the defendant be imprisoned in the state prison for the term of three years from the date of his incarceration": *People v.*



*King*, 28 Cal. 265. Or that the defendant "be imprisoned four years from the time of his delivery to the warden," etc.: *People v. Hughes*, 29 Cal. 257. A failure to specify any time for the imprisonment to commence does not invalidate the judgment: *State v. Smith*, 10 Nev. 107. But a judgment for a term longer than that provided by the statute will be reversed, and the lower court directed to proceed to judgment upon the verdict: *People v. Riley*, 48 Cal. 549; see *Ex parte Ah Cha*, 40 Cal. 426. So a judgment which attempts to punish a man for an act which is not a crime is absolutely void: *People v. Kearney*, 55 Cal. 212; see *People v. Liscomb*, 60 N. Y. 569; *Ex parte Siebold*, 100 U. S. 371. After sentence, but before the judgment is signed, it may be amended by shortening the time: *People v. Thompson*, 4 Cal. 238.

**Judgment — Void and voidable defined.** — An error which will render a judg-

ment voidable only is the want of adherence to some prescribed mode of proceeding in conducting the action or defense. An error which renders a judgment void is such an illegality as is contrary to the principles of law as distinguished from rules of procedure: *Ex parte Gibson*, 31 Cal. 619. The judgment is not void because it does not state the offense of which the prisoner was convicted, if it shows that he was indicted for some offense, and tried and convicted, and that the sentence passed on him was one which the court had jurisdiction to pronounce for some offense of which he might have been convicted under the indictment: *Ex parte Gibson*, 31 Cal. 619. But a judgment which punishes a man for an act which is not a crime is absolutely void: *Ex parte Kearney*, 55 Cal. 212; *Matter of Corryell*, 22 Cal. 178. So a sentence of a party convicted under an unconstitutional law is void: *Ex parte Siebold*, 100 U. S. 371.

*Rendition of judgment — Defendant may be present when, and when not.*

§ 1337. [1115.] For the purpose of judgment, if the conviction be for an offense punishable by imprisonment, the defendant must be personally present; if for a fine only, he must be personally present, or some responsible person must undertake for him to secure the payment of the judgment and costs; judgment may then be rendered in his absence.

**Judgment, pronouncing.** — A judge who did not try the case, if legally presiding, has jurisdiction to pronounce sentence: *People v. Henderson*, 28 Cal. 606.

*Warrant of arrest may issue to bring in defendant.*

§ 1338. [1116.] If in any case the defendant is not present when his personal attendance is necessary, the court may order the clerk to issue a warrant for his arrest, which may be served in any county in this state, as a warrant of arrest in other cases.

*Before pronouncing judgment, court must inform defendant of verdict, etc.*

§ 1339. [1117.] When the defendant appears for judgment, he must be informed by the court of the verdict of the jury, and asked whether he have any legal cause to show why judgment should not be pronounced against him.

**Mistake, correction of.** — Clerical error, committed by the clerk in making entry of judgment, where not prejudicial to any substantial right of the defendant, may be corrected, by order of the court, even after appeal,

and cannot invalidate a judgment regularly pronounced: *People v. Murback*, 64 Cal. 369. The statement required by the above section, while necessary to pronouncing judgment, is no part thereof: *People v. Murback*, 64 Cal. 369.

*Bench-warrant may issue to bring in defendant for judgment — Forfeiture, etc.*

§ 1340. [1118.] If the defendant have been discharged on bail, or have deposited money instead thereof, and do not appear for judgment when his personal appearance is necessary, the court, in addition to the forfeiture of the recognizance, or of the money deposited, may direct the clerk to issue a bench-warrant for his arrest.

*Defendant to be committed until fine and costs are paid.*

§ 1341. [1119.] When the defendant is adjudged to pay a fine and costs, the court shall order him to be committed to the custody of the sheriff until the fine and costs are paid or secured as provided by law.

**Enforcement of judgment.** — A person against whom a judgment of fine and costs is given has the privilege of paying it either by money or by imprisonment. If he pays in money, there can be no commitment. If he refuses to pay in that way, the commitment follows, as an incident to the judgment, until the judgment has been complied with according to law: *Ex parte Harrison*, 63 Cal. 299-301; *Matter of Tyler*, 64 Cal. 434. But execution may issue at any time: See § 1347, *post*.

*Execution against defendant's property may issue upon judgment for fine and costs.*

§ 1342. [1120.] Upon a judgment for fine and costs, and for all adjudged costs, execution shall be issued against the property of the defendant, and returned in the same manner as in civil actions.

*Except in cases of felony, defendant may, in addition to punishment, be recognized to keep the peace.*

§ 1343. Every court before whom any person shall be convicted upon an indictment or information for an offense not punishable with death or imprisonment in the penitentiary may, in addition to the punishment prescribed by law, require such person to recognize with sufficient sureties in a reasonable sum to keep the peace, or to be of good behavior, or both, for any term not exceeding one year, and to stand committed until he shall so recognize. [February 24, 1891, § 83.]

*Proceedings upon breach of recognizance.*

§ 1344. [1122.] In case of the breach of the conditions of any such recognizance, the same proceedings shall be had that are by law prescribed in relation to recognizances to keep the peace.

*Stay of execution upon judgment for fine and costs.*

§ 1345. [1123.] Every defendant against whom a judgment has been rendered for fine and costs may stay the execution for the fine assessed and costs for sixty days from the rendition of the judgment, by procuring one or more sufficient sureties, to enter into a recognizance in open court, acknowledging themselves to be bail for such fine and costs.

*Qualification and liability of sureties—Issuance of execution.*

§ 1346. [1124.] Such sureties shall be approved by the clerk, and the entry of the recognizance shall be written immediately following the judgment, and signed by the bail, and shall have the same effect as a judgment; and if the fine or costs be not paid at the expiration of the sixty days, a joint execution shall issue against the defendant and the bail, and an execution against the body of the defendant, who shall be committed to jail, to be released as provided in this act in committal for default to pay or secure the fine and costs.

*Judgment for fine and costs, how enforced.*

§ 1347. If any person ordered into custody until the fine and costs adjudged against him be paid shall not, within five days pay or cause the payment of the same to be made, the clerk of the court shall issue a warrant to the sheriff commanding him to imprison such defendant in the county jail until such fine and costs are paid, or until he has been imprisoned in such jail one day for every three dollars of such fine and costs; but execution may at any time issue against the property of the defendant as in other cases. [February 24, 1891, § 84.]

See § 1350.

**Enforcement of judgment:** See *ante*, § 1341.

*Clerk to issue certified transcript — Mittimus.*

§ 1348. [1126.] When any person shall be sentenced to be imprisoned in the penitentiary or county jail, the clerk of the court shall, as soon as may be, make out and deliver to the sheriff of the county, or his deputy, a transcript, from the minutes of the court, of such conviction and sentence, duly certified by such clerk, which shall be sufficient authority for such sheriff to execute the sentence, who shall execute it accordingly.

*Form of sentence to penitentiary, and execution of punishment.*

§ 1349. [1127.] In every case where imprisonment in the penitentiary is awarded against any convict, the form of the sentence shall be, that he be punished by confinement at hard labor; and he may also be sentenced to solitary imprisonment for such term as the court shall direct, not exceeding twenty days at any one time; and in the execution of such punishment the solitary shall precede the punishment by hard labor, unless the court shall otherwise order.

*Fine and costs, how to be worked out.*

§ 1350. [1129.] When a defendant is committed to jail on failure to pay any fine or costs, he shall, under the order of the county commissioners, work out the amount of the fine and costs at the rate of three dollars per day; and in case he shall so work out the fine and costs, or in case he shall not be able to work, or the county commissioners fail to provide work, and he shall have been confined in the county jail one day for every three dollars of such fine and costs, no execution shall issue therefor. When any defendant is in the custody of the sheriff by virtue of a sentence of imprisonment in the county jail, and there be no county jail in the county, he shall, under the order of the county commissioners, cause such person to work his unexpired term of imprisonment in such manner as said county commissioners may direct.



*Death-warrant, requisites of, and return.*

§ 1351. [1130.] When judgment of death is rendered, a warrant signed by the judge and attested by the clerk, under the seal of the court, shall be drawn and delivered to the sheriff; it shall state the conviction and judgment, and appoint a day in which the judgment shall be executed, which shall not be less than thirty nor more than ninety days from the time of judgment. And the sheriff or officer to whom said warrant was delivered shall return the same within twenty days after the time fixed for the execution.

**Execution of death sentence.** — The day for carrying into effect a sentence of death should not be designated in the judgment, but in the warrant for the execution: *Timmerman v. Territory*, 3 Wash. 445; *People v. Bonilla*, 38 Cal. 699; *People v. Murphy*, 45 Cal. 137. But fixing a specific day in the death sentence is an irregularity amounting to mere surplusage, and does not affect the validity of the judgment: *Timmerman v. Territory*, 3 Wash. 445. If the judgment of death is not executed on the day appointed, the court rendering it may appoint another day for carrying it into effect: *People v. Bonilla*, 38 Cal. 701. See *People v. Dick*, 39 Cal. 102. Upon the affirmance

of an order or judgment in a criminal case, no order of the appellate court directing the lower court to proceed to carry the judgment into effect is necessary: *People v. Dick*, 39 Cal. 182. The defendant is entitled to be in court when an order for his execution is made; and to make it in his absence is error: *People v. Sprague*, 54 Cal. 92; *People v. Sing Lum*, 61 Cal. 538. It will be presumed that the defendant was present, unless the record discloses that he was not: *People v. Sing Lum*, 61 Cal. 538.

A statement in the judgment that defendant be taken to the "place of public execution" is surplusage: *People v. Brown*, 59 Cal. 345, 357.

*Death penalty, how executed.*

§ 1352. [1131.] The punishment of death prescribed by law must be inflicted by hanging by the neck.

*Return and filing of death-warrant — Duty of clerk.*

§ 1353. [1132.] The sheriff shall return and file with the clerk the warrant, with a statement of his doings thereon, and the clerk shall subjoin a brief abstract of such statement to the record of conviction and sentence.

*Proceedings upon failure to execute death sentence on day set.*

§ 1354. [1133.] Whenever the time appointed for the execution of a prisoner shall have passed, from any cause, the court by whom the time was fixed, or the judge or judges thereof, shall cause the prisoner to be brought immediately before the said court, judge or judges, and proceed to appoint a day for the carrying into effect of the sentence of death.

**Judgment of death in force and unexecuted:** See *ante*, note to § 1351.

*Final record shall be made made by clerk — And shall contain what.*

§ 1355. The clerk of the court shall make a final record of all the proceedings in a criminal prosecution within six months after the same shall have been decided, which shall contain a copy of the minutes of the challenge to the panel of the grand jury, the indictment or information, journal entries, pleadings, minutes of challenges to panel of petit jurors, judgment, orders, or decision, and bill of exceptions. [February 24, 1891, § 85.]

**Record of the action.** — A bill of exceptions which has been duly settled and signed by the judge and filed constitutes a portion of the record of the action: *People v. Trim*, 37 Cal. 274. The record should show that the defendant was arraigned and pleaded, and if it does not show these facts, it will be presumed that there was no arraignment or plea: *People v. Gaines*, 52 Cal. 479. Presumptions in capital cases are not made in favor of the regularity of the proceedings in the trial court: *Shapoonmash v. United States*, 1 Wash. 183. The record must show that the prisoner was present when the jury rendered their verdict, and what dis-

position was made of the jury on adjournment from one day until the next during the trial: *Id.* The proceedings before the committing magistrate do not form a portion of the judgment roll in criminal cases: *People v. Shubrick*, 57 Cal. 565. A copy of the minutes of the trial constitutes a part of the judgment roll: *People v. Gaines*, 52 Cal. 479. The action of the court below in granting or refusing instructions cannot be reviewed unless there is a statement or bill of exceptions showing the evidence to which the instructions pertain: *Thompson v. Territory*, 1 Wash. 548.

*Governor may commute sentence and grant pardons, etc.*

§ 1356. [1136.] Whenever a prisoner has been sentenced to death, the governor shall have power to commute such sentence to imprisonment for life at hard labor; and in all cases in which the governor is authorized to grant pardons or commute sentence of death, he may, upon the petition of the person convicted, commute a sentence or grant a pardon upon such conditions and with such restrictions and under such limitations as he may think proper; and he may issue his warrant to all proper officers to carry into effect such pardon or commutation, which warrant shall be obeyed and executed instead of the sentence, if any, which was originally given. The governor may also, on good cause shown, grant respites, from time to time, as he may think proper.

**Constitutional provisions:** See U. S. Const., art. 2, sec. 2; Wash. Const., art. 3, secs. 9, 11. On pardon and amnesty generally, see *State v. McIntyre*, 59 Am. Dec. 575-581; article in 6 Crim. L. Mag. 457.

**Pardoning power.** — The pardoning power, whether exercised under the federal or state constitution, is the same in its nature and effect as that exercised by the representatives of the English crown in this country in colonial times: *People v. Bowen*, 43 Cal. 439; *United States v. Wilson*, 7 Pet. 159; *Ex parte Wells*, 18 How. 307. Pardon may be granted before trial: *Com. v. Hitchman*, 46 Pa. St. 357. The pardon may be granted after the offender has suffered the punishment adjudged for his crime: *People v. Bowen*, 43 Cal. 439; *United States v. Jones*, 2 Wheel. C. C. 451. The pardoning power has no limitations except those found in the constitution and statutes. It may be exercised at any time: *Ex parte Garland*, 4 Wall. 380.

**Conditional pardon.** — Where the condition of the pardon is that the defendant

shall leave the state, and he either does not leave, or, having left, returns, the original sentence revives, and may be enforced: See *Ex parte Marks*, 64 Cal. 29; *Flavel's Case*, 8 Watts & S. 197; *State v. Chancellor*, 1 Strob. 347; *People v. Potter*, 1 Park. Cr. 47; *Ex parte Wells*, 18 How. 307. But if the time for departure is specified in the pardon, it will not begin to run during sickness or incapacity: *People v. James*, 2 Caines, 57. A pardon with a condition precedent does not operate until the condition is performed: *Flavel's Case*, 8 Watts & S. 197.

**Effect of pardon.** — A pardon is to be construed favorably to the convict; it not only relieves from punishment, but clears the pardoned from the guilt of the offense: *Ex parte Hunt*, 10 Ark. 284. It removes from the offender the disability to testify where such disability follows conviction of a felony: *People v. Bowen*, 43 Cal. 439. A pardon with a condition precedent does not operate until the condition is performed: *Flavel's Case*, 8 Watts & S. 197. But see *Ex parte Hunt*, 10 Ark. 284.

## CHAPTER XIV.

## OF FORFEITED RECOGNIZANCES IN CRIMINAL ACTIONS.

§ 1357. Forfeiture of recognizance — Judgment against principal and sureties — Execution.

§ 1358. Stay of execution.

§ 1359. Judgment may be vacated when — Execution against sureties.

§ 1360. Suit by prosecuting attorney upon recognizances.

§ 1361. Action on recognizance not to be barred or defeated by defects of form, etc.

*Forfeiture of recognizance — Judgment against principal and sureties — Execution.*

§ 1357. [1137.] In criminal cases where a recognizance for the appearance of any person, either as a witness or to appear and answer, shall have been taken and a default entered, the recognizance shall be declared forfeited by the court, and at the time of adjudging such forfeiture said court shall enter judgment against the principal and sureties named in such recognizance for the sum therein mentioned, and execution may issue thereon the same as upon other judgments.

*Stay of execution.*

§ 1358. The parties, or either of them, against whom such judgment may be entered in the superior or supreme courts, may stay said execution for sixty days, by giving a bond, with two or more sureties, to be approved by the clerk, conditioned for the payment of such judgment at the expiration of sixty days, unless the same shall be vacated before the expiration of that time. [February 24, 1891, § 86.]

*Judgment may be vacated when — Execution against sureties.*

§ 1359. If a bond be given and execution stayed, as provided in section thirteen hundred and fifty-eight, and the person for whose appearance such recognizance was given shall be produced in court before the expiration of said period of sixty days, the judge may vacate such judgment upon such terms as may be just and equitable; otherwise execution shall forthwith issue as well against the sureties in the new bond as against the judgment debtors. [February 24, 1891, § 87.]

*Suit by prosecuting attorney upon recognizances.*

§ 1360. [1166.] All recognizances taken and forfeited before any justice of the peace or magistrate shall be forthwith certified to the clerk of the superior court of the county; and it shall be the duty of the prosecuting attorney to proceed at once by action against all the persons bound in such recognizances, and in all forfeited recognizances whatever, or such of them as he may elect to proceed against.

Action on forfeited bail bond may be brought by the district attorney, either in the name of the people (People v. De Pelanconi, 63 Cal. 409; People v. Penniman, 37 Cal. 271), or of the county: Mendocino Co. v. Lamar, 30 Cal. 628; San Francisco v. Randall, 54 Cal. 408.



*Action on recognizance not to be barred or defeated by defects of form, etc.*

§ 1361. No action brought on any recognizance given in any criminal proceeding whatever shall be barred or defeated, nor shall judgment be arrested thereon, by reason of any neglect or omission to note or record the default of any principal or surety at the time when such default shall happen, or by reason of any defect in the form of the recognizance, if it sufficiently appear, from the tenor thereof, at what court or before what justice the party or witness was bound to appear, and that the court or magistrate before whom it was taken was authorized by law to require and take such recognizance; and a recognizance may be recorded after execution awarded. [*February 24, 1891, § 88.*]

**It is no defense to action on bail bond** the bond was not declared forfeited because of voluntarily given that the conditions of the the fact that the journal had not been signed by bond are more onerous than the statute permits: *Ainsworth v. Territory*, 3 Wash. 270. Such signature is unnecessary to make journal entries valid: *Ainsworth v. Territory*, 3 Wash. 270. Neither can defendant take the ground that

## CHAPTER XV.

### MISCELLANEOUS PROVISIONS RELATING TO CRIMINAL ACTIONS.

- § 1362. Rights of accused.
- § 1363. Rights of accused continued.
- § 1364. Verdict or confession in court necessary to conviction.
- § 1365. Conviction or acquittal by judgment is bar to another prosecution.
- § 1366. Acquittal on account of variance does not bar further prosecution.
- § 1367. No one charged with crime shall be punished before conviction.
- § 1368. Discharge on failure to indict.
- § 1369. Defendant is entitled to speedy trial — Dismissal.
- § 1370. Continuance by court when defendant is not indicted or tried.
- § 1371. Upon dismissal of action, defendant is to be discharged, etc.
- § 1372. Court may order action dismissed after indictment.
- § 1373. Entry of *nolle prosequi* is abolished.
- § 1374. Dismissal is a bar in felony cases, but not in misdemeanors.
- § 1375. Right of accused to give bail.
- § 1376. Accessary after fact may be tried, though principal has not been.
- § 1377. Variance as to ownership of property, what shall not be.
- § 1378. Truth of matter charged as libel may be a defense.
- § 1379. Officer may break door, etc., to make arrest.
- § 1380. Stolen property to be restored to owner — Sale of does not divest title — Duty of officer thereto.
- § 1381. Recompense to prosecutor and to keeper of stolen property.
- § 1382. Defendant not liable for costs when — Fees and charges, how taxed and paid.
- § 1382 a. Cost bills, how to be made and certified.

#### *Rights of accused.*

§ 1362. On the trial of any indictment or information, the party accused shall have the right to be heard by himself or counsel, to meet the witnesses produced against him face to face; *provided always*, that in any case where a witness or witnesses whose deposition or depositions have been taken by a committing magistrate pursuant to law are absent, and cannot be found when required to testify in such case, so much of such deposition or depositions as the court shall

decide to be admissible and competent shall be admitted and read as evidence in such case. [February 24, 1891, § 89.]

**Accused, rights of.** — “In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face,” etc.: See Const., sec. 22, art. 1.

**Confronted with witnesses.** — The defendant is entitled to be confronted with the witnesses against him, in the presence of the court in which the action is being tried, except in the instances specified in the above section. Therefore, reporter's notes of testimony given by a witness at a former trial, and now out of the state, are inadmissible: *People v. Chung Ah Chue*, 57 Cal. 567, 568.

**Depositions taken upon a preliminary examination** before a committing magistrate may be used upon the trial of a defendant, if it appears that the witness is dead, insane, or cannot be found within the state: *People v. Curtis*, 50 Cal. 96. And this is constitutional: *People v. Olier*, 60 Cal. 101; 4 West Coast Rep. 383. Where, however, the witness is within the reach of a subpoena, but too unwell to appear in court, his deposition is not admissible: *People v. Bojorquez*, 55 Cal. 463.

Taking the testimony of a witness on behalf

of the people in a criminal case by deposition is an exception to the rule which entitles the defendant in a criminal action to be confronted with the witnesses against him, in the presence of the court; and every substantial requirement of the law which authorizes it must be observed. Any real departure from the course prescribed for the taking of the deposition renders the deposition itself objectionable: *People v. Morine*, 54 Cal. 575; *Williams v. Chadbourne*, 6 Cal. 559; *People v. Chung Ah Chue*, 57 Cal. 567; *People v. Mitchell*, 64 Cal. 85; *People v. Morine*, 54 Cal. 575, 577; *Kallock v. Superior Court*, 56 Cal. 229.

**Deposition not the best evidence.** — The deposition taken is not the best or only evidence of what a witness may have sworn to. Oral evidence is admissible to show what was sworn upon the examination, notwithstanding the evidence may have been reduced to writing: *People v. Curtis*, 50 Cal. 95.

**Argument of counsel.** — The court may limit the defendant's counsel to a reasonable time in the argument of a case; yet if without consent, such limitation is imposed, and the accused is thereby deprived of the opportunity of a full defense, a new trial will be granted: *People v. Keenan*, 13 Cal. 581.

### *Rights of accused continued.*

§ 1363. On the trial of any indictment or information the party accused shall have the right to produce witnesses and proofs in his favor, and have compulsory process to compel the attendance of witnesses in his behalf, and to a speedy public trial by an impartial jury, and no person shall be put upon trial on an indictment or information for a felony until the expiration of five days from the day of his arrest. [February 24, 1891, § 90.]

**Right of accused:** See next preceding section. The accused shall also have the right “to have compulsory process to compel the attendance of witnesses in his own behalf,” and “to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed”: See Const., art. 1, sec. 22.

**“Public trial” as affected by excluding persons from court room.** — The constitutional right of the accused to a public trial is not violated by an order of court excluding all

persons from the court-room except the judge, jurors, witnesses, and persons connected with the case, during the trial of a criminal charge: *People v. Swafford*, 65 Cal. 223; *People v. Kerrigan*, 73 Cal. 222. The word “public,” in that clause of the constitution, is used in opposition to “secret”: *People v. Swafford*, 65 Cal. 223. An order excluding from the court-room such of the jurors summoned for the term as are not impaneled to try the case is not a deprivation of the right of public trial: *People v. Sprague*, 54 Cal. 491.

### *Verdict or confession in court necessary to conviction.*

§ 1364. No person indicted or informed against for an offense shall be convicted thereof unless by confession of his guilt in open court, or by the verdict of a jury accepted and recorded in open court. [February 24, 1891, § 91.]

Defendant may consent to trial without a jury: § 1304, ante.

**Conviction.** — The term “convicted” signifies a finding that the accused is guilty, either by his own confession or by the verdict

of a jury: *Ex parte Brown*, 68 Cal. 176. “Judgment” or “sentence” is the appropriate word to denote the action of the court in declaring the consequences of conviction: *Commonwealth v. Lockwood*, 109 Mass. 323.



*Conviction or acquittal by judgment is bar to another prosecution.*

§ 1365. [768.] A conviction or acquittal by a judgment upon a verdict shall bar another prosecution for the same offense, notwithstanding a defect in form or substance in the indictment [or information] on which the conviction or acquittal took place.

**Jeopardy:** See § 1288, *ante*, and notes to §§ 1368, 1374, *post*. No person shall be twice put in jeopardy for the same offense: See U. S. Const., amend. 5; Wash. Const., art. 1, sec. 9; extended note to *Roberts v. State*, 58 Am. Dec. 536-549. When a person is once placed upon his trial before a competent court and jury, charged with his case upon a valid indictment, he is in jeopardy, unless such jury be discharged without rendering a verdict from a legal necessity or cause beyond the control of the court, such as death, sickness, or insanity of one of the jury, or of the prisoner or the court, or unless the jury be discharged by consent of the prisoner: *People v. Webb*, 38 Cal. 467; *Ex parte Hartman*, 44 Cal. 32. Sickness of juror: See *People v. Stewart*, 64 Cal. 60. Among these unavoidable necessities is the inability of the jury to agree after a reasonable time for deliberation: *People v. Cage*, 48 Cal. 324; *Ex parte McLaughlin*, 41 Cal. 211. So, also, when the defendant, during the trial for a felony, flees, and not being able to be found, the jury is discharged: *People v. Higgins*, 59 Cal. 357. Where the defendant is tried and convicted, and does not move for new trial, but appeals to the supreme court, and that court reverses the judgment, and orders a new trial, the former conviction is no bar to a new trial: *People v. Olwell*, 28 Cal. 456; *People v. Barric*, 49 Cal. 342. Where an indictment is set aside on defendant's motion, and the case ordered submitted to another grand jury, it does not amount to an acquittal: *People v. Varsum*, 53 Cal. 630; *Ex parte Cahill*, 52 Cal. 463; *People v. March*, 6 Cal. 543. Nor does the examination and dismissal of a charge by the grand jury, without an order by the court for a resubmission of the case to another grand jury, amount to jeopardy: *Ex parte Clarke*, 54 Cal. 412. Where the verdict is so defective and uncertain that no judgment can pass, it may be set aside, and the proceedings theretofore had will be no bar to another trial: *People v. Baza*, 53 Cal. 690. The defendant was indicted for manslaughter, and on his trial the court,

against his consent, discharged the jury, being of opinion that the evidence showed defendant to be guilty of murder; defendant was afterwards indicted and tried for murder for the same homicide. *Held*, that he is twice put in jeopardy: *People v. Hunckeler*, 48 Cal. 331. Where one is subjected to increased punishment for a second offense, he is not twice put in jeopardy for the same offense. The increased punishment is not a punishment for the first offense, but is inflicted because of persistence in crime: *People v. Stacey*, 47 Cal. 113; *People v. Lewis*, 64 Cal. 401. The pendency of one information does not affect the right of the prosecution to present another against defendant for the same offense: *Kulloch v. Superior Court*, 56 Cal. 229. A defendant indicted for an offense is indicted for every lesser grade that may be included under it, and if convicted of one of the lesser offenses, it amounts to an acquittal of all offenses higher than that of which he is convicted, and if a new trial is granted, he cannot be tried for any higher offense than that of which he was convicted: *People v. Gilmore*, 4 Cal. 376; *People v. Appgar*, 35 Cal. 389. And see *People v. Helbing*, 61 Cal. 620. But the lesser does not include the greater, and a conviction on an indictment for an assault is not a bar to a subsequent trial for battery: *Id.* "To entitle a defendant to the plea of *autrefois convict* or *acquit*, it is necessary that the offense charged be the same in law and in fact": *Id.* If the defendant, when arraigned, pleads guilty, and his plea is entered of record, such proceeding amounts to a conviction, and is a good defense if he is again indicted for the same offense, although no judgment was pronounced upon the plea of guilty: *People v. Goldstein*, 32 Cal. 432. It has been said that if the district attorney obtain the discharge of one of several defendants jointly indicted, in order to use such defendant as a witness for the people, such discharge from the indictment would, in its legal effect, be an acquittal, and bar another prosecution: *People v. Bruzzo*, 24 Cal. 41.

*Acquittal on account of variance does not bar further prosecution.*

§ 1366. A defendant acquitted on the ground of variance between the indictment or information and the proof may be thereafter prosecuted upon a new indictment or information. [Feb. 24, 1891, § 92.]

Setting aside indictment for defect of form or substance does not bar subsequent prosecution: § 1279, *ante*.

**Variance between indictment or information and proof.** — As to former conviction, see note to § 1374, *post*. An acquittal of a defendant because of a variance between the proof and the indictment is no bar to a second indictment, if the variance is material: *People v. McNealy*, 17 Cal. 332; *People v. Hughes*, 41 Cal.

234; extended note to *Roberts v. State*, 58 Am. Dec. 537-540; as where a conviction was legally impossible upon the first indictment. It being legally impossible to have convicted the defendant, he has never been "in jeopardy": *People v. McNealy*, 17 Cal. 332; see *People v. March*, 6 Cal. 543. If, however, the variance is immaterial, an acquittal of the defendant because of such variance will bar any subsequent prosecution for the same offense. An error of



the court in regarding as material a variance between the allegations and proof will not render the acquittal less available and conclusive as a bar to a subsequent prosecution. The question to be determined under the plea of former acquittal is, Would the evidence which is necessary to support the second indictment have been sufficient to procure a legal conviction on the first? If it would, the acquittal is a bar to a subsequent prosecution; and if not, it is no bar: *People v. Hughes*, 41 Cal. 234. Where the subject of the assault named in the information was charged to be one John Carl, and his real name was John Carlin, the court may, where defendant is acquitted on the ground of variance, direct the district attorney to amend his information. If, however, the court will not so direct, a new information may be filed without the order of court; an appeal by the

district attorney effects nothing, and will be dismissed: *People v. Allen*, 61 Cal. 140. The mere opinion of a judge, that the evidence shows the defendant to be guilty of a higher degree of crime, does not authorize him to discharge the jury without the defendant's consent, and hold the defendant for the higher offense. Such discharge amounts to an acquittal, and the defendant cannot be again tried for that offense: *People v. Hunckeler*, 48 Cal. 331.

A variance in the name of the insurance company given in an indictment for arson, to defraud, and that as proved is no ground for an arrest of judgment: *People v. Hughes*, 29 Cal. 257. Immaterial variance in indictment for forgery, the word "shipped" being spelled "shiped" in the original instrument: *People v. Cummings*, 58 Cal. 88.

*No one charged with crime shall be punished before conviction.*

§ 1367. [770.] No person charged with any offense against the law shall be punished for such offense unless he shall have been duly and legally convicted thereof in a court having competent jurisdiction of the case and of the person.

"Convicted." — For definition, see note to § 1364, *ante*.

*Discharge on failure to indict.*

§ 1368. When a person has been held to answer, if an indictment be not found or information filed against him within thirty days, the court must order the prosecution to be dismissed, unless good cause to the contrary be shown. [February 24, 1891, § 93.]

**Dismissal of prosecution:** See next succeeding section. An application of a prisoner for discharge on the ground that no indictment was found or information filed within the time allowed by law must be made, in the first place, to the court where the prosecution against him is pending: *Ex parte Fennessy*, 54 Cal. 101. A dismissal of the action against

defendant under this section is in the nature of a judgment of nonsuit; and as defendant has never been in jeopardy, it is not a constitutional bar to another prosecution: *Ex parte Clarke*, 54 Cal. 412; *Ex parte Cahill*, 52 Cal. 463; see also *Ex parte Bull*, 42 Cal. 196.

See notes to § 1365.

*Defendant is entitled to speedy trial — Dismissal.*

§ 1369. If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his application, be not brought to trial within sixty days after the indictment is found or the information filed, the court must order it to be dismissed, unless good cause to the contrary be shown. [February 24, 1891, § 94.]

**Speedy trial.** — Defendant demurred to the indictment, and his demurrer was sustained. On appeal, this decision was reversed, and the case was remanded for trial; and the superior court, over defendant's objection, set down the case to be tried on a day more than

sixty days after the filing of the remittitur. The defendant, under a statute similar to this section, demanded his discharge, which was denied. This decision was affirmed on appeal, the court holding the statute did not apply to such a case: *People v. Gresea*, 63 Cal. 345.

*Continuance by court where defendant is not indicted or tried.*

§ 1370. If the defendant be not indicted, informed against, or tried, as provided in the last two sections, and sufficient reason therefor shown, the court may order the action to be continued from time to

time, and in the mean time may discharge the defendant from custody on his recognizance or on bail for his appearance to answer the charge at the time to which the action is continued. [February 24, 1891, § 95.]

*Upon dismissal of action, defendant is to be discharged, etc.*

§ 1371. [774.] If the court direct the action to be dismissed, the defendant must, if in custody, be discharged therefrom, or if admitted to bail, his bail must be exonerated; and if money has been deposited instead of bail, it must be refunded to him.

*Court may order action dismissed after indictment.*

§ 1372. The court may, either upon its own motion or upon application of the prosecuting attorney, and in furtherance of justice, order an action, after an indictment or information, to be dismissed; but in such case the reason of the dismissal must be set forth in the order, which must be entered upon the record. [Feb. 24, 1891, § 96.]

**Dismissal of action.** — The discharge of a defendant, that he may be a witness against others, must be made at the trial before the defendant has gone into his defense, by the court on its own motion, or upon the application of the district attorney: *People v. Indian*

*Peter*, 48 Cal. 251. In criminal cases, the defendant cannot be discharged from the indictment without trial, except in certain particular cases enumerated in the statute: *People v. Indian Peter*, 48 Cal. 251.

*Entry of nolle prosequi is abolished.*

§ 1373. [776.] The entry of a *nolle prosequi* is abolished, and no prosecuting attorney shall hereafter discontinue or abandon a prosecution except as provided in the last section.

*Dismissal is a bar in felony cases, but not in misdemeanors.*

§ 1374. [777.] An order for dismissal as provided in this chapter is a bar to another prosecution for the same offense, if it be a misdemeanor; but it is not a bar if the offense charged be a felony.

**Dismissal not a bar in felonies.** — Where defendant has been found guilty of murder, and the judgment of death has been reversed in the appellate court, because of an information fatally defective in that it contained no allegation that the homicide had been committed with "malice aforethought," and where the case was remanded for further proceedings without a new trial being ordered, he is not entitled to be discharged upon the

pleas of "once in jeopardy" and a "former conviction." In such a case the court may, under § 1372, *supra*, upon motion of the district attorney, dismiss the action and retain the defendant in custody for a re-examination upon a new charge for the same homicide; and such dismissal will not constitute a bar to another prosecution for the same offense: *People v. Schmidt*, 64 Cal. 260.

*Right of accused to give bail.*

§ 1375. [778.] Every person charged with an offense, except that of murder in the first degree, where the proof is evident or the presumption great, may be bailed by sufficient sureties, and bail shall justify and have the same rights as in civil cases, except as otherwise provided in this chapter; *provided*, that all persons accused of crime in any court of this state, whether by indictment or otherwise, shall be admitted to bail by the court where the same is pending, or by a judge, when it shall appear to the court or judge that the

accused has offered to go to trial in good faith and without collusion with witnesses, and has been denied a trial by the court, or that the accused is so sick or infirm that further confinement in jail would greatly endanger his life or make his sickness or infirmity permanent; and the bail bond in such cases shall be reasonable, and at the sound discretion of the court.

**Bail.** — All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great: See Const., sec. 20, art. 1. As to various questions concerning application for bail, excessive bail, amount of bail, etc., see note to § 152, *post*.

*Accessory after fact may be tried, though principal has not been.*

§ 1376. Every person who shall become an accessory after the fact to any felony may be indicted, convicted, and punished, whether the principal felon shall or shall not have been convicted previously, or shall or shall not be amenable to justice by any court having jurisdiction to try the principal felon. [February 24, 1891, § 97.]

**Trial of accessory.** — Before an accessory after the fact can be tried and convicted independently of the principal, the guilt of the principal must be alleged and proved: *Pettes v. Commonwealth*, 126 Mass. 242; *State v. Cassidy*, 12 Kan. 550; 1 Wharton's Criminal Law, 8th ed., sec. 237. The indictment against an accessory after the fact must allege that the crime of the principal was committed before the indictment was found and presented: *People v. Thrall*, 50 Cal. 415.

*Variance as to ownership of property, what shall not be.*

§ 1377. [963.] In the prosecution of any offense committed upon or in relation to or in any way affecting any real estate, or any offense committed in stealing, embezzling, destroying, injuring, or fraudulently receiving or concealing any money, goods, or other personal estate, it shall be sufficient, and shall not be deemed a variance, if it be proved on trial that, at the time when such offense was committed, either the actual or constructive possession, or the general or special property, in the whole or any part of such real or personal estate, was in the person or community alleged in the indictment or other accusation to be the owner thereof.

*Truth of matter charged as libel may be a defense.*

§ 1378. [1233.] In prosecution for libel, the truth thereof may be given in evidence to the jury, and if it appear to them that the matter charged as libelous was a crime punishable by fine or imprisonment, and was true, and that the same was published with good motives and justifiable ends, the defendant shall be acquitted.

*Officer may break door, etc., to make arrest.*

§ 1379. [1170.] To make an arrest in criminal actions, the officer may break open any outer or inner door or windows of a dwelling-house or other building, or any other inclosure, if, after notice of his office and purpose, he be refused admittance.

**Breaking open doors to effect arrest:** See extended note to *Hawkins v. Commonwealth*, 61 Am. Dec. 157.



*Stolen property to be restored to owner — Sale of, does not divest title — Duty of officers as to.*

§ 1380. [851.] All property obtained by larceny, robbery, or burglary shall be restored to the owner; and no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his rights to such property; and it shall be the duty of the officer who shall arrest any person charged as principal or accessory in any robbery or larceny, to secure the property alleged to have been stolen, and he shall be answerable for the same, and shall annex a schedule thereof to his return of the warrant.

*Recompense to prosecutor and to keeper of stolen property.*

§ 1381. [852.] Upon any conviction of burglary, robbery, or larceny, the court may order a suitable recompense to the prosecutor, and also to the officer who has secured and kept the stolen property, not exceeding their actual expenses, with a reasonable allowance for their time and trouble, to be paid by the county treasurer.

*Defendant not liable for costs when — Fees and charges, how taxed and paid.*

§ 1382. [1168.] No prisoner or person under recognizance who shall be acquitted by verdict or discharged because no indictment is found against him, or for want of prosecution, shall be liable for any costs or fees of any officer, or for any charge of subsistence while he was in custody, but in every such case the fees of the defendant's witnesses, and of the officers for services rendered at the request of the defendant, and charges for subsistence of the defendant while in custody, shall be taxed and paid as other costs and charges in such cases.

An amendment adapting this section to procedure by information as well as indictment was reported but not passed.

*Cost bills, how to be made and certified.*

§ 1382 a. In all convictions for felony, whether capital or punishable by imprisonment in the penitentiary, the clerk of the superior court shall forthwith, after sentence, tax the costs in the case. The cost bill shall be made out in triplicate, and be examined by the prosecuting attorney of the county in which the trial was had. After which the judge of the superior court shall allow and approve such bill or so much thereof as is allowable by law. The clerk of the superior court shall thereupon, under his hand, and under the seal of the court, certify said triplicate cost bills, and shall file one with the papers of the cause, and shall transmit one to the state auditor and one to the county auditor of the county in which said felony was committed. [November 28, 1883, § 1. In effect immediately.]

## CHAPTER XVI.

### OF SEARCH-WARRANTS.

§ 1383. Search-warrants, when may be issued.

§ 1384. Other cases in which search-warrants may issue.

§ 1385. Search-warrant, to whom directed, and what to contain.

§ 1386. Execution of search-warrant, and disposition of property seized under it.

#### *Search-warrant, when may be issued.*

§ 1383. [967.] When complaint shall have been made on oath to any magistrate authorized to issue warrants in criminal cases that personal property has been stolen or embezzled, or obtained by false tokens or pretenses, and that the complainant believes that it is concealed in any particular house or place, the magistrate, if he be satisfied that there is reasonable cause for such belief, shall issue a warrant for such property.

**Search warrants, use of.** — The fourth amendment to the constitution of the United States prohibits unreasonable searches and seizures, and provides that "no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The constitution of Washington provides that "no person shall be

disturbed in his private affairs, or his home invaded, without authority of law": Sec. 7, art. 1. The legislature has power to authorize the issuance of a warrant to search the person of an individual in a proper case, and neither of the above constitutional provisions prohibits it. Such power has been exercised by the enactment of sections 1383-1386, inclusive: *Collins v. Lean*, 68 Cal. 284.

#### *Other cases in which search-warrants may issue.*

§ 1384. [968.] Any such magistrate, when satisfied that there is reasonable cause, may also, upon like complaint made on oath, issue search-warrant in the following cases, to wit:—

1. To search for and seize any counterfeit or spurious coin, or forged instruments, or tools, machines, or materials prepared or provided for making either of them.

2. To search for and seize any gaming apparatus used or kept and to be used in any unlawful gaming-house, or in any building, apartment, or place resorted to for the purpose of unlawful gaming.

**Officer may take property not on person — Lottery tickets.** — A warrant was regularly issued by a justice of the peace, and directed the officer executing it to make immediate search of the person of the plaintiff for lottery tickets, and if any were found, to bring them before him. The officer, after searching the person of the plaintiff, discovered in the room where the search was made

a package of such tickets, belonging to the plaintiff and in his possession, but not on his person, and carried them away for the purpose of using them as evidence against him in a future prosecution; such action of the officer was proper, and authorized by the warrant: *Collins v. Lean*, 68 Cal. 284.

#### *Search-warrant, to whom directed, and what to contain.*

§ 1385. [969.] All such warrants shall be directed to the sheriff of the county, or his deputy, or to any constable of the county, commanding such officer to search the house or place where the stolen property or other things for which he is required to search are believed to be concealed, which place and property or things to be

searched for shall be designated and described in the warrant, and to bring such stolen property or other things, when found, and the person in whose possession the same shall be found, before the magistrate, who shall issue the warrant, or before some other magistrate or court having cognizance of the case.

**Form of the search-warrant.** — The search-warrant should be specific in terms, both as to the place to be searched and the persons or things to be seized. General warrants have always been considered illegal: *Money v. Leach*, 1 W. Black. 555; *Bell v. Clapp*, 10 Johns. 263; *Sandford v. Nichols*, 13 Mass. 286; *State v. Spencer*, 38 Me. 30. To command a search of the "suspected place" is not sufficient: *People v. Holcomb*, 3 Park. Cr. 656. Neither is a "building" a sufficient description of the place to be searched: *State v. Spencer*, 38 Me. 30. The description should be as certain in the warrant as would be necessary in a deed to convey such place: *Jones v. Fletcher*, 41 Me. 254; *State v. Bartlett*, 47 Me. 358. A warrant which describes the place to be searched as "a place of common resort" is insufficient: *Commonwealth v. Liquors*, 97 Mass. 332. So a warrant directing the dwelling-house of a person to be searched only authorizes a search of the house which such person occupies, and not a house owned by him but occupied by another person: *McGlinchy v. Barrows*, 41 Me. 74; see *Flaherty v. Longley*, 61 Me. 420. It is no objection to the warrant that several different places are directed to be searched: *Gray v. Davis*, 27 Conn. 447. A description of the place to be searched, by giving the owner's name and a description of the kind of liquors which he was believed to keep, is sufficient: *State v. Thompson*, 44 Iowa, 399.

**Description of things.** — The things to

be searched for should also be specifically described. Where property was described as "three cases of misses' and women's boots, of the value of one hundred dollars; a lot of oak-tanned soles, of the value of fifty dollars; and ten sides of sole-leather of the value of forty dollars," — this was held sufficient: *Dwinnels v. Boynton*, 3 Allen, 310. So where the description was, "certain spirituous and intoxicating liquors, to wit, rum, gin, brandy, wine, alcohol, and ale," it was held sufficient: *State v. Whisky*, 54 N. H. 164. But a description of certain "goods, wares, and merchandise," without any specification of their character, quality, number, or weight, or any other circumstance tending to distinguish them, was held not to be such a particular description as the constitution requires: *Sandford v. Nichols*, 13 Mass. 285.

**Officer must follow warrant.** — It is incumbent upon the officer to strictly observe the directions of the warrant. If he be directed to seize only stolen sugar, and seize tea, he is a trespasser: *Price v. Messenger*, 2 Bos. & P. 158. But he may seize goods described in the warrant, although they turn out not to be the particular ones which the person procuring it had in mind: *Stone v. Dana*, 3 Met. 98. Although, as a general rule, the officer should only seize such goods as are specified, yet there may be cases in which he would be justified in taking others: *Crozier v. Cundy*, 9 Dowl. & R. 224; *State v. Brennan's Liquors*, 25 Conn. 278. See next preceding section.

*Execution of search-warrant, and disposition of property seized under it.*

§ 1386. [970.] When any officer, in the execution of a search-warrant, shall find any stolen or embezzled property, or shall seize any other things for which a search is allowed by this chapter, all the property and things so seized shall be safely kept by the direction of the court or magistrate so long as shall be necessary for the purpose of being produced in evidence on any trial; and as soon as may be afterwards, all such stolen and embezzled property shall be restored to the owner thereof, and all other things seized by virtue of such warrant shall be destroyed under direction of the court or magistrate.

**Other property:** See notes to §§ 1384, 1385, *supra*.



## CHAPTER XVII.

## OF PROCEEDINGS IN RELATION TO FUGITIVES FROM JUSTICE.

- § 1387. Governor may appoint agent to demand fugitive -- Duty of prosecuting officer.
- § 1388. Demand upon governor — Proceedings.
- § 1389. Warrant of arrest before demand made for fugitive found in this state.
- § 1390. Examination of person charged.
- § 1391. Discharge unless demand is made or detention ordered by court.
- § 1392. Complainant is liable for costs while fugitive is detained.

*Governor may appoint agent to demand fugitive — Duty of prosecuting officer.*

§ 1387. The governor of this state may appoint agents to demand of the executive authority of any state or territory any fugitive from justice, or any other person charged with felony or any other crime in this state; and whenever an application shall be made to the governor for that purpose, the prosecuting attorney, when required by the governor, shall forthwith investigate the ground of such application, and report to the governor all material circumstances which may come to his knowledge, with an abstract of the evidence and his opinion as to the expediency of the demand; but the governor may, in any case, appoint such agents without requiring the opinion of or any report from the prosecuting attorney, and the accounts of the agents appointed for such purposes shall in all cases be audited by the state auditor and paid from the state treasury. [*February 24, 1891, § 98.*]

**Fugitives from justice.** — The right of extradition between the several states of the United States is derived from article 4, section 2, of the federal constitution: See *ante*, U. S. Const. This provision, being a part of the supreme law of the land, is a part of the law of each state, and state officers whose duty it is to adjudicate or execute the laws are governed by it the same as by every other law in force: *Matter of Romaine*, 23 Cal. 585. The particular object to be effected by the constitutional provision just cited is to supply the defect in the administration of criminal justice resulting from the rule that courts have no control over offenses committed beyond their jurisdiction. The state to which the fugitive escapes having no power to try the offense, it was enjoined by the constitution to surrender him to the state having jurisdiction, simply on demand, in order that, within the United States, the administration of criminal justice might be perfect: *Brown v. Maryland*, 12 Wheat. 419, 437. The states can pass no laws inconsistent with this constitutional provision, or with the legislation of Congress, for its execution. Both are parts of "the supreme law of the land," and neither can be invaded or superseded by the legislative power of the states: Spear on Extradition, 243.

"*Person charged.*" — The constitution of the United States nowhere defines the word "charged," as used in section 2 of article 4 (and likewise used in the above section), or

tells how the charge should be made or authenticated. Congress, however, by an act passed February 12, 1793, the substance of which has been re-enacted as section 5278 of the Revised Statutes, provided that the charge must be in the form of "an indictment found or affidavit made before a magistrate of any state or territory" in which the crime is alleged to have been committed, and that "a copy" of such indictment or affidavit, "certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled," shall be produced as evidence that the charge has been made in the proper manner: Spear on Extradition, 231. This act was declared constitutional in *Prigg v. Com.*, 16 Pet. 539, "in all its leading provisions."

*For what offenses.* — The clause, "charged with treason, felony, or other crime" (as used both in the United States constitution and in the above section), embraces every act forbidden and made punishable by the law of the state, and the right of a state to demand the surrender of fugitives from justice extends to all cases of the violation of its criminal law: *People v. Brady*, 56 N. Y. 182; *Morton v. Skinner*, 48 Ind. 123; *Taylor v. Taintor*, 16 Wall. 366; *Johnston v. Riley*, 13 Ga. 97; *Matter of Voorhees*, 32 N. J. L. 141. It embraces "every act forbidden and made punishable by a law of the state," "every offense made punishable by a law of the state in which it was committed," "every offense known to the

law of the state from which the party charged had fled," "without any exception as to the character and nature of the crime": *Com. v. Dennison*, 24 How. 66, 99-103, per Taney, C. J.; 1 Bishop's *Crim. Proc.*, sec. 222. The object of connecting the words "treason" and "felony" with the words "other crime" was for the purpose of excluding the possible construction that political offenders were not to be surrendered the same as others: *Com. v. Dennison*, 24 How. 66. Misdemeanors are included as well as felonies: *Ex parte Reggel*, 114 U. S. 642; *Morton v. Skinner*, 48 Ind. 123; *People v. Brady*, 56 N. Y. 182, 188; *Brown's Case*, 112 Mass. 409. So if the criminal act be such in the state demanding the fugitive, although not in the state surrendering, it is sufficient: *Johnston v. Riley*, 13 Ga. 97; *In re Voorhees*, 32 N. J. L. 141.

*Who is fugitive from justice.* — One who "flees from justice" is one who commits a crime in the state making the demand and flees to the other state: *Ex parte Smith*, 3 McLean, 121; *In re Heyward*, 1 Sand. 701. It is sufficient to constitute a fleeing that the person charged with crime has gone beyond the jurisdiction, so that there has been no reasonable opportunity to prosecute him since the facts were known; and it is immaterial that he has gone to the place of his domicile: *Kingsbury's Case*, 106 Mass. 223. So when a person infringes the criminal laws of a state, and departs therefrom without waiting to abide the consequences of such act, he is a fugitive from justice within the meaning of the constitutional provision in question: *Matter of Voorhees*, 32 N. J. L. 141. Upon the executive of the state or territory in which the accused is found rests the responsibility of determining whether he is a fugitive from the justice of the demanding state. But the act of Congress does not direct his surrender, unless it is made to appear that he is in fact a fugitive from justice: *Ex parte Reggel*, 114 U. S. 642.

*"Demand of the executive."* — The language of the constitution is, that the delivery of a fugitive criminal must be made "on demand of the executive authority of the state from which he fled." This demand is "a formal written and official application made by the governor of the state or territory in which the crime is charged to have been committed, upon the governor of the state or territory to which the criminal is assumed to have fled, and in which he is found. The order of the constitution is demand first and delivery afterwards": Spear on Extradition, 263. Without such demand, no executive, acting under this authority, has any power to make a delivery. The arrest of the fugitive and his detention by an order of the court does not of itself give any executive jurisdiction over the case: *Id.* The power must proceed from the demand, and nothing else: *Botts v. Williams*, 17 B. Mon. 687. It must also appear that judicial proceedings have been commenced against the person demanded, in the state from which the demand is made: *Ex parte White*, 49 Cal. 433.

*Evidence of charge.* — The evidence required, that a person whose delivery is demanded has been charged with the commission of a crime, is "a copy of an indictment found or an affi-

davit made before a magistrate of any state or territory, charging the person with having committed" the particular crime therein set forth. This copy must be "certified as authentic by the governor, or other chief magistrate, of the state or territory from whence the person so charged has fled": U. S. Rev. Stats., sec. 5278. Three things are necessary to give the executive jurisdiction: 1. The fugitive must be demanded by the executive of the state from which he fled; 2. A copy of the indictment found, or an affidavit made before a magistrate, charging the fugitive with having committed the crime; 3. Such copy of the indictment or affidavit must be certified as authentic by the executive: *Matter of Clark*, 9 Wend. 212; *In re Rutter*, 7 Abb. Pr., N. S., 67. Each state has the right to prescribe the forms of pleading and process to be observed in its courts, in both civil and criminal cases, subject only to those provisions of the national constitution designed for the protection of life, liberty, and property in all the states of the Union; consequently, in a case involving the surrender, under the act of Congress, of a fugitive from justice, it may not be objected that the indictment is not framed according to the technical rules of criminal pleading, if it conforms substantially to the laws of the demanding state: *Ex parte Reggel*, 114 U. S. 643.

The executive of the state issuing the requisition is the only proper judge of the authenticity of the affidavit: *Matter of Manchester*, 5 Cal. 237. It is not necessary that the affidavit should set forth the crime charged with all legal exactness necessary to be observed in an indictment. If it distinctly charge the commission of an offense, it is all that is necessary, *Ex parte Reggel*, 114 U. S. 642; *Matter of Manchester*, 5 Cal. 237; *Davis's Case*, 122 Mass. 324. Nor need it state that the prisoner is a fugitive from justice: *Davis's Case*, 122 Mass. 324. It has been uniformly held by the courts that the requirements of the law relating to the evidence of the charge shall be strictly complied with, as indispensable to the legality of the demand and resulting obligation of delivery: Spear on Extradition, 268; *Ex parte Thornton*, 9 Tex. 635; *Soloman's Case*, 1 Abb. Pr., N. S., 347.

*Release on habeas corpus.* — The courts will inquire on *habeas corpus* whether the prisoner is properly detained: *Ex parte Smith*, 3 McLean, 121; *In re Manchester*, 5 Cal. 237; Church on Habeas Corpus, chapter on Interstate Extradition; *In re Robb*, 64 Cal. 431; 9 Saw. 568; *sub nom. Robb v. Connolly*, 111 U. S. 624. Where the return to a writ of *habeas corpus* sets forth the fact that the party is a fugitive from justice, that he was demanded as such, and was arrested and committed for the purpose of being surrendered, the only inquiry is, whether the provisions of the act of Congress of 1793 have been complied with: *People v. Brady*, 56 N. Y. 182, 187. If it appear that the papers presented to the executive, and upon which the rendition of the person as a fugitive from justice is demanded, are in form and substance sufficient to authorize the issuing of the executive warrant, the prisoner will be remanded: *Ex parte Reggel*, 114 U. S. 642; *People v. Brady*, 56 N. Y. 182; *State v. Schlemm*, 4 Harr. (Del.) 577; *Matter of Manchester*, 5 Cal.



237. On such a return being made, the facts and circumstances of the alleged offense with which the party stands charged cannot be inquired into: *State v. Schlemm*, 4 Harr. (Del.) 577. See *Nichols v. Cornelius*, 7 Ind. 611; *Matter of Clark*, 9 Wend. 212. More formal defects in the indictment will not entitle the prisoner to his discharge: *Davis's Case*, 122 Mass. 324. The accused should not be discharged on *habeas*

*corpus* merely because, in the judgment of the court, the proof showing that he was a fugitive from justice may not be as full as might properly have been required: *Ex parte Reggel*, 114 U. S. 642. Guilt or innocence of the prisoner will not be inquired into on this writ: Note to *Matter of Fetter*, 57 Am. Dec. 395, where the subject of extradition papers generally is considered.

*Demand upon governor—Proceedings.*

§ 1388. [972.] When a demand shall be made upon the governor of this state by the executive of any state or territory, in any case authorized by the constitution and laws of the United States, for the delivery over of any person charged in such state or territory with treason, felony, or any other crime, the prosecuting attorney, or any other prosecuting officer, when required by the governor, shall forthwith investigate the ground of such demand, and report to the governor all material facts which may come to his knowledge as to the situation and circumstances of the person so demanded, especially as to whether he is held in custody or is under recognizance to answer for any offense against the laws of this state or of the United States, or by force of any civil process, and also whether such demand is made according to law, so that such person ought to be delivered up; and if the governor be satisfied that such demand is conformable to law, and ought to be complied with, he shall issue his warrant, under the seal of the state, authorizing the agents who make such demand either forthwith, or at such time as shall be designated by the warrant, to take and transport such person to the line of the state at the expense of such agents, and shall also by such warrant require the civil officers within this state to afford all needful assistance in the execution thereof.

*Warrant of arrest before demand made for fugitive found in this state.*

§ 1389. [973.] Whenever any person shall be found within this state charged with an offense committed in any state or territory, and liable by the constitution and laws of the United States to be delivered on the demand of the executive of such state or territory, any court or magistrate authorized to issue warrants in criminal cases may, upon complaint under oath setting forth the offense, and such other matters as are necessary to bring the offense within the provisions of law, issue a warrant to bring the person so charged before the same or some other court or magistrate so authorized within the state, to answer such complaint as in other cases.

**Arrest before demand made.** — The law of this state authorizing the arrest of a fugitive from justice, who has fled from another state before a demand by the executive of the state from which he fled, and his detention for a reasonable time to afford an opportunity for such executive demand, is not in conflict with the

second section of article 4 of the constitution of the United States: *Ex parte White*, 49 Cal. 433; *Ex parte Cubreth*, 49 Cal. 435; *Ex parte Rosenblatt*, 51 Cal. 285.

**Warrant for arrest.** — Before a magistrate has any authority to issue a warrant for the arrest of a fugitive from justice who has fled



from another state, there must be filed in his office a complaint, under oath, setting forth three things: 1. That a crime has been committed; 2. That the accused has been charged in the foreign state with the commission of such crime; 3. That he has fled from justice, and is found within this state: *Matter of Hey-*

*ward*, 1 Sand. 701; *Matter of Leland*, 7 Abb. Pr., N. S., 64. To be valid, the warrant should specify the offense alleged to have been committed by the accused; stating that the accused is a fugitive from justice is insufficient: *Ex parte Cubreth*, 49 Cal. 437; see *People v. Brady*, 56 N. Y. 182; *Ex parte Pfizer*, 28 Ind. 450.

*Examination of person charged.*

§ 1390. [974.] If, upon the examination of the person charged, it shall appear to the court or magistrate, by proof in addition to the oath of the complainant, that there is reasonable cause to believe that the complaint is true, and that such person may be lawfully demanded of the governor, he shall, if not charged with a capital crime, be required to recognize, with sufficient sureties, in a reasonable sum, to appear before such court or magistrate at a future day, allowing a reasonable time to obtain a warrant of the executive, and to abide the order of the court or magistrate; and if such person shall not so recognize, he shall be committed to prison, and there be detained until such day, in like manner as if the offense charged had been committed in this state; and if the person so recognizing shall fail to appear according to the conditions of his recognizance, he shall be defaulted, and the like proceedings shall be had as in the case of other recognizances entered into before such court or magistrate; but if such person be charged with a capital crime, he shall be committed to prison, and there be detained until the day so appointed for his appearance before the court or magistrate.

*Discharge unless demand is made or detention ordered by court.*

§ 1391. [975.] If the person so recognized or committed shall appear before the court or magistrate upon the day ordered, he shall be discharged, unless he be demanded by some persons authorized by the warrant of the executive to receive him, or unless the court or magistrate shall see cause to commit him, or require of him to recognize anew for his appearance at some other day; and if, when ordered, he shall not so recognize, he shall be committed and be detained as before provided. Whenever the person so appearing shall be recognized, committed, or discharged, any person authorized by the warrant of the executive may at all times take him into custody, and the same shall be a discharge of the recognizance, if any, and shall not be deemed an escape.

*Complainant is liable for costs while fugitive is detained.*

§ 1392. [976.] The complainant in such cases shall be answerable for the actual costs and charges, and for the support in prison of any person so committed, and shall advance to the jailer one week's board at the time of commitment, and so from week to week, so long as such person shall remain in jail; and if he fails to do so, the jailer may forthwith discharge the person from his custody.

## TITLE XIV.

## OF PROCEEDINGS TO VACATE OR MODIFY JUDGMENTS IN THE COURTS IN WHICH THEY WERE RENDERED.

§ 1393. Causes for which superior court may vacate or modify judgment.

§ 1394. Proceedings to vacate or modify judgments shall be by motion when.

§ 1395. Proceedings to vacate or modify judgment to be by verified petition when — Affidavit to contain what.

§ 1396. Jurisdiction of person, how acquired — Proceedings to vacate or modify judgment, how to be conducted.

§ 1397. Prerequisites to vacating judgment on motion or petition — Effect of modifying judgment.

§ 1398. Grounds upon which to vacate or modify judgment may first be tried.

§ 1399. Injunction on proceedings to vacate or modify judgment may be granted when.

§ 1400. Construction of provisions of this chapter.

§ 1401. Judgment upon denial of application to vacate or modify original judgment.

*Causes for which superior court may vacate or modify judgment.*

§ 1393. [436.] The superior court in which a judgment has been rendered, or by which or the judge of which a final order has been made, shall have power, after the term at which such judgment or order was made, to vacate or modify such judgment or order:—

1. By granting a new trial for the cause, within the time and in the manner, and for any of the causes prescribed by the sections relating to new trials;

2. By a new trial granted in proceedings against defendant, served by publication only as prescribed in section one hundred and eighty-two;

3. For mistakes, neglect, or omission of the clerk, or irregularity in obtaining the judgment or order;

4. For fraud practiced by the successful party in obtaining the judgment or order;

5. For erroneous proceedings against a minor person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

6. For the death of one of the parties before the judgment in the action;

7. For unavoidable casualty or misfortune preventing the party from prosecuting or defending;

8. For error in a judgment shown by a minor, within twelve months after arriving at full age.

**Power of courts over their own proceedings.** — In the absence of express statutory prohibition, courts always have control over their own proceedings, and may deal with them so that what is right and just may be done: *In re City of Buffalo*, 78 N. Y. 362.

When an erroneous judgment has been ren-

dered against defendant, and he neither appeals therefrom nor applies to the court in the time or manner prescribed by law to have it corrected, the court has not the power, after the time has expired, to vacate or modify it: *Hawkes v. Votaw*, 23 Pac. Rep. 442 (Wash.).

*Proceedings to vacate or modify judgments shall be by motion when.*

§ 1394. The proceedings to vacate or modify a judgment or order for mistakes or omissions of the clerk, or irregularity in obtaining the judgment or order, shall be by motion served on the adverse party, or on his attorney in the action, and within one year. [*February 24, 1891, § 1.*]

*Proceedings to vacate or modify judgment to be by verified petition when —*  
*Affidavit to contain what.*

§ 1395. The proceedings to obtain the benefit of subdivisions two, three, four, five, six, and seven of section thirteen hundred and ninety-three shall be by petition verified by affidavit, setting forth the judgment or order, the facts or errors constituting a cause to vacate or modify it, and if the party is a defendant, the facts constituting a defense to the action; and such proceedings must be commenced within one year after the judgment or order was made, unless the party entitled thereto be a minor or person of unsound mind, and then within one year from the removal of such disability. [*February 24, 1891, § 2.*]

*Jurisdiction of person, how acquired — Proceedings to vacate or modify judgment, how to be conducted.*

§ 1396. In such proceedings the party shall be brought into court in the same way, on the same notice as to time, mode of service and mode of return, and the pleadings shall be governed by the same principles, and issues be made up by the same form, and all the proceedings conducted in the same way, as near as can be, as in original action by ordinary proceedings, except that the facts stated in the petition shall be deemed denied without answer, and defendant shall introduce no new cause, and the cause of the petition shall alone be tried. [*February 24, 1891, § 3.*]

**"Due service."** — Admitting "due service of copy" does not waive objection that service is too late: *Towdy v. Ellis*, 22 Cal. 657. "Service admitted" means personal service admitted: *Brown v. Greene*, 2 West Coast Rep. 828.

**Service of notice.** — Service of notice can only be made upon the attorney of the party to be served, when such attorney resides within the county: *Rees v. Rees*, 7 Or. 78; *Byers v. Cook*, 13 Or. 297. Outside of the county, service can only be had on the party: *Lindley v. Wallis*, 2 Or. 204. The return of service which is required to be made between certain hours must show when it was made: *Lindley v. Wallis*, 2 Or. 205. When a notice of appeal was served by leaving a copy of the notice at the place of residence of the person to be served, with a person of suitable age and discretion, but the return did not show that it was so left "between the hours of six in the morning and nine in the evening," held, that the proof of service was not sufficient: *Lindley v. Wallis*, 2 Or. 205.

**Service by mail.** — This is good only where the person making the service and the

person on whom it is to be made reside or have their offices in different places, between which there is a regular communication by mail: *People v. Alameda T. Co.*, 30 Cal. 184. The "person making the service" is the attorney, or party giving the notice, etc., and not the process server: *Moore v. Besse*, 35 Cal. 186. It is not necessary that the notice be mailed at the place where the attorney serving it has his office or place of residence; to place the notice in the post-office at another place, if there is a regular mail communication between such place and that where the party to be served resides, will be sufficient: *Luck v. Luck*, 83 Cal. 574, overruling the prior cases on this point. The only essentials are residence or offices in different places, and a regular mail communication between the place of mailing and the place of destination: *Luck v. Luck*, 83 Cal. 574. And the affidavit of service must disclose the fact of residence in different places: *Cunningham v. Warnekey*, 61 Cal. 507. As to other matters concerning service by mail, see *Pacific etc. Ins. Co. v. Shepardson*, 76 Cal. 376; *Brown v. Green*, 65 Cal. 221; *Sullivan v. Wallace*, 73 Cal. 307.



*Prerequisites to vacating judgment on motion or petition — Effect of modifying judgment.*

§ 1397. [441.] The judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment is rendered; or if the plaintiff seeks its vacation, that there is a valid cause of action; and when judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment.

*Grounds upon which to vacate or modify judgment may first be tried.*

§ 1398. [442.] The court may first try and decide upon the grounds to vacate or modify a judgment or order, before trying or deciding upon the validity of the defense or cause of action.

*Injunction on proceedings to vacate or modify judgment may be granted when.*

§ 1399. [443.] The party seeking to vacate or modify a judgment or order may obtain an injunction suspending proceedings on the whole or part thereof, which injunction may be granted by the court or the judge, upon its being rendered probable, by affidavit or petition sworn to, or by exhibition of the record, that the party is entitled to have such judgment or order vacated or modified.

*Construction of provisions of this chapter.*

§ 1400. The provisions of this chapter shall not be so construed as to affect the power of the court to vacate or modify judgments or orders as elsewhere in this code provided; nor shall any judgment of acquittal in a criminal action be vacated under the provisions of this chapter. [February 24, 1891, § 4.]

A defendant in a criminal action cannot be tried after an acquittal on the merits: Const., art. 1, sec. 9.

*Judgment upon denial of application to vacate or modify original judgment.*

§ 1401. In all cases in which an application under this chapter to vacate or modify a judgment or order for the recovery of money is denied, if proceedings on the judgment or order shall have been suspended, judgment shall be rendered against the plaintiff for the amount of the former judgment or order, interest, and costs, together with damages at the discretion of the court, not exceeding ten per cent on the amount of the judgment or order. [Feb. 24, 1891, § 5.]

## TITLE XV.

## OF APPEALS.

- § 1402. Appeals, in what cases allowed.
- § 1403. Time within which appeals must be taken.
- § 1404. Title of action on appeal.
- § 1405. Manner of taking appeal.
- § 1406. Service of notice — Who may join, and how.
- § 1407. Appellant must give bond.
- § 1408. Conditions of bond for appeal and for *supersedeas*.
- § 1409. Bond to keep injunction in force.
- § 1410. Same on appeal to United States supreme court.
- § 1411. Amount of bond, how determined.
- § 1412. Qualifications of sureties.
- § 1413. Recall of execution on *supersedeas*.
- § 1414. Sheriff must restore property on *supersedeas*.
- § 1415. Clerk must make transcript.
- § 1416. Definition of transcript.
- § 1417. Dismissal of appeal, etc., on failure to fill transcript.
- § 1418. Appeal not to be dismissed for formal defects of notice.
- § 1419. When respondent may have affirmance on motion.
- § 1420. Dismissal for other causes.
- § 1421. New bond required if old not sufficient.
- § 1422. Statement of facts on appeal.
- § 1423. Judge's certificate — Appeals in equity causes.
- § 1424. What evidence need not be copied into transcript.
- § 1425. Supreme court may require production of original paper.
- § 1426. Bills of exceptions, when issued.
- § 1427. Statement or bill of exceptions, where settled.
- § 1428. Form of assignment of errors.
- § 1429. Court may affirm, reverse, or modify.
- § 1430. Cause not decided till decision is filed.
- § 1431. Damages for delay on frivolous appeals.
- § 1432. Supreme court may give judgment against sureties.
- § 1433. Supreme court may either remand or issue process.
- § 1434. Effect of entry of mandate.
- § 1435. Restitution, how enforced.
- § 1436. Supreme court may enforce its mandates upon inferior courts.
- § 1437. Reversal does not disturb titles.
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- § 1439. Proceedings on petition for rehearing.
- § 1440. Action does not abate by death of party.
- § 1441. Manner of serving notices, etc., on appeal.
- § 1442. Appeal is *supersedeas* in criminal cases.
- § 1443. Bail pending appeal in criminal cases.
- § 1444. Personal appearance not required in supreme court.
- § 1445. Proceedings as to defendant on reversal of judgment.
- § 1446. Certified transcript of judgment, etc., of supreme court is authority to carry out its mandate.
- § 1447. Credit of imprisonment pending appeal, etc.
- § 1448. Supreme court to try cases on merits.
- § 1449. Form and effect of executions from supreme court.
- § 1450. Supreme court may make rules of practice.
- § 1451. Manner of removing causes herein provided is exclusive.
- § 1451 a. Vested rights to remain undisturbed.

*Appeals, in what cases allowed.*

§ 1402. Except as otherwise provided in this section, any party aggrieved may appeal to the supreme court from the superior courts, in all actions and proceedings. No appeal shall be allowed in any civil action at law for the recovery of money or property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute; nor shall an appeal be allowed to the state in any criminal action, except when the error complained of is in setting aside the indictment or information, or in arresting the judgment, on the ground that the facts stated in the indictment or information do not constitute a crime. [March 9, 1891, § 1.]

**Appeals, generally.** — An appeal must be taken within the time prescribed by statute: *Leary v. Territory*, 3 Wash. 13; and in conformity with the statute: *Meeker v. Gardella*, 2 Wash. 355; *Puget Sound etc. Co. v. Pierce Co.*, 1 Wash. 76. The time in which it may be taken is fixed in the interest of the state, and cannot be waived by the parties to the suit, so as to have the case afterwards heard: *Coxwell v. Hogan*, 23 Pac. Rep. 835 (Wash.); *Stark v. Jenkins*, 1 Wash. 421. Actions at law and criminal cases, as well as equitable actions, may be appealed, as the law governing appeals seems to apply to every class of cases which the appellate court is competent to review: *Baker v. Prewett*, 3 Wash. 474; *Bremer v. Burgess*, 2 Wash. 290. A case will be heard on its merits only so far as the record sent up discloses them: *Swift v. Stine*, 3 Wash. 518. The supreme court, in the absence of positive law or rule of court will be governed by considerations of convenience and propriety in hearing appeal cases: *Turner v. Saxon*, 3 Wash. 473. No assignment of errors is contemplated by the law governing appeals except such as may be required by a rule of court: *Bremer v. Burgess*, 2 Wash. 290.

**Notice of appeal.** — The notice may contain appeals from several orders; but care must be taken to have the record upon each appeal complete and intelligible: *People v. Center*, 61 Cal. 191. The notice of appeal should with reasonable certainty identify the decree appealed from, the court rendering it, the parties, and the fact that one or the other appeals: *Christie v. Evans*, 5 Or. 253; *Luse v. Luse*, 9 Or. 149. The filing of the notice of appeal must have preceded the filing of the undertaking: *Buckholder v. Byers*, 10 Cal. 482; *Weiss v. Jackson*, 8 Or. 529. Service of notice of appeal can be made upon the party or his attorney: *Carr v. Hurd*, 3 Or. 160; *Rees v. Rees*, 7 Or. 19. The notice must be served on all the adverse parties whose rights may be affected by a reversal of the judgment appealed from: *Williams v. Santa Clara M. Co.*, 4 West Coast Rep. 616. Though service on one of two persons who appear as partners is service upon the firm: *Shirley v. Birch*, 16 Or. 1. The appellant may abandon his appeal, and give a second notice of appeal, if all within the time fixed by law to

perfect the appeal: *Holladay v. Teal*, 7 Or. 454. To perfect an appeal, the notice must be accompanied by proof of service in the form of an indorsement thereon: *Brine v. Storr*, 6 Or. 207; *Lillienthal v. Caravita*, 15 Or. 339. The return of service, if imperfect, may be amended to conform to the facts: *Dolph v. Nickun*, 2 Or. 202; *Lindley v. Wallis*, 2 Or. 204; *Seeley v. Sebastian*, 3 Or. 363.

**Time for taking appeal.** — *Judgment must be entered.* — An appeal from a judgment will not lie until the judgment has been entered: *Lorenz v. Jacobs*, 53 Cal. 25; *Miller v. Sharp*, 54 Cal. 590; *McLaughlin v. Doherty*, 54 Cal. 519; *Preston v. Hearst*, 54 Cal. 596; *Trenouth v. Farrington*, 54 Cal. 273; *Thomas v. Anderson*, 55 Cal. 43; *People v. Center*, 61 Cal. 191. If taken, the appeal will be dismissed: *Schroder v. Schmidt*, 71 Cal. 399; *Onderdonk v. San Francisco*, 75 Cal. 534; *Tyrrell v. Baldwin*, 72 Cal. 192; *Kimple v. Conway*, 69 Cal. 71; *McLaughlin v. Doherty*, 54 Cal. 519; *Thomas v. Anderson*, 55 Cal. 43. So, also, an appeal from an order settling the accounts of an administrator or the estate of a deceased person is premature and will be dismissed, when taken before the order is entered in the minute-book of the court: *Estate of Rose*, 72 Cal. 577; but an appeal from an order refusing a new trial may be taken before the judgment is entered: *Schroder v. Schmidt*, 71 Cal. 399. And when the notice of appeal from the judgment is filed on the day on which the judgment is entered, the appeal is not premature, and will not be dismissed, notwithstanding the notice was served on the preceding day: *Tyrrell v. Baldwin*, 72 Cal. 192. But the dismissal of a premature appeal is not a bar to a second appeal in the same case, if taken in time, and when a record is made up from which an appeal can be taken: *In re Rose*, 80 Cal. 166. If the record shows that the notice of appeal was not served in time, no appeal is pending, and a motion to dismiss will be denied: *Harbin v. Pratt*, 50 Cal. 94. The modification of a judgment made as the result of a motion for a new trial is, in effect, the rendition of a new judgment, and a party may appeal at any time within the statutory period after its rendition: *Mann v. Haley*, 45 Cal. 64. The failure to take an appeal within the time prescribed by statute goes to the jurisdiction:



*Estate of Fisher*, 75 Cal. 523; and an appeal from a judgment which is not taken within the statutory time after its entry will be dismissed: *In re Grider*, 81 Cal. 571; *Turner v. Reynolds*, 81 Cal. 214; *Coward v. Clanton*, 79 Cal. 23; *Watson v. Sutro*, 77 Cal. 609; *Gruell v. Spooner*, 71 Cal. 493; *Moyk v. Peterson*, 75 Cal. 496; *Dominguez v. Mascotti*, 74 Cal. 269. The rights of the parties in respect to an appeal are determined by the date of the actual entry of the judgment, and cannot be affected by entry of judgment *nunc pro tunc* as of prior date: *Coon v. Grand Lodge United Order of Honor*, 76 Cal. 354.

**Final judgment.** — A sentence, in a criminal case, is the final act, and constitutes the judgment. Judgment and sentence are synonymous: *Lytle v. Territory*, 1 Wash. 435, 444.

But the entry upon the journal of a verdict of guilty, and also a copy of the warrant of execution, do not constitute a final judgment on the record: *Regan v. Territory*, 1 Wash. 31.

**Motion in arrest of judgment** made and afterwards waived in the lower court cannot be considered in the supreme court: *Freany v. Territory*, 1 Wash. 71.

**People may appeal** from an order setting aside an indictment on defendant's motion on the ground that it was found upon illegal testimony: *People v. Young*, 31 Cal. 563. The people cannot appeal from a judgment upon a verdict of acquittal directed by instruction of the court because of the insufficiency of the indictment to authorize the admission of evidence on the part of the people: *Territory v. Hui and Sam Lee*, 3 Wash. 396.

*Time within which appeals must be taken.*

§ 1403. In civil actions and proceedings, appeals shall be prosecuted within six months after the rendition of the decision, order or judgment complained of; appeals in criminal cases may be prosecuted at any time within one year after final judgment, and the notice of appeal in such cases may be given within the same time. [March 9, 1891, § 2.]

*Title of action on appeal.*

§ 1404. The party appealing shall be designated as the appellant, and the adverse party as the respondent, but the title of the action shall, in other respects, remain unchanged. [March 9, 1891, § 3.]

*Manner of taking appeal.*

§ 1405. A person desiring to appeal from any such decision, order, or judgment may, by himself or attorney, give notice in open court, or before the judge if the decision, order or judgment appealed from be rendered or made at chambers, at the time said decision, order, or judgment is made, that he appeals from such decision, order or judgment to the supreme court, and such notice shall, by order of the court or judge, be entered in the journal of the court. If the appeal be not taken at the time the decision, order or judgment is rendered or made, then the party desiring to appeal may, by himself or attorney, at any time within six months after the decision, order or judgment complained of was made, give notice in writing to the prevailing party or his attorney that he appeals from said decision, order, or judgment to the supreme court, and shall file with the clerk of the superior court the original of such notice, with a return of service or acceptance of service thereon, and it shall then be the duty of the clerk of the superior court to enter said notice, with the return or acceptance of service thereon, in the journal of the court. [March 9, 1891, § 4.]

*Service of notice — Who may join, and how.*

§ 1406. When the notice of appeal is not given at the time the de-

cision, order, or judgment is rendered or made, it shall be served upon all parties who have appeared in the action or proceeding. Parties whose interests are affected in the same way by the decision, order, or judgment appealed from may join in the notice of appeal, whether it be given at the time the decision, order or judgment is rendered or made, or be subsequently given; and any such party who has not joined in the notice may, at any time within ten days after the notice is given or served, join in the appeal by filing in the office of the clerk a notice that he joins therein. Any such party who does not join shall not derive any benefit from the appeal, unless from the necessity of the case, nor shall he thereafter take an appeal from such decision, order, or judgment. All parties who join in after the notice is given shall be liable for expenses thereof, and costs and damages, to the same extent and upon the same conditions as if they had joined in the notice. [March 9, 1891, § 5.]

*Appellant must give bond.*

§ 1407. Except as otherwise provided in the next section, an appeal in a civil action or proceeding is ineffectual for any purpose unless within five days after the notice of appeal is given or served a bond be filed or money be deposited as provided in the next section. No bond shall be required when the appeal is taken by the state, or a county, incorporated city, or organized school district thereof. [March 9, 1891, § 6.]

*Conditions of bond for appeal and for supersedeas.*

§ 1408. The bond for appeal must be executed on behalf of the appellant, by one or more sufficient sureties, to the effect that the appellant will pay all costs and damages that may be awarded against him on the appeal, or on the dismissal thereof, not exceeding three hundred dollars, or that sum of money must be deposited with the clerk to abide the event of the appeal. An appeal shall not stay proceedings on the judgment or order appealed from, or any part thereof, unless the bond for appeal, or a subsequent bond, be to the further effect that the appellant will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render or make, or order to be rendered or made by the inferior court, and all rents or damages to property during the pendency of the appeal, out of the possession of which the respondent is kept by reason of the appeal. If the bond is intended to stay proceedings on only a part of the judgment or order, it shall be varied so as to secure the part stayed alone. When such bond has been filed, the clerk shall issue a written order commanding the respondent and all others to stay proceedings on such judgment or order, or on such part as is superseded, as the case may be. No appeal or stay shall vacate or affect any part of the judgment not



appealed from. The bond for stay of proceedings shall be in such sum as the court from which the appeal is taken, or a judge thereof, shall order. [*March 9, 1891, § 7.*]

**Stay of proceedings.** — An undertaking to stay execution may be filed at any time after the appeal is taken and before the execution is satisfied: *Hill v. Finnigan*, 54 Cal. 493; *Mansfield v. Stern*, 4 West Coast Rep. 141. But on failure of the sureties in such an undertaking to justify, a new bond cannot be filed below: *Id.* The circumstance that a prior appeal from a judgment has been dismissed for want of prosecution before an appeal from an order denying appellant's motion for a new trial therein has been perfected cannot change the effect of the appeal from the order as a stay: *Fulton v. Hanna*, 40 Cal. 280. A stay, pending an appeal from a final judgment awarding an injunction, does not affect the validity or effect of the judgment, so far as it restrains the appellant. It only operates to prevent action on the part of the plaintiff: *Sixth Avenue R. R. Co. v. Gilbert etc. R. R. Co.*, 71 N. Y. 430.

**Bonds on appeal, generally.** — If an undertaking on appeal is filed before the notice of appeal is filed and served, the appeal will be dismissed on motion: *Carpentier v. Williamson*, 24 Cal. 609. It is of no consequence that the undertaking has been accepted and filed by the clerk; he had no discretion in the matter: *Chapin v. Broder*, 16 Cal. 423. The undertaking may be filed at any time after the notice; if filed in the same day, the filing is good, and it will be presumed to have been filed after the notice of appeal: *Poppleton v. Nelson*, 10 Or. 437. Affidavits of sureties in an undertaking on appeal as to their qualifications must be filed with the undertaking: *Holcomb v. Teal*, 4 Or. 352; *Alberson v. Marshall*, 6 Or. 412; *State v. McKinnon*, 8 Or. 207.

**Liability on undertaking.** — Only those who sign an undertaking on injunction are liable on it: *Lindsay v. Flint*, 4 Cal. 88; *Tissot v. Darling*, 9 Cal. 285. An allegation in a complaint on an undertaking on appeal that the undertaking was perfected for the purpose of perfecting the appeal and staying the execution of the judgment, followed by an allegation as to the hearing and determination of the appeal by the supreme court, was held a sufficient averment of a consideration: *Curtis v. Richards*, 9 Cal. 37. There is no necessity, in suing on an undertaking on appeal, to aver the issuance of execution: *Tissot v. Darling*, 9 Cal. 285; *Palmer v. Vance*, 13 Cal. 553. Where, in an action on an appeal bond, conditioned to pay the judgment appealed from if the same should be affirmed by the appellate court, it appeared that the judgment appealed from was reversed, with directions to enter a different judgment, it was held that the conditions of such bond were not broken, and that no action would lie: *Chase v. Ries*, 10 Cal. 517. The law presumes an appeal bond was executed at the request of appellant: *Bostic v. Love*, 16 Cal. 73. The justification of the sureties forms no part of their contract, and bail are liable though they do not justify to the proper amount: *People v. Shirley*, 18 Cal. 121. Where an undertaking not required by law is

exacted, no liability results from its execution: *People v. Cabannes*, 20 Cal. 528. The sureties are liable on the dismissal of an appeal: *Ellis v. Hull*, 23 Cal. 160; *Chase v. Beraud*, 29 Cal. 138. In an action on an undertaking on appeal, it is a sufficient averment of the delivery of the undertaking if the complaint show that it was filed in the clerk's office: *Holmes v. Ohm*, 23 Cal. 268. Whenever the liability of sureties is fixed by the rendition of a judgment in favor of the plaintiffs, the sureties have a right to tender the plaintiff the full amount of the judgment, and if he refuses to receive the same, the sureties are discharged. Where the means of satisfying the debt subsequently come into the hands of the creditor, and he does not avail himself of such means, but parts with them without the knowledge or consent of the surety, the surety is discharged: *Hayes v. Josephi*, 26 Cal. 535; *Baker v. Briggs*, 8 Pick. 121; 19 Am. Dec. 311; *Hayes v. Ward*, 4 Johns. Ch. 122; 8 Am. Dec. 554. The sureties on an appeal bond are liable though the appeal is not taken within time: *Hathaway v. Davis*, 33 Cal. 169.

The jurisdiction of the court in the case in which the undertaking was given cannot be questioned by the sureties; for the judgment of the appellate court is conclusive upon the appellant as to the jurisdiction of the court, as well as all other matters involved in the case, and is therefore conclusive upon his sureties also: *Murdock v. Brooks*, 38 Cal. 600; *Hathaway v. Davis*, 33 Cal. 161; *Riddle v. Baker*, 13 Cal. 295; *Irwin v. Backus*, 25 Cal. 223. To discharge the sureties on appeal, it must appear that the judgment has been paid, and non-payment of the judgment may be shown by the plaintiff by other testimony as well as by the return of an execution unsatisfied: *Nickerson v. Chatterton*, 7 Cal. 573; *Tissot v. Darling*, 9 Cal. 285; *Hubner v. Townsend*, 8 Abb. Pr. 237; *Murdock v. Brooks*, 38 Cal. 600.

**What is an affirmance.** — The dismissal of an appeal by order of the appellate court for defects in the undertaking of appeal itself does not operate as an affirmance of the judgment appealed from: *State v. McKinnon*, 8 Or. 485. The dismissal of the cause by the appellant, or a judgment of dismissal for want of prosecution, will not release the bail or sureties, for this would be a fraud on the respondent; but a voluntary withdrawal of the appeal by both parties, and a settlement by consent, is not an affirmance, and the bond falls with the settlement: *Osborn v. Hendrickson*, 6 Cal. 175. The sureties are bound if the appeal is dismissed for neglect to prosecute: *Karth v. Light*, 15 Cal. 327. The affirmance of the judgment as to one of two joint appellants is sufficient to hold the sureties: *Wood v. Orford*, 56 Cal. 157.

**Other matters concerning bonds.** — A married woman may be a surety upon an undertaking for an appeal: *Woolsey v. Brown*, 74 N. Y. 82. A notice of appeal, served without an undertaking, is validated by the subsequent execution and service of the undertaking within the time allotted for the appeal: *Raymond v.*



*Richmond*, 76 N. Y. 106. Where the appellant failed to give the undertaking, it was held that no appeal was pending, and a motion to dismiss the same was denied: *Benedict etc. Co. v. Thayer*, 82 N. Y. 610. Where an order granting a new trial is affirmed, and judgment absolute is rendered against the appellant, the

sureties in the undertaking are liable only for the costs of the appeal to this court, not for all the costs in the action: *Burdett v. Lowe*, 85 N. Y. 241. The court has no power to dispense with the undertaking required by this section: *Architectural Iron Works v. Brooklyn*, 85 N. Y. 652.

*Bond to keep injunction in force.*

§ 1409. In all cases where a final judgment or decree shall be rendered by any superior court of this state in a cause wherein a temporary injunction or restraining order has been granted, and the party at whose instance said restraining order or injunction was granted shall appeal from said judgment or decree to the supreme court of this state, such restraining order or injunction shall remain in force until said appeal is finally determined, if said appellant shall cause to be executed and filed with the clerk of the court which rendered such judgment or decree a bond in a sum to be fixed by the court, with one or more sufficient sureties, to the effect that the appellant shall pay to the respondent all costs and damages that may be adjudged against the appellant on the appeal, and all damages and costs which may accrue by reason of said injunction or restraining order. [March 9, 1891, § 8.]

*Same on appeal to United States supreme court.*

§ 1410. In all cases where a final judgment or decree shall be rendered by the supreme court of this state in a cause wherein a temporary injunction or restraining order has been granted, and the party at whose instance said restraining order or injunction was granted shall appeal from said judgment or decree to the supreme court of the United States, such restraining order or injunction shall remain in force until said appeal is finally determined, if said appellant shall cause to be executed and filed with the clerk of the supreme court of the state a bond in a sum to be fixed by the court, with one or more sufficient sureties, to the effect that appellant shall pay to the respondent all costs and damages that may be adjudged against the appellant on the appeal, and all damages and costs which may occur by reason of said injunction or restraining order. [March 9, 1891, § 9.]

*Amount of bond, how determined.*

§ 1411. If the judgment or order is for the payment of money, the penalty of the bond for stay of execution, or to keep in force an injunction or restraining order, shall be at least twice the amount of the judgment or order, and costs. If not for the payment of money, the penalty shall be sufficient to save the respondent harmless from the consequences of taking the appeal. But it shall in no case be less than one hundred dollars. [March 9, 1891, § 10.]

*Qualifications of sureties.*

§ 1412. The sureties in every bond for appeal, for stay of proceedings, or to keep in force an injunction or restraining order, must possess the qualifications required for bail upon arrest in a civil action; their affidavits of qualifications must be attached to or filed with the bond; and they must, if required, justify in the same manner as bail upon arrest. [March 9, 1891, § 11.]

*Recall of execution on supersedeas.*

§ 1413. If execution has issued prior to the filing of the bond for stay of proceedings, the clerk shall countermand the same. [March 9, 1891, § 12.]

*Sheriff must restore property on supersedeas.*

§ 1414. Property levied upon, and not sold at the time such countermand is received by the sheriff, shall forthwith be delivered up to the judgment debtor. [March 9, 1891, § 13.]

*Clerk must make transcript.*

§ 1415. Upon the giving of the notice or the filing of the written notice, as provided in section fourteen hundred and six, it shall be the duty of the clerk of the superior court, as soon as may be, in due course of business, to make and certify a full and complete transcript of the record in such cause or proceeding, up to the time of giving notice of appeal, and to cause such transcript to be filed with the clerk of the supreme court within the time provided by law; but in civil actions and proceedings he shall, before making, certifying, or filing such transcript, require payment by the appellant of the lawful charges therefor. [March 9, 1891, § 14.]

This is section 3 of the act of December 23, 1889, with addition of the provision requiring payment to the clerk in civil causes.

**Duty of clerk.** — It is the duty of the clerk to certify to the correctness of the documents in a transcript, if they are correct copies of the originals in his custody, and transmit the same to the supreme court. For all the purposes connected with its appellate jurisdiction, the supreme court has the same power over the

clerk of the court below that it has over its own clerk. After an appeal is perfected, the court below has no longer any jurisdiction of the action, and an order of such court forbidding its clerk to certify to the correctness of a transcript on appeal is void: *People v. Center*, 54 Cal. 236; see also *People v. Geiger*, 49 Cal. 643; *People v. Myers*, 20 Cal. 76.

**Transcript on appeal:** See next succeeding section.

*Definition of transcript.*

§ 1416. The transcript is a copy, certified by the clerk, of the pleadings, orders, papers, and journal entries constituting the judgment roll; of the bills of exceptions, if there be any; of the statement of facts, if there be one; of the notice of appeal; of all orders and notices concerning the appeal; of the bond for appeal; of the bond for stay of proceedings, if there be one; and of the bond to keep in force an injunction or restraining order, if there be one. [Mar. 9, '91, § 15.]

**Transcript on appeal:** See next preceding section. In a criminal case, a copy of the notice of appeal and of the record, and of the statement of facts, bills of exceptions, instructions, and indorsements thereon, constitutes the only evidence in the supreme court of the

proceedings of the court from which the appeal is taken. The "record of the action" consists of, — 1. The indictment and a copy of the minutes of the plea or demurrer; 2. A copy of the minutes of the trial; 3. The charges given or refused, and the indorsements thereon; 4. A copy of the judgment: *People v. Colby*, 4 Pac. C. L. J. 333; see also *People v. Martin*, 32 Cal. 91; *People v. Romero*, 18 Cal. 89. It is not necessary that the record show that a copy of the indictment was served on the defendant: *Leonard v. Territory*, 2 Wash. 381. The clerk

of the supreme court must file the transcript in criminal actions without his fees in advance: *People v. Myers*, 20 Cal. 76. Appeal was dismissed, the transcript not containing the judgment from which the appeal was taken: *People v. Sing Lum*, 60 Cal. 6. To enable the appellate court to review the instructions, the evidence must be embodied in the record: *Id.*; *People v. Herbert*, 61 Cal. 545; and the bill of exceptions must show whether the instructions given or refused were pertinent to the case: *Yelm Jim v. Territory*, 1 Wash. 63.

*Dismissal of appeal, etc., on failure to file transcript.*

§ 1417. In a criminal case, if the transcript shall not be filed within sixty days after the appeal is taken, the appeal shall be dismissed, unless it shall appear that the appellant was not in fault; and if it be shown that the transcript is incomplete, the court may order a new transcript or further record to be certified at any time. [March 9, 1891, § 16.]

*Appeal not to be dismissed for formal defects of notice.*

§ 1418. An appeal may be dismissed for insufficiency of the notice of appeal, or want of service of such notice in cases requiring service; but no appeal shall be dismissed for any informality or defect in the notice or the service thereof, if from the transcript it can be reasonably understood that the adverse party has had sufficient notice of the appeal, describing the order or judgment complained of with such certainty that his substantial right would not be prejudiced by the hearing of the cause. And the supreme court shall, upon reasonable terms, allow all amendments in matters of form curative of such defects, to the end that substantial justice be secured to the parties. [March 9, 1891, § 17.]

**Causes are to be heard and determined on merits**, disregarding technicalities; as where a decree rendered October 1st was described in the notice of appeal as dated October 7th, the error will be disregarded, it not appearing that there was any other decree in the cause: *British Bark Latona v. McAllep*, 3 Wash. 332 b; or where there are immaterial

discrepancies between the notice of appeal as filed and the copy as served: *McKilrer v. Manchester*, 1 Wash. 255. But this provision of the code is not intended to shield from inexcusable neglect: *Crawford v. Haller*, 2 Wash. 161.

**Amendments curative of defects may be allowed:** See *Swasey v. Adair*, 83 Cal. 136.

*When respondent may have affirmance on motion.*

§ 1419. In a civil action or proceeding, if the transcript be not filed within sixty days, as provided in the preceding section, the respondent may file a certified copy of the judgment or order appealed from, and of the notice served, or of the record of the notice of appeal in case no written notice was made, and may, on motion, have the appeal dismissed or the judgment or order appealed from affirmed; *provided*, that when the failure to file the transcript is owing to the fault or omission of the clerk of either the appellate or inferior court, or other circumstances over which the [appellant] has no control, the court shall not dismiss the cause, but shall fix such time for hearing the same as will insure a fair trial. [March 9, 1891, § 18.]



**Of transcripts and briefs, generally:** See notes to § 1416, *supra*. Where, because of the loss of the records, no transcript has been made out, the court below should supply the defect so that it can be made: *Buckman v. Whitney*, 24 Cal. 267. Courts will not take advantage of the impecuniosity of a poor man, who endeavored to have his transcript filed in time, but had no means of having it printed and filed, and will extend time for him: *Hubbuck v. Ross*, 79 Cal. 564. The court will dismiss an appeal of which it has no jurisdiction, of its motion, whether the point is raised by counsel or not: *Bienenfeld v. Fresno Milling Co.*, 82 Cal. 425. The court is not bound to search the record for errors not specifically pointed out or discussed in the brief of appellant: *West v. Cranford*, 80 Cal. 19.

**Dismissals for failure to file brief and transcript.** — Statutes fixing the time for filing papers are directory merely, and the court may, in proper cases, extend the time as the ends of justice require: *Wood v. Forbes*, 5 Cal. 62; *Rumfelt v. Trinity etc. Min. Co.*, 83 Cal. 649; *Desmond v. Faus*, 83 Cal. 134. Where no transcript was filed, the appeal was dismissed, with ten per cent damages, upon respondent's affidavit that it was taken for delay: *Buckley v. Morse*, 2 Cal. 149; *Pacheco v. Bernal*, 2 Cal. 150; and see *Mix v. Boothe*, 54 Cal. 589. Where a transcript was filed, but no error shown, the judgment was affirmed, with ten per cent damages and costs of suit: *Brown v. Pepin*, 1 Wash. 205. Appeal may be dismissed, with costs, unless appellant's brief is filed in time: *Lewis v. Host*, 2 Wash. 402; or where he has neglected to file and serve one: *Fountain v. Leckie*, 3 Wash. 407; *Oregon etc. Co. v. O'Brien*, 3 Wash. 21; and unless a full, complete, and properly certified transcript is filed: *Roberts v. Tucker*, 1 Wash. 179; *Lewis v. Host*, 2 Wash. 402. But in the latter case another appeal may be prosecuted within the time allowed by law: *Roberts v. Tucker*, 1 Wash. 179.

The "statement" provided for by the appeal law need not be made and settled except at the option of the party, and where a transcript is filed, but a "statement" is not, the court must hear the case on its merits, but only so far as the record sent up discloses them; and it makes no difference that the cause is an equitable one: *Swift v. Stine*, 3 Wash. 518; overruling *Swift v. Stine*, 3 Wash. 18; *Kenyon v. Knipe*, 3 Wash. 243. An appeal dismissed

for failure to file transcript was reinstated on an affidavit of the clerk of the district court, that the failure was owing to the clerk's not having prepared the transcript in time, without any fault in the appellant: *Stark v. Barnes*, 2 Cal. 162. Where an appeal has been dismissed for failure to file papers, the order of dismissal will not be vacated, unless not only is it shown that there was no want of diligence, but also that, in the opinion of counsel, the appeal has been taken in good faith, and that there are substantial errors which ought to be corrected: *Hagar v. Mead*, 25 Cal. 598.

The motion to dismiss will not be entertained, even upon the ground that the appeal is frivolous, until after the time allowed by the rules for filing the transcript, etc.: *Fosculina v. Doyle*, 48 Cal. 151.

Where the record showed that no appeal had been taken by reason of failure to serve notice of appeal in time, no transcript having been filed, the court denied a motion to dismiss, as no appeal appeared to have been taken: *Harkan v. Pratt*, 50 Cal. 94. On an appeal from a judgment of nonsuit, there being no statement or bill of exceptions, the ruling will not be reviewed: *Nicholl v. Littlefield*, 60 Cal. 238.

**Judgment of affirmance or reversal** will not be rendered unless a transcript is filed: *Roberts v. Tucker*, 1 Wash. 179; *Roberts v. Bush*, 1 Wash. 181. An appellee who has not filed a certified copy of the judgment, and of the notice of appeal, as required by statute, is not entitled to a dismissal, though the transcript was not filed in time: *Haas v. Gualdis*, 23 Pac. Rep. 1010 (Wash.); but where the defendant produces such transcript and notice, the judgment below, on his motion, will be affirmed: *Roberts v. Tucker*, 1 Wash. 179; *Roberts v. Bush*, 1 Wash. 181. And where he does this, and the appellant fails to prosecute the appeal, the appellee may have judgment of affirmance against the appellant and the sureties on the appeal bond: *O'Hare v. Wilson*, 3 Wash. 251. If it appears that the failure of the appellant to file a transcript was occasioned by the neglect or refusal of the trial judge to settle the facts of the case, appellee's motion for affirmance of judgment will be held over pending the result of a writ of *mandamus* from the supreme court instituted by plaintiff to compel such settlement: *Norager v. Norwald*, 3 Wash. 246.

### *Dismissal for other causes.*

§ 1420. Within such time after the transcript is filed as the supreme court may prescribe by rule, the respondent may move to dismiss the appeal upon the grounds, either that when the appeal was taken the appellant had no right to appeal, or that by reason of facts subsequent to the taking of the appeal the appellant has no right further to prosecute it. If the facts upon which the motion is based do not appear in the record, they must be presented in a verified statement, and in such case the appellant may by verified answer controvert the facts, and may also set forth any other facts showing that the motion ought not to be allowed; and the court shall determine the

facts, and make such order thereupon as the law and the ends of justice shall require. [March 9, 1891, § 19.]

**Party is estopped from appealing** by accepting the fruits of a decree rendered in the court below: *Lyons v. Bain*, 1 Wash. 482.

*New bond required if old not sufficient.*

§ 1421. If the respondent believe the bond defective, or the sureties insufficient, he may move the supreme court, on ten days' written notice to the appellant, to discharge the bond; and if the court find the sureties insufficient, or the bond substantially defective, an order shall be made discharging such bond, unless a good and sufficient bond, with sufficient sureties, be executed before a day to be fixed and specified in the order. On the filing of a certified copy of the order in the office of the clerk of the court from which the appeal was taken, execution and other proceedings for enforcing the judgment or order may be taken, if a new and good and sufficient bond is not filed therein by the day specified; but another order staying proceedings may be issued by the clerk upon execution before him of a new and lawful bond, with sufficient sureties, as provided in section fourteen hundred and eight. [March 9, 1891, § 20.]

**Filing new undertaking in appellate court.** — Where an undertaking on appeal is duly filed, and the sureties are excepted to, and appellant gives notice that they will justify, and both parties appear before the officer at the time fixed for justification, and a new undertaking is then filed in place of the old one, the appeal will not be dismissed because the undertaking was not filed within the statutory time after filing notice of appeal: *Cummins v. Scott*, 23 Cal. 526. If the sureties on the original bond fail to justify, the appellant may file a new undertaking, with sureties approved by the chief justice: *Schache v. Odell*, 52 Cal. 447.

It is the duty of the judge, when called upon to approve an undertaking proposed to be given in substitution of one executed in the first instance, to ascertain by examination of the sureties that they possess the qualifications required, as well as that the undertaking is in the form and amount prescribed by the statute: *Stevenson v. Steinberg*, 32 Cal. 375. See also *Hill v. Finnigan*, 54 Cal. 493, as to the procedure on filing a new stay undertaking in the appellate court. The procedure approved in this last case was followed in *Mansfield v.*

*Stern*, 4 West Coast Rep. 141, where the appellant was allowed twenty days in which to file a stay bond on appeal, execution not having issued below. The filing of a new undertaking under this section is probably limited to cases where it is attempted to remedy a defective undertaking: See *Schurtz v. Romer*, 81 Cal. 244. But if the appellate court has jurisdiction of the case, an appeal will not be dismissed because the undertaking was insufficient, if a new undertaking is filed in the appellate court: *Moyle v. Landers*, 78 Cal. 99.

**When stay continues and relates back to first stay.** — The fact that a stay bond on appeal is insufficient because the sureties are not good, and that a new bond is given upon exception to the sureties upon the first bond, does not affect the stay of proceedings, which takes place upon the filing of the required bond without regard to the sufficiency or insufficiency of the sureties. If the same or other sureties justify within the time allowed, after exception to the sureties, the stay continues, and the liability of the new sureties relates back to the time of the first stay: *Lee Chuck v. Quan Wo Chong Co.*, 81 Cal. 222.

*Statement of facts on appeal.*

§ 1422. In all cases and proceedings in which an appeal lies to the supreme court, any party feeling himself aggrieved may have any material fact or facts not already a part of the record made so by a statement of facts. Such facts shall be settled and agreed on in the following manner: The party desiring to settle a statement of facts shall prepare and file with the clerk of the superior court a statement of facts, complete and ready for signing, and shall, within thirty days



after the decision, order, or judgment to be appealed from was made or rendered, give notice to the opposite party, or his attorney, that the said statement has been prepared and filed, and that, upon a day to be named in said notice, he will apply to the court or judge who tried the cause or made the decision, order, or judgment complained of, at a place to be named in said notice, to settle and certify said statement of facts. Said notice shall be given within thirty days after the decision, order, or judgment is made, and the day fixed for the settling and certifying of the statement shall be at least ten days and not more than thirty days after the day of service. The party upon whom such notice is served shall, within ten days thereafter, serve upon the opposite party a written notice, in which shall be stated whether or not the correctness of said statement of facts is contested; and if contested, in what particular or particulars the said statement is deficient, incorrect, or incomplete. Upon the day named in said notice the said parties, or their attorneys, may appear before the said court or judge, and it shall be the duty of said court or judge to settle between the parties what is the proper statement, and to certify the same. The settling of said statement may be adjourned to a later day by order of said court or judge. [*March 9, 1891, § 21.*]

*Judge's certificate — Appeals in equity causes.*

§ 1423. The certificate of the judge that said statement contains all the material facts in the cause or proceeding shall be sufficient. In causes of equitable cognizance, where the appeal is from the final judgment, the said statement of facts shall contain all the testimony on which the cause was tried below, together with any objections or exceptions taken to the reception or rejection of testimony. In cases at law, the statement of facts need contain no more than was necessary or proper in a bill of exceptions. [*March 9, 1891, § 22.*]

*What evidence need not be copied into transcript.*

§ 1424. Copies of depositions and other written evidence used on the trial or hearing in the court from which the appeal is taken need not be embodied in the statement of facts, but if not so embodied, such depositions and written evidence, or copies thereof, referred to and identified with convenient certainty in the certificate of the judge, shall be attached to the statement of facts. [*March 9, 1891, § 23.*]

A certificate that the evidence contained in the record is all that was reported in the cause before the trial court by a referee is not one showing that all the evidence in the case is certified to the supreme court, and amounts to no certificate: *Mulkey v. McGrew*, 2 Wash. 259. It is not within the power of the parties to waive the required statutory certificate by stipulation: *Mulkey v. McGrew*, 2 Wash. 259.

Supreme court will review case when it appears with certainty that the transcript contains all the evidence introduced by the parties on the trial in the court below: *Ex parte Parker*, 120 U. S. 737, construing various sections of the territorial code of 1881. This applies to equitable causes, and the supreme court must receive the evidence upon the faith of the certificate, and regard it as all the evidence in the cause where it is so certified. *Carson v. Chandler*, 3 Wash. 66; but cases



which are to be heard on appeal upon the evidence will not be reviewed unless the whole evidence is taken up, though notice of appeal has been duly given, and a properly certified

transcript has been filed: *Swift v. Stine*, 3 Wash. 18; *Coleman v. Yesler*, 1 Wash. 591; *Parker v. Denny*, 2 Wash. 360.

*Supreme court may require production of original paper.*

§ 1425. When a review of an original paper in the action may be important to a correct decision of the appeal, the court may order the clerk of the court below to transmit the same, which he shall do in some safe mode to the clerk of the supreme court, who shall hold the same subject to the control of the court. [March 9, 1891, § 24.]

*Bills of exceptions, when used.*

§ 1426. In actions at law, and in special proceedings which are appealable, the appellant, instead of settling a statement of facts, as provided by this act, may have his exceptions, and such facts as are material to the same made a part of the record by bill of exceptions, as provided by chapter six of title seven of this code, relating to exceptions. [March 9, 1891, § 25.]

**Transcripts and statements.** — A transcript must show that an undertaking has been filed in due time: *Franklin v. Reiner*, 8 Cal. 340; and that notice of appeal has been duly served, etc.: *Hildreth v. Grindon*, 10 Cal. 491; that the amount in controversy is sufficient to authorize an appeal: *Hoyt v. Stearns*, 39 Cal. 93; and counsel must see that all clerical and typographical errors are corrected in all the copies filed: *Vassault v. Edwards*, 43 Cal. 458. It is sufficient, when the style of the court and title of the cause is given in the first paper, to afterwards give the name of the document, and at the head say, "Title of Cause." And where a paper is verified or acknowledged, and no point is made on the verification or acknowledgment, to say, "Duly verified," or "Duly acknowledged." The date of the paper, date of filing, date of service, etc., and every indorsement that may be important, should, of course, appear. The rest may, with advantage, be omitted: *Marriner v. Smith*, 27 Cal. 654. Superfluous matter embodied in a transcript should be punished by the imposition of costs: *King Co. v. Collins*, 1 Wash. 469. The court can only act upon a transcript of the record as it exists in the lower court, duly authenticated, and cannot alter it: *Bond v. Hickman*, 29 Cal. 461; *Boston v. Haynes*, 31 Cal. 107; *Buckman v. Whitney*, 24 Cal. 267; *Buckman v. Whitney*, 28 Cal. 555; *Satterlee v. Bliss*, 36 Cal. 521; *People v. Woods*, 43 Cal. 177; *Thompson v. Paterson*, 54 Cal. 542. If the record does not speak the truth, it should be corrected by a proper proceeding in the court below; its verity cannot be attacked by using affidavits in the appellate court: *People v. Jordan*, 4 West Coast Rep. 138. The proceedings should be chronologically arranged in the transcript: *Thompson v. Lynch*, 43 Cal. 482. If the transcript does not contain the judgment appealed from, the appeal cannot be entertained: *People v. Sing Lum*, 60 Cal. 6. The papers used on the hearing must be brought up in the transcript; if not appearing, the court will act as if there were

none: *Miller v. Bate*, 56 Cal. 135. Receipt of attorney in satisfaction of a judgment rendered in the lower court, and filed with the papers in the case, is properly a part of the transcript: *Lyon v. Bain*, 1 Wash. 482. Papers must be either contained in a bill of exceptions or authenticated by the judge below: *Nash v. Harris*, 57 Cal. 242; *Strathern v. Dakin*, 63 Cal. 478. Rules of court below are a part of the record in every cause tried therein, but cannot be considered by the appellate court unless properly certified as a part of the record: *Walla Walla etc. Co. v. Budd*, 2 Wash. 336. If the clerk marks affidavits as used at the hearing, he ought to do so at the time of the hearing; otherwise his indorsement will not stand against his verbal statement of indorsement by mistake: *Baker v. Snyder*, 58 Cal. 617. An appeal from an order after final judgment was dismissed, there being no record to show what papers were used on the hearing: *Angell v. Delmas*, 60 Cal. 254.

Where the record, on account of the insufficiency of the transcript, is in such a condition that it would be useless to attempt an examination of the case upon its merits, and impossible to determine whether the error assigned exists or not, the appeal will be dismissed: *Miller v. Thomas*, 78 Cal. 509; *Green v. McManis*, 79 Cal. 561. While interlineations and erasures in the printed transcript on appeal, made before the transcript was certified by the clerk or filed, and which do not in any respect render the record difficult to be read or understood, will not render the transcript so irregular in character as to be reprinted, or as to call for a dismissal of the appeal: *Fogel v. Schmitz*, 83 Cal. 201; *Swasey v. Adair*, 83 Cal. 136; still the court will of its own motion insist upon a compliance with its rules as to the printing and chronological arrangement of the several parts of the transcript, and may strike out the transcript, dismiss the case, or compel the printing and filing of a new transcript, for non-compliance: *Martin v. Hudson*, 79 Cal. 612; *Green v.*

*McMann*, 79 Cal. 561. Cases will not be dismissed on account of defective transcripts caused by erasures, interlineations, alterations, and marginal corrections, if the case is not worse than others which have been tolerated: *Swasey v. Adair*, 83 Cal. 136; *Green v. McMann*, 79 Cal. 561. Objections to rulings upon evidence in court below will not be considered, if the transcript upon appeal does not disclose that the ruling objected to was made: *Wallace v. Maples*, 79 Cal. 433. When there is nothing to show that the papers contained in the transcript constituted a part of the record below, or that a notice of appeal was filed or served, the attempted appeal will be dismissed: *Beets v. Chart*, 79 Cal. 185. But exhibits may be made part of a statement by reference, and the fact that some of them have been omitted from the transcript is not ground for striking out the whole statement. The remedy of the respondent is to suggest a diminution of the record and have them brought up: *Sharon v. Sharon*, 79 Cal. 633.

**As to dismissals for failure to file transcript**, see notes to § 1419, *ante*, note.

**Statement of facts** is intended to include everything material that transpired in the cause not otherwise a part of the record, and it must be settled, agreed upon, and authenticated as required by statute: See *Puget Sound Iron Co. v. Worthington*, 2 Wash. 472; *Collins v. City of Seattle*, 2 Wash. 354; *Bremer v. Burgess*, 2 Wash. 290; *King Co. v. Hill*, 23 Pac. Rep. 926 (Wash.). Unless the judge certifies that it contains all the material facts in the cause, the appellate court will strike it out on motion: *Collins v. City of Seattle*, 2 Wash. 354; *King Co. v. Hill*, 23 Pac. Rep. 926 (Wash.); *Zenkner v. Northern Pacific R. R. Co.*, 3 Wash. 60. A certificate by the judge that the statement contains all the material facts relative to the execution of the bond in suit, and the decision on the question of its execution, is not good, and will be stricken out on motion; *King Co. v. Hill*, 23 Pac. Rep. 926 (Wash.). But where the trial judge has certified that

the statement contains all the material facts in the case, the omission of an instruction not claimed to be material by the appellee is no ground for dismissing the appeal: *Haas v. Gaddis*, 23 Pac. Rep. 1010 (Wash.). A statement of facts on appeal may be settled outside of the immediate jurisdiction of the court below, as such statement is not jurisdictional: *Marsh v. Wade*, 3 Wash. 477. It can be settled by the judge outside of the county or district where he tried the case, if the parties are present and do not object: *Marsh v. Wade*, 3 Wash. 477; *King Co. v. Hill*, 23 Pac. Rep. 926 (Wash.). Compare *Ex parte Parker*, 131 U. S. 221. A failure to do so waives the objection: *Marsh v. Wade*, 3 Wash. 477. A statement of facts made up without notice is invalid: *Caton v. Switzler*, 3 Wash. 242; *Taylor v. Osborn*, 23 Pac. Rep. 858 (Wash.). Notice of settlement of statement of facts may precede the notice of appeal: *King Co. v. Hill*, 23 Pac. Rep. 926, (Wash.); and need not be accompanied with either the original or a copy of the statement sought to be settled: *Puget Sound etc. Co. v. Worthington*, 2 Wash. 472. Unless a statement of facts is filed, the merits of a case can be heard by the appellate court only so far as the record discloses them: *Swift v. Stine*, 3 Wash. 518. It is not necessary that the statement of facts should be attached to the transcript, if it is otherwise sufficiently identified: *Haas v. Gaddis*, 23 Pac. Rep. 1010 (Wash.). Both a statement of facts and bill of exceptions in the same case are not contemplated or intended by the law governing appeals: *Puget Sound etc. Co. v. Worthington*, 2 Wash. 472.

**Appellate court's control over clerk of lower court.** — For all purposes connected with its appellate jurisdiction, the appellate court has the same power over the clerk of the court below as it has over its own clerk; and it may, on proper application by order, require the clerk of the court below to perform any duty which is necessary to a complete exercise of its jurisdiction in the cause: *People v. Center*, 54 Cal. 236; *Winder v. Hendrick*, 54 Cal. 275.

### *Statement or bill of exceptions, where settled.*

§ 1427. A statement of facts or bill of exceptions may be settled and certified by the judge trying the cause, or who rendered the decision, order or judgment to be appealed from, at any place in the state; but the time and place shall be stated in the notice given for the settling and certifying the same. [March 9, 1891, § 26.]

### *Form of assignment of errors.*

§ 1428. An assignment of error, when required to be made, need follow no stated form, but must, in a way as specific as the case will allow, point out the very error objected to; among several points in a demurrer, or in a motion or instructions or rulings in an exception, it must designate which is relied on as an error; and the court will only regard errors which are assigned with the required exactness; but the court must decide on each error assigned. [Mar. 9, 1891, § 27.]



**Review of judgment or decree — Bill of exceptions.** — Errors not objected and excepted to are not ground for reversal on appeal: *Kearney v. Snodgrass*, 12 Or. 311. Error to reverse a cause must be affirmatively shown: *Tucker v. Salem F. Co.*, 13 Or. 28; *Kremsen v. Purdon*, 13 Or. 563; *Danvers v. Durkin*, 14 Or. 37. Findings of fact are not open to review simply on the question of preponderance of evidence: *Fulton v. Earhart*, 4 Or. 61. Interlocutory non-appealable orders will not be reviewed, unless embodied in the record by bill of exceptions or statement, if there be one: *Abbott v. Douglass*, 28 Cal. 295; *Feely v. Shirley*, 43 Cal. 369; *Dinick v. Campbell*, 31 Cal. 238; *More v. Del Valle*, 28 Cal. 174; *McAbee v. Randall*, 41 Cal. 137; *Nevada etc. Co. v. Kild*, 43 Cal. 180; *Morris v. Angle*, 42 Cal. 236. The bill of exceptions must show that instructions complained of were all the instructions on that subject: *Oregon R'y & Nav. Co. v. Galliher*, 2 Wash. 70.

**Bill of exceptions** is a simple and convenient method of preserving exceptions and bringing up the evidence on appeal, and is equally applicable to any and all kinds of appeals provided for by the code, and is to be preferred in

practice to a statement of the case: *Brandt v. Clark*, 81 Cal. 634. And no review can be had in the appellate court of a motion, unless it is made a part of the record by being embodied in a bill of exceptions or statement of the case showing that the motion was made and the ground upon which it was made: *Herrlich v. McDonald*, 80 Cal. 472; or to review errors in evidence: *Brown v. Casey*, 80 Cal. 504; and unless it contains all the evidence, the action of the court below in refusing to order a nonsuit will not be reviewed: *Woods v. Courtney*, 16 Or. 121. No assignment of errors will be considered unless such errors appear on the record or from a bill of exceptions: *Coffin v. Taylor*, 16 Or. 375; *Wilson v. Wilson*, 64 Cal. 92.

So to review questions not answered, there must be a bill of exceptions or statement showing by statement or recital what facts the party offering the testimony expected to elicit by such questions: *Tucker v. Constable*, 16 Cal. 407. And to review an order striking out an amended complaint, there must be a statement or bill of exceptions: *Cleland v. Walbridge*, 78 Cal. 358. The judge may sign the bill at any time: *Che Gong v. Stearns*, 16 Or. 219.

*Court may affirm, reverse, or modify.*

§ 1429. The supreme court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. The decision of the court shall be given in writing; and in giving its decision, if a new trial is granted, the court shall pass upon and determine all the questions of law involved in the case presented upon such appeal and necessary to the final determination of the case. Its judgments in appealed cases shall be remitted from [to] the court from which the appeal was taken. [March 9, 1891, § 28.]

**Reversing judgment, etc.** — The question whether a defendant in a criminal case is entitled to a new trial, on the ground that the verdict is contrary to evidence, is one of law, and not of fact, within the meaning of the constitution, and the supreme court on appeal has therefore jurisdiction of the question: *People v. Jones*, 31 Cal. 565; *People v. Smallman*, 55 Cal. 191. "Unless the evidence is so slight as that the court below would be justified in directing a verdict for defendant, we are not authorized to reverse a judgment upon the ground that the evidence does not sustain a verdict of guilty": *People v. Bird*, 60 Cal. 7, 8. If the verdict finding the accused guilty is clearly not sustained by the evidence, the judgment will be reversed: *People v. Turner*, 39 Cal. 370. But if there is a substantial conflict in the evidence, the verdict will not be disturbed: *People v. Montgomery*, 53 Cal. 576. If a motion for new trial is made and denied, and a bill of exceptions is prepared, settled, and signed, the bill should show that evidence was introduced tending to prove every material issue, and if it fails to show this, it will be presumed that as to such issue the verdict is contrary to the evidence: *People v. Fisher*, 51 Cal. 319.

**Modification of judgment, etc.** — Under

this section, on appeal from a judgment in favor of the vendee in an action to recover the purchase price on rescission of the contract, the court may modify the judgment by requiring the vendee, before issuance of execution, to execute a release and cancellation of the bond for a deed: *Ankeny v. Clark*, 20 Pac. Rep. 583 (Wash.). All the facts being before the appellate court, it may render such judgment as the court below should have rendered: *Wilby v. Morrow*, 1 Wash. 474. It may modify the judgment so as to allow a cross-demand admitted by the pleadings to be due: *Parker v. Denny*, 21 Pac. Rep. 386 (Wash.); or in any other way that may be just: *Ankeny v. Clark*, 20 Pac. Rep. 583.

**Affirmance and reversal of judgments, etc.** — A judgment will be sustained, on appeal, where it can be done by giving a liberal construction to pleadings which were not objected to before verdict: *Johnson v. Leonhard*, 20 Pac. Rep. 591 (Wash.); and will not reverse a finding of fact if there was evidence tending to uphold it: *Baker v. McAllister*, 2 Wash. 48; *Bullene v. Garrison*, 1 Wash. 587. It will not set aside the verdict of jury, unless it appears there was no evidence to support it: *Williams v. Miller*, 1 Wash. 88. It will, however, re-



verse a judgment for a refusal to give a proper instruction, upon request, where such refusal has worked injury to the requesting party: *City of Seattle v. Buzby*, 2 Wash. 25. A judge's intimation of his opinion as to the value of some portions of the evidence is not ground for reversal, where he clearly and fully instructed the jury that the facts were exclusively for them to determine: *White v. Territory*, 24 Pac. Rep. 447 (Wash.); *Northern Pacific R. R. Co. v. O'Brien*, 21 Pac. Rep. 32 (Wash.). If the findings of fact below are not commensurate with the issues made, or insufficient to sustain the conclusions of law, the remedy is by motion in the lower court for further findings, and not by appeal: *Eakin v. McCraith*, 2 Wash. 112. The trial of challenges to jurors rests largely in the discretion of the trial court, and its ruling will not be disturbed except for abuse of discretion, and that must be shown by the record: *Timmerman v. Territory*, 3 Wash. 445; *White v. Territory*, 3 Wash. 397; *Blanton v. State*, 24 Pac. Rep. 439 (Wash.).

*Cause not decided till decision is filed.*

§ 1430. No cause is decided until the opinion, in writing, is filed with the clerk. [March 9, 1891, § 29.]

*Damages for delay on frivolous appeals.*

§ 1431. Upon the affirmance of any [judgment] or order for the payment of money, the collection of which, in whole or in part, has been superseded by bond as hereinbefore provided, the court shall award to the respondent damages upon the amount superseded; and if satisfied by the record that the appeal was taken for delay only, must award such sum as damages, not exceeding fifteen per cent thereon, as shall effectually tend to prevent the taking of appeals for delay only. [March 9, 1891, § 30.]

**Damages for delay.** — Unlike costs, damages do not follow as a matter of course, but must be specially awarded by the court: and hence, when claimed by the respondent in an action upon the appeal bond, he must aver that they were awarded by the appellate court: *Hathaway v. Davis*, 33 Cal. 169. When an appeal is evidently for delay, the judgment will be affirmed, with damages: *Whitby v. Rowell*, 82 Cal. 635; *Dreyfuss v. Giles*, 79 Cal. 409; though the attorney for appellant exercised good faith: *Lemon v. Rucker*, 80 Cal. 609. Damages will not be allowed on an appeal, unless it was clearly taken for delay, except when the appellant has abandoned his appeal: *Nelson v. Oregonian R'y Co.*, 13 Or. 141. If it is uncertain whether the appeal was in good faith or not, the court will refuse to impose damages for delay: *Coffin v. Hanner*, 1 Or. 236, Deady, J., dissenting. In the absence of a transcript, the supreme court, having nothing from which to determine that the appeal was taken for delay, will not award damages: *Vaughn v. Werley*, 62 Cal. 181.

It is not a proper ground to move to dismiss an appeal that it is sham and frivolous. The

One defaulted after personal service cannot object on appeal, for the first time, that the summons did not state the general nature of the action: *Baker v. Prewitt*, 3 Wash. 595. An erroneous ruling in refusing to dissolve an attachment cannot affect the judgment upon the merits: *Williams v. Miller*, 1 Wash. 88.

After appeal has been perfected, the lower court no longer has control or any power over the action, except as to matters not affected by the appeal: *Baggs v. Smith*, 53 Cal. 88; *People v. Center*, 54 Cal. 236. The lower court has no power to say what papers shall be used on the appeal; and an order forbidding the clerk to certify to the correctness of the transcript is void: *People v. Center*, 54 Cal. 236.

The effect of an appeal from an order setting aside a judgment is not to revive the judgment; the judgment no longer exists, so far as the assertion of any rights under it are concerned, until it shall be brought into force again by a reversal of the order setting it aside: *Estate of Crozier*, 3 West Coast Rep. 157.

remedy is damages: *Ricketson v. Compton*, 23 Cal. 649; *Dey v. Walton*, 2 Hill, 405. The amount of damages awarded has varied. Five per cent: *Pinknum v. Wemple*, 12 Cal. 449; *Magruder v. Melvin*, 12 Cal. 559. Ten per cent: *Russell v. Williams*, 2 Cal. 158; *Harvey v. Fisk*, 9 Cal. 94; *Primm v. Gray*, 10 Cal. 523; *Gannon v. Dougherty*, 41 Cal. 653; *Makimey v. Bostwick*, 11 Pac. C. L. J. 36. Fifteen per cent: *Whitcher v. Webb*, 44 Cal. 131; *Bateman v. Blumenthal*, 61 Cal. 628. Twenty per cent: *Meerholz v. Sessions*, 9 Cal. 277; *Nickerson v. California Stage Co.*, 10 Cal. 522; *C. P. R. R. Co. v. Frisbie*, 41 Cal. 359; *Perkins v. Patrick*, 45 Cal. 393; *Wilber v. Sanderson*, 43 Cal. 497; *Heney v. Alpers*, 11 Pac. C. L. J. 163; *Wilson v. Europa Mining Co.*, 11 Pac. C. L. J. 179; *Robinson v. Carr*, 11 Pac. C. L. J. 213. Twenty-five per cent: *McKeon v. Millard*, 47 Cal. 584. In one case, where the appeal was taken from a judgment in a partition suit for ninety dollars rent, the court awarded fifty per cent: *Kincaid v. Johnson*, 47 Cal. 619. In another, damages in the sum of one hundred dollars were awarded: *Russell v. Hill*, 59 Cal. 21.

*Supreme court may give judgment against sureties.*

§ 1432. The supreme court, when it affirms the judgment, shall

also, if the respondent moves therefor, render judgment against the appellant and his sureties on the bond for the amount of the judgment, damages, and costs referred to therein, in case such damages can be accurately known to the court without an issue and trial. [March 9, 1891, § 31.]

*Supreme court may either remand or issue process.*

§ 1433. If the supreme court affirm or modify the judgment or order, it may remand the cause to the court below to have the same carried into effect, or it may itself issue the necessary process for this purpose, and direct such process to the sheriff of the proper county, as the party may require. [March 9, 1891, § 32.]

*Effect of entry of mandate.*

§ 1434. If remanded to the inferior court to be carried into effect, such decision, and the order of the court thereon, being certified thereto and entered on the records of the court, shall have the same force and effect as if made and entered during the session of the court. [March 9, 1891, § 33.]

*Restitution, how enforced.*

§ 1435. If, by the decision of the supreme court, the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of such judgment or order, either the supreme court, or the court below, may direct execution or writ of restitution to issue for the purpose of restoring to such appellant his property, or the value thereof. [March 9, 1891, § 34.]

**Restitution, etc.** — Where the judgment requires a writ of restitution, it cannot be satisfied without a restitution being effected. An order awarding the writ is the very judgment itself, and until restitution is effected, such judgment is not satisfied: *Chambers v. Hoover*, 3 Wash. 20. Restitution may be awarded on motion. Where the purchaser of property is the plaintiff, it must be restored to defendant if the judgment under which it was

sold is reversed. This is otherwise as to a stranger, but only if he is an innocent purchaser without notice: *Reynolds v. Harris*, 14 Cal. 677; 76 Am. Dec. 459; *Raun v. Reynolds*, 18 Cal. 275; *Polack v. Schafer*, 46 Cal. 275; *Pico v. Cuyas*, 48 Cal. 639. See extended note to *Little v. Bunce*, 28 Am. Dec. 368-372, on restitution of property upon reversal of judgment, and as to restitution of property from third parties.

*Supreme court may enforce its mandates upon inferior courts.*

§ 1436. The supreme court shall have power to enforce its mandates upon inferior courts and officers by fine and imprisonment, which imprisonment may be continued until obeyed. [March 9, 1891, § 35.]

**Mandates of supreme court.** — The action of an inferior court by way of compliance with a mandate from the supreme court, in a case where the rights of all the parties have been determined by a decision of the supreme court, upon which the mandate was issued, is not re-

viewable by appeal: *Waterman v. Lemon*, 3 Wash. 15. But a non-compliance with the mandate of the supreme court is corrigible by further mandate, upon the application of any party aggrieved: *Waterman v. Lemon*, 3 Wash. 15.

*Reversal does not disturb titles.*

§ 1437. [480.] Property acquired by a purchaser in good faith, under a judgment subsequently reversed, shall not be affected by such reversal.

*Petition for rehearing suspends decision.*

§ 1438. If a petition for rehearing be filed, the same shall suspend the decisions of the court, on its presentation, until the application shall be determined. [March 9, 1891, § 36.]

*Proceedings on petition for rehearing.*

§ 1439. The petition for rehearing shall be the argument of the applicant therefor; and if the court think that such argument requires a reply, it shall so indicate to the other party, and he may make reply within such time as said court shall allow. [March 9, 1891, § 37.]

*Action does not abate by death of party.*

§ 1440. The death of one or all of the parties shall not cause the proceedings to abate, but the names of the proper persons shall be substituted, as is provided in such cases in the superior court, and the case may proceed. The court may also, in such case, grant a continuance when such a course will be calculated to promote the ends of justice. [March 9, 1891, § 38.]

**Action does not abate on death of party:** *Mitchell v. Schoonover*, 16 Or. 211. **to substitution, see same case, and *Davies etc.*** *As Lumber Co. v. Gottschalk*, 81 Cal. 641.

*Manner of serving notices, etc., on appeal.*

§ 1441. The services of notices of appeal, and of all notices and orders and process connected with appeals, or with proceedings on appeal, shall, except as otherwise directed by the supreme court by general rule or special order, be made in the way provided for the services of like notices in the superior court, and they may be served by the same person and returned in the same manner. The original notice of appeal must be returned immediately after service to the office of the clerk of the superior court from which the appeal is taken. [March 9, 1891, § 39.]

*Appeal is supersedeas in criminal cases.*

§ 1442. An appeal by a defendant in a criminal action shall stay the execution of the judgment of conviction. [March 9, 1891, § 40.]

In most of the states the right of appeal is wholly statutory, and is given with such conditions as the legislature may prescribe. In Washington the right of appeal is a constitutional right "in all cases": Const., art. 1, sec. 22.

*Bail pending appeal in criminal cases.*

§ 1443. In all criminal actions, except capital cases in which the proof of guilt is clear or the presumption great, upon an appeal being taken from a judgment of conviction, the court in which the judgment was rendered, or a judge thereof, must, by an order entered in the journal or filed with the clerk, fix and determine the amount of bail to be required of the appellant; and the appellant shall be committed until a bond to the state of Washington in the sum so fixed be executed on his behalf by at least two sureties possessing the qualifi-



cations required for bail upon arrest in civil actions, such bond to be conditioned that the appellant shall appear whenever required, and stand to and abide by the judgment or orders of the appellate court, and any judgment and order of the superior court that may be rendered or made in pursuance thereof. If the appellant be already at large on bail, his sureties shall be liable to the amount of their bond, in the same manner and upon the same conditions as if they had executed the bond prescribed by this section; but the court may, by order, require a new bond in a larger amount, or with new sureties, and may commit the appellant until the order be complied with. [March 9, 1891, § 41.]

*Personal appearance not required in supreme court.*

§ 1444. [1152.] Personal appearance of any party in the supreme court shall not be necessary on appeal in either civil or criminal actions. In criminal actions the defendant shall be entitled to close the argument. [March 9, 1891, § 42.]

**Right to appear by counsel.**—A defendant who has escaped from custody has no right to appear in the appellate court by counsel until he has returned into custody. By breaking jail and escaping, he waives his right to have counsel appear for him: *People v. Redinger*, 55 Cal. 298; *Com. v. Andrews*, 97 Mass. 544; *Sherman v. Com.*, 14 Gratt. 677; *Leftwich's Case*, 20

Gratt. 716; *People v. Genet*, 59 N. Y. 80; *Smith v. United States*, 94 U. S. 97. It is generally the practice, on motions to dismiss an appeal because the defendant refuses to submit to the jurisdiction of the court, to enter an order directing the appeal to be dismissed unless the defendant returns into custody by a fixed date: *Id.*; *People v. Redinger*, 55 Cal. 299.

*Proceedings as to defendant on reversal of judgment.*

§ 1445. When in a criminal action the judgment against the defendant is reversed, and it appears that no offense whatever has been committed, the supreme court must direct that the defendant be discharged; but if it appear that the defendant is guilty of an offense, although defectively charged in the indictment or information, the supreme court, if the defendant is imprisoned, must direct the keeper of the place of confinement to cause the prisoner to be returned to the sheriff of the proper county, there to abide the order of the superior court thereof; and such keeper shall be entitled to the usual fees therefor. [March 9, 1891, § 43.]

*Certified transcript of judgment, etc., of supreme court is authority to carry out its mandate.*

§ 1446. A transcript of any order or judgment, or both, of the supreme court, certified under the seal of the court, shall be sufficient authority to any court, or to any officer on whom it may be served, to proceed according to its mandate. [March 9, 1891, § 44.]

**Mandates of supreme court, enforcement of:** See § 1435, *ante*. Any non-compliance with the mandate of the supreme court

is corrigible by further mandate, as in a cause whereof that court still has jurisdiction: *Waterman v. Lemon*, 3 Wash. 15.

*Credit of imprisonment pending appeal, etc.*

§ 1447. If a defendant who has been imprisoned during the pen-

dency of an appeal, upon a new trial ordered by the supreme court, shall be again convicted, the period of his former imprisonment shall be deducted by the superior court from the period of imprisonment to be fixed on the last verdict of conviction. [March 9, 1891, § 45.]

*Supreme court to try cases on merits.*

§ 1448. The supreme court shall hear and determine all causes removed thereto, in the manner hereinbefore provided, upon the merits thereof, disregarding all technicalities, and shall, upon the hearing, consider all amendments which could have been made as made. [March 9, 1891, § 46.]

**Judgment on appeal.** — On hearing on appeal the supreme court will give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the defendant: *People v. Sprague*, 53 Cal. 491; *People v. Turley*, 50 Cal. 469; *People v. Nelson*, 56 Cal. 77; *People v. St. Clair*, 56 Cal. 406; 55 Cal. 524; *People v. Cronin*, 34 Cal. 191; *People v. Dick*, 32 Cal. 213. Errors which do not prejudice will not warrant a reversal: *Id.*; *People v. Rolfe*, 61 Cal. 540, 544; *People v. Morine*, 61 Cal. 367, 373; *People v. Smith*, 59 Cal. 601; *People v. Williams*, 59 Cal. 674, 677, where the court went outside the evidence in charging the jury, but simply by way of illustration. A technical error is not sufficient of itself to reverse a judgment, but it must appear that by such error a substantial right of the defendant has been thereby affected, and the defendant must affirmatively prove that fact: *People v. Brotherton*, 47 Cal. 404. A judgment will not be reversed by the appellate court by reason of alleged error in a proceeding had in the course of the trial by express agreement of the defendant and his counsel, unless bound to do so by some controlling rule of law: *People v. Henderson*, 28 Cal. 466. So a party cannot complain of an instruction given at his own request: *People v. Lopez*, 59 Cal. 362. The appellant must affirmatively show error; the appellate court will not presume it: *People v. Ferris*, 56 Cal. 442; *People v. Gilbert*, 60 Cal. 108, 112; *People v. Johnson*, 47 Cal. 122; *People v. Brotherton*, 47 Cal. 388; *People v. Best*, 39 Cal. 690; *People*

*v. Jocelyn*, 29 Cal. 562; *People v. King*, 27 Cal. 507; *People v. Lerison*, 16 Cal. 98; *People v. Bouncey*, 19 Cal. 426; *People v. Connor*, 17 Cal. 354; *People v. Robinson*, 17 Cal. 363; *People v. Bealoba*, 17 Cal. 389; *People v. Lafuente*, 6 Cal. 202; but where error has been committed in a criminal trial, it will be presumed to have injured the defendant unless the contrary clearly appears: *People v. Murphy*, 47 Cal. 103; *People v. Furtado*, 57 Cal. 345, 347; but see *People v. Gray*, 61 Cal. 182, and the cases there cited. If there is a substantial conflict in the evidence, the verdict will not be disturbed on appeal on the ground that it was not justified by the evidence: *People v. Montgomery*, 53 Cal. 576; *People v. Smallman*, 55 Cal. 185. Although some of the instructions given may not state the law applicable to the case with precise accuracy, yet, if taken as a whole, they are substantially correct, and could not have misled the jury, the judgment will not be disturbed: *People v. Cleveland*, 49 Cal. 577; *People v. Clementshaw*, 49 Cal. 385; *People v. Salorse*, 62 Cal. 139, 144; *People v. Ye Park*, 62 Cal. 204; *People v. Tamkin*, 62 Cal. 468; *People v. Gray*, 61 Cal. 164, 182. An order denying a motion for a continuance may be reviewed on appeal: *People v. Diaz*, 6 Cal. 248. Any intermediate order of the court, and any action of the court during the progress of the trial, by which defendant is deprived of a substantial legal right, or by which to any extent a substantial, legal, or constitutional privilege claimed by him is withheld, is a proper subject-matter of review on appeal: *People v. Harrington*, 42 Cal. 165.

*Form and effect of executions from supreme court.*

§ 1449. Executions issued from the supreme court shall be the same as those from the superior court, and attended with the same consequences, and shall be returnable in the same time. [March 9, 1891, § 47.]

*Supreme court may make rules of practice.*

§ 1450. The supreme court is hereby authorized to make all needful rules and regulations not inconsistent with law concerning practice and procedure in the supreme court in causes appealed thereto, and concerning the settlement of bills of exceptions and statement of facts, and concerning the time and manner of filing transcripts and briefs. [March 9, 1891, § 48.]

**Rules of supreme court.** — The court may punish a non-compliance with its rules as to briefs, etc., by striking out the offensive papers, or by imposing costs, if they are allowed to stand: *Carroll v. Anderson*, 2 Wash. 366. Where a party's brief does not conform to the rules of court, the case will sometimes be continued for a hearing upon the merits, on

condition that the offending party pay the costs of both courts: *Dodd v. Bowles*, 3 Wash. 11. Rule being purely for the convenience of the court, it is in its discretion to refuse to dismiss an appeal for non-compliance therewith, where the delinquent party was unaware that it had been adopted: *Lery v. Sheehan*, 23 Pac. Rep. 802.

*Manner of removing causes herein provided is exclusive.*

§ 1451. The method provided by this title for removing causes to the supreme court, and for securing a revision of the same, shall be exclusive, and shall supersede all other methods heretofore provided. [March 9, 1891, § 49.]

*Vested rights to remain undisturbed.*

§ 1451 a. No rights acquired under statutes which are abrogated by this title shall be lost by reason of the passage of this title, but all appeals pending when this title takes effect may be prosecuted to their determination, as if this title had not been passed. [March 9, 1891, § 50.]

Word "title" substituted for "act." The act, of which this is section 50, is identical with this title, with the exception of § 1437.



## TITLE XVI.

## OF ACTIONS AND PROCEEDINGS IN JUSTICES' COURTS AND BEFORE MAGISTRATES.

## CHAPTER I.—OF THE COMMENCEMENT OF CIVIL ACTIONS IN JUSTICE'S COURT.

## II.—OF THE PLEADINGS IN CIVIL ACTIONS IN JUSTICE'S COURT.

## III.—OF PROVISIONAL REMEDIES IN JUSTICE'S COURT.

## IV.—OF THE TRIAL OF CIVIL ACTIONS IN JUSTICE'S COURT.

## V.—OF JUDGMENT IN CIVIL ACTIONS IN JUSTICE'S COURT.

## VI.—OF EXECUTIONS, AND PROCEEDINGS THEREON.

## VII.—OF FORMS IN CIVIL ACTIONS IN JUSTICE'S COURT.

## VIII.—OF PRACTICE IN CRIMINAL ACTIONS IN JUSTICE'S COURT.

## IX.—OF FORMS IN CRIMINAL ACTIONS.

## X.—OF PROCEEDINGS TO PREVENT THE COMMISSION OF CRIMES.

## XI.—OF THE EXAMINATION OF PERSONS CHARGED WITH CRIME BEFORE MAGISTRATES.

## XII.—OF PROCEEDINGS FOR CONTEMPT BEFORE JUSTICES OF THE PEACE.

## XIII.—OF PROCEEDINGS AGAINST VAGRANTS.

## XIV.—OF CERTIORARI, AND PROCEEDINGS THEREON.

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## CHAPTER I.

## OF THE COMMENCEMENT OF CIVIL ACTIONS IN JUSTICE'S COURT.

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- § 1468. Change of venue.
- § 1469. False return or failure to execute process, effect of.
- § 1470. Security may be required of non-resident for costs.

*Civil actions, how commenced.*

§ 1452. [1712.] Civil actions in the several justices' courts of this state may be instituted either by the voluntary appearance and agreement of the parties, by the service of a summons, or by the service upon the defendant of a true copy of the complaint and notice, which notice shall be attached to the copy of the complaint, and cite the defendant to be and appear before the justice at the time and place therein specified, which shall not be less than six nor more than twenty days from the date of filing the complaint.

**Jurisdiction of justices' courts:** See §§ 22-29, *ante*.

**Appearance.** — A defendant has a right to appear for the purpose of moving to dismiss a defective summons, and it is error in the court to refuse him that privilege. And the fact that he afterwards appears and answers does not waive his right or cure the error: *Deidesheimer*

*v. Brown*, 8 Cal. 339; *Gray v. Hayes*, 8 Cal. 569; *Lyman v. Milton*, 44 Cal. 630; *Paul v. Armstrong*, 1 Nev. 98; *Southern Pacific R. R. Co. v. Superior Court*, 59 Cal. 471. The court does not acquire jurisdiction to proceed against him by reason of his special appearance for such purpose: See case last cited.

*Action by summons — How commenced — Form, etc., of summons.*

§ 1453. [1713.] A party desiring to commence an action before a justice of the peace for the recovery of a debt by summons shall file his claim with the justice of the peace, verified by his own oath, or that of his agent or attorney; and thereupon the justice of the peace shall, on payment of his fees, if demanded, issue a summons to the opposite party, which summons shall be in the following form, or as nearly as the case will admit, viz.:—

The State of Washington, }  
                     — County.        } ss.

To the sheriff or any constable of said county.

In the name of the state of Washington, you are hereby commanded to summon —, if he (or they) be found in your county, to be and appear before me at —, on — day of —, at — o'clock, P. M. (or A. M.), to answer the complaint of —, for a failure to pay him a certain demand, amounting to — dollars and — cents, upon (here state briefly the nature of the claim); and of this writ make due service and return.

Given under my hand this — day of —, 18—.

—, Justice of the Peace.

And the summons shall specify a certain place, day, and hour for the appearance and answer of the defendant, not less than six nor more than twenty days from the date of filing plaintiff's claim with the justice, which summons shall be served at least five days before the time of trial mentioned therein, and shall be served by the officer delivering to the defendant, or leaving at his place of abode, with some person over twelve years of age, a true copy of such summons, certified by the officer to be such.

All process must run in the name of the state of Washington: Const., art. 4, sec. 27; see § 1456.

**Summons, when returnable.** — A justice of the peace cannot make a summons returnable at a day further in the future than the longest time specified in the statute: *Deidesheimer v. Brown*, 8 Cal. 340. But where the summons is to be served by publication, the return day may be fixed at such time as will enable the summons to be published as required by the order before such return day: *Seaver v. Fitzgerald*, 23 Cal. 91; *Hisler v. Carr*, 34 Cal. 646. See § 1456, *infra*, where one justice succeeds another to office, and receives the complaint, the former must issue summons, and order defendant to appear not more than twenty days from that time: *Nelson v. Campbell*, 24 Pac. Rep. 539 (Wash.).

**Contents of summons.** — There are no presumptions in favor of the jurisdiction of justices' courts; so where the complaint is against the "Independent Company," and service on R., a member of the said company,

and the summons is addressed to the "Independent Tunnel Company," a judgment by default against the last-named company is void: *King v. Randlett*, 33 Cal. 318.

**Territorial extent of jurisdiction.** — A provision that mesne and final process of justices' courts may be issued to any part of the county where they are held is constitutional: *Chipman v. Bowman*, 14 Cal. 158; see § 27, *ante*.

**Collateral attack.** — An objection to the regularity of the issuance of an *alias* summons in an action in a justice's court is not jurisdictional, and cannot be taken advantage of in a collateral attack: *Dore v. Dougherty*, 72 Cal. 232.

The summons in an action in a justice's court for a trespass on land contained a statement that, in case of the defendant's failure to answer, "the plaintiff would take judgment for the amount claimed in the complaint." It was held that a judgment by default rendered after a personal service on the defendant was voidable only, and could not be collaterally attacked: *Keybers v. McComber*, 67 Cal. 395.

### *Action by service of complaint and notice, how commenced—Form of notice.*

§ 1454. [1714.] Any person desiring to commence an action before a justice of the peace by the service of a complaint and notice can do so by filing his complaint, verified by his own oath or that of his agent or attorney, with the justice, and when such complaint is so filed, upon payment of his fees, if demanded, the justice shall attach thereto a notice, which shall be substantially as follows:—

The State of Washington, )  
                   — County.                 } ss.

To —.

In the name of the state of Washington, you are hereby notified to be and appear at my office in —, on the — day of —, 18—, at the hour of —, — M., to answer to the foregoing complaint, or judgment will be taken against you as confessed, and the prayer of the plaintiff granted.

Dated —, 18—.

—, J. P.

### *Complaint and notice, how served.*

§ 1455. [1715.] The complaint and notice shall be served at least five days before the time mentioned in the notice for the defendant to appear and answer the complaint, by delivering to the defendant, or leaving at his place of abode, with some person over twelve years of age, a true copy of the complaint and notice, certified by the officer or person making the service to be such.

### *Process to run in name of state—Service of.*

§ 1456. [1716.] All process issued by justices of the peace shall run in the name of the state of Washington, be dated the day issued,



signed by the justice granting the same, and directed to the sheriff or any constable of the proper county, and the same, as also the complaint and notice, shall be served by one of said officers, unless otherwise directed by the justice.

See note to § 1453, *ante*.

*Return of process, what to contain.*

§ 1457. [1717.] Every constable or sheriff serving any process, or complaint and notice, shall return thereon in writing the time and manner of service, and shall sign his name to such return, and indorse thereon his fees for service.

**Constable.** — The constable is the executive officer of the justice's court, and is called on and authorized to do all the acts which the sheriff is required to perform in courts of record: *Wilson v. Maddock*, 5 Or. 480.

*Justice may appoint person to serve process when — How to be returned — Fees.*

§ 1458. [1718.] Any justice may, by appointment in writing, authorize any person, other than the parties to the proceeding or action, to serve any process or paper issued by such justice; and any such person making such service shall return on such process or paper, in writing, the time and manner of service, and shall sign his name to such return, and be entitled to like fees for making such service as a sheriff or constable, and shall indorse his fees for service thereon; *provided*, it shall not be lawful for any justice to issue any process or papers to any person but a regularly qualified sheriff or constable, in any precinct where such officers reside, unless from sickness or some other cause said sheriff or constable is not able to serve the same.

*Proof of service, how made.*

§ 1459. [1719.] Proof of service in either of the above cases shall be as follows: When made by a constable or sheriff, his return signed by him and indorsed on the paper or process. When made by any person other than such officer, then by the affidavit of the person making the service.

**Service is sufficiently proved by the** copy thereof personally at," etc., "this twenty-fifth day of April, 1879. W. Bettis, constable," etc.: *Cardwell v. Sabichi*, 59 Cal. 490.

*Service by publication — Form of notice.*

§ 1460. [1720.] In case personal service cannot be had by reason of the absence of the defendant from the county in which the action is sought to be commenced, it shall be proper to publish the summons or notice, with a brief statement of the object and prayer of the claim or complaint, in some weekly newspaper published in the county wherein the action is commenced; or if there is no paper published in such county,

then in some newspaper published in the nearest adjoining county, which notice shall be published not less than once a week for three weeks prior to the time fixed for the hearing of the cause, which shall not be less than four weeks from the first publication of said notice. Said notice may be substantially as follows:—

The State of Washington, }  
County of ———. } ss.

In Justice's Court, ——— Justice.

To ———.

In the name of the state of Washington, you are hereby notified that ——— has filed a complaint (or claim, as the case may be) against you in said court, which will come on to be heard at my office in ———, in ——— county, state of Washington, on the ——— day of ———, A. D. 18—, at the hour of ——— o'clock, — M., and unless you appear and then and there answer, the same will be taken as confessed, and the demand of the plaintiff granted. The object and demand of said claim (or complaint, as the case may be) is (here insert a brief statement).

Complaint filed ———, A. D. 18—.

———, J. P.

*Proof of service by publication, how made.*

§ 1461. [1721.] Proof of service, in case of publication, shall be the affidavit of the publisher, printer, foreman, or principal clerk, showing the same.

**Affidavit by editor.** — This statute is satisfied if the affidavit be made by the editor: *Pennoyer v. Neff*, 95 U. S. 714.

*Written admission is equivalent to proof of service.*

§ 1462. [1722.] The written admission of the defendant, his agent or attorney, indorsed upon any summons, complaint, and notice, or other paper, shall be complete proof of service in any case.

*Jurisdiction is acquired from time of service.*

§ 1463. [1723.] The court shall be deemed to have obtained possession of the case from the time the complaint or claim is filed, after completion of service, whether by publication or otherwise, and shall have control of all subsequent proceedings.

**Jurisdiction must affirmatively appear.** — A justice's court is an inferior court, and a party relying upon or claiming any right under its judgments must affirmatively show its jurisdiction: *Keybers v. McComber*, 67 Cal. 395.

personal in its nature, move for a dismissal on the ground that the court has no jurisdiction to try the cause, their subsequent withdrawal of the motion and consent to a trial on the merits is a waiver of the objection to the want of jurisdiction: *Luco v. Superior Court of Tuolumne County*, 71 Cal. 555.

**Motion to dismiss.** — Where the defendants, in an action in a justice's court which is

*Justice's docket — Shall contain what.*

§ 1464. [1724.] Every justice of the peace shall keep a docket in a well-bound book, in which he shall enter,—

1. The titles of all actions commenced before him;

2. The object of the action or proceeding, and if a sum of money be claimed, the amount of the demand;
3. The date of the notice and the time of its return; and if an order to arrest the defendant be made, the statement of the facts on which the order is issued;
4. The time when the parties, or either of them, appear, or their non-appearance, if default be made;
5. A brief statement of the nature of the plaintiff's demand, and the amount claimed; and if any set-off be pleaded, a similar statement of the set-off, and the amount estimated, and every motion, rule, order, and exception, with the decision of the court thereon;
6. Every continuance, stating at whose request, and for what time;
7. The demand for a trial by jury, when the same is made, and by whom made, the order for the jury, and the time appointed for the trial and return of the jury;
8. The names of the jury who appear and are sworn; the names of witnesses sworn, and at whose request;
9. The verdict of the jury, and when received; and if the jury disagree and are discharged, the fact of such disagreement and discharge;
10. The judgment of the court, and the time when rendered;
11. The time of issuing execution, and the name of the officer to whom delivered, and an account of the debt and costs, and the fees due to each person separately;
12. The fact of an appeal having been made and allowed, and the time when;
13. Satisfaction of the judgment, or any money paid thereon, and the time when;
14. And such other entries as may be material.

**Jurisdiction and docket.**—There is no presumption in favor of the jurisdiction of justices' courts: *Kane v. Desmond*, 63 Cal. 464; *Spear v. Carter*, 48 Am. Dec. 688; *Levy v. Sherman*, 42 Am. Dec. 690. Their jurisdiction is special and limited, and the jurisdictional facts must be affirmatively shown; *Id.*; *Keybers v. McComber*, 67 Cal. 395; as that suit was brought in the proper township, etc.: *Loive v. Alexander*, 15 Cal. 296. And their judgments must show a close compliance with the requirements of the statute: *Beach v. Botsford*, 40 Am. Dec. 45; though they cannot be impeached on collateral attack: *Keybers v. McComber*, 67 Cal. 395; *Allen v. Martin*, 25 Am. Dec. 564; *Arnold v. Shields*, 30 Am. Dec. 669. Technical precision in matters of form is not required in such courts: *Bradner v. Howard*, 75 N. Y. 417. Entry of judgment in the docket is not the judgment itself, but is the best evidence of the judgment: *Hickey v. Hinsdale*, 77 Am. Dec. 450; *Coffman v. Hampton*, 37 Am. Dec. 511; but the record kept by a justice is not the only evidence of what was done, and omissions from the docket may be supplied from other sources when necessary: *Blair v. Hamilton*, 32 Cal. 49; see *Scott v.*

*Superior Court*, 73 Cal. 11. Statutes like the above section seem to be peremptory in requiring every justice of the peace to keep a docket in which he shall enter the particulars specified; but whether such statutes are considered directory, or a violation of them as misconduct on the part of the justice, courts will not allow the rights of parties to be defeated by mere irregularities, omissions, or clerical defects: *Fish v. Emerson*, 44 N. Y. 376, 380; *Hickey v. Hinsdale*, 77 Am. Dec. 450; *Blair v. Hamilton*, 32 Cal. 49. Thus in *Hickey v. Hinsdale*, *supra*, a statute requiring the entry of judgment in the justice's docket was held to be merely directory; and that where it had not been entered, the minutes or memorandum of the justice made at the time of giving the judgment, and filed with the papers in the cause, would, when proved by the justice, be competent evidence of the judgment. And in *Fish v. Emerson*, *supra*, the court would not allow the neglect of the justice to enter the judgment in his docket, to "inflict a penalty upon the plaintiff more justly due to the magistrate." Failure to enter up a judgment is merely irregular, and the omission does not make it invalid: *Lynch*



*v. Kelly*, 41 Cal. 232. Entry in the docket of the justice, to the effect that the summons was returned served, does not show such a service as the law requires to give jurisdiction of the person: *Kane v. Desmond*, 63 Cal. 464; *Denmark*

*v. Liening*, 10 Cal. 93; *Rowley v. Howard*, 23 Cal. 403. The fact of service should be shown by the return of the officer on the summons: *Denmark v. Liening*, 10 Cal. 93.

*How infant must sue — Appointment of prochein ami.*

§ 1465. [1753.] No action shall be commenced by an infant plaintiff, except by his guardian or until a next friend for such infant shall have been appointed. Whenever requested, the justice shall appoint some suitable person, who shall consent thereto in writing, to be named by such plaintiff, to act as his next friend in such action, who shall be responsible for the costs therein.

*Appointment of guardian ad litem for infant defendant.*

§ 1466. [1754.] After service and return of process against an infant defendant, the action shall not be further prosecuted until a guardian for such infant shall have been appointed. Upon the request of such defendant, the justice shall appoint some person, who shall consent thereto in writing, to be guardian of the defendant in defense of the action; and if the defendant shall not appear on the return day of the process, or if he neglect or refuse to nominate such guardian, the justice may, at the request of the plaintiff, appoint any discreet person as such guardian. The consent of the guardian or next friend shall be filed with the justice; and such guardian for the defendant shall not be liable for any costs in the action.

*Time for appearance.*

§ 1467. [1755.] The parties shall be entitled to one hour in which to make their appearance after the time mentioned in the summons or notice for appearance, but shall not be required to remain longer than that time, unless both parties appear, and the justice, being present, is actually engaged in the trial of another action or proceeding; in such case he may postpone the time of appearance until the close of such trial.

**Appearance of parties:** See § 1530, *post*. Party to an action in a justice's court is entitled to one hour in which to appear, after the time mentioned in the notice. If defendant do not so appear, judgment shall be entered against him without further proof or evidence.

The mere corporal presence of defendant is not sufficient; he must answer, demur, or give the plaintiff written notice; or if by attorney, the attorney must give notice of appearance for him: *McCoy v. Bell*, 20 Pac. Rep. 595 (Wash.).

*Change of venue.*

§ 1468. [1938.] If, previous to the commencement of any trial before a justice of the peace, the defendant, his attorney or agent, shall make and file with the justice an affidavit that the deponent believes that the defendant cannot have an impartial trial before such justice, it shall be the duty of the justice to forthwith transmit all papers and documents belonging to the case to the next nearest justice of the

peace in the same county, who is not of kin to either party, sick, absent from the county, or interested in the result of the action, either as counsel or otherwise. The justice to whom such papers and documents are so transmitted shall proceed as if the suit had been instituted before him. Distance, as contemplated by this section, shall be computed upon the shortest traveled route. The costs of such change of venue shall abide the result of the suit.

**Impartial trial, etc.** — Upon filing the affidavit for change of venue, it is the duty of the justice not to try the case, but to transfer it. The fact that the venue has already been changed, and the action sent to him, makes no difference. He may change the

venue again upon a proper showing: *Flagley v. Hubbard*, 22 Cal. 35.

**Order, effect of.** — The order *ipso facto* vests jurisdiction in the transferee justice, and divests jurisdiction from the transferrer: *Hatch v. Galvin*, 50 Cal. 443.

*False return or failure to execute process, effect of.*

§ 1469. [1752.] If any officer, without showing good cause therefor, fail to execute any process to him delivered, and make due return thereof, or make a false return, such officer, for every such offense, shall pay to the party injured ten dollars, and all damage such party may have sustained by reason thereof, to be recovered in a civil action.

*Security may be required of non-resident for costs.*

§ 1470. [1725.] Whenever the plaintiff is a non-resident of the county, the justice may require of him security for the costs before the commencement of the action.

**Right of action** upon an undertaking given to secure costs under this section does not pass to an assignee by the assignment of the judg-

ment in the cause: *Dray v. Mayer*, 5 Or. 185. He must have an assignment of the bond: *Moses v. Thorne*, 6 Cal. 87.

## CHAPTER II.

### OF THE PLEADINGS IN CIVIL ACTIONS IN JUSTICE'S COURT.

- § 1471. Pleadings and adjournments.
- § 1472. Pleadings in justices' courts.
- § 1473. Pleadings shall be in writing when.
- § 1474. Pleadings not required to be in any particular form.
- § 1475. Denial, what is equivalent to.
- § 1476. Pleading written instrument.
- § 1477. Pleadings to be verified.
- § 1478. Uncontroverted allegations are deemed to be true.
- § 1479. Objection to pleadings, grounds of.
- § 1480. Variance to be disregarded when.
- § 1481. Amendments of pleadings.
- § 1482. Set-off must be pleaded.
- § 1483. Proceedings when title of lands is put in issue.

*Pleadings and adjournments.*

§ 1471. [1756.] The pleadings in justice's court shall take place upon the appearance of the parties, unless they shall have been pre-

viously filed, or unless the justice shall, for good cause shown, allow a longer time than the time of appearance.

*Pleadings in justices' courts.*

§ 1472. [1757.] The pleadings in the justice's court shall be,—

1. The complaint of the plaintiff, which shall state in a plain and direct manner the facts constituting the cause of action.

2. The answer of the defendant, which may contain a denial of the complaint, or any part thereof, and also a statement, in a plain and direct manner, of any facts constituting a defense.

3. When the answer sets up a set-off by way of defense, the reply of the plaintiff.

**New matter in answer presumed to be denied.** — The fact that plaintiff, in an action of forcible entry and detainer, does not, by a reply, deny an allegation of "one year's quiet possession," etc., set up by defendant in his answer, is not to be taken as a confession of the truth of such allegation, because, under subdivision 3 of the above section, all new matter in the answer is presumed to be denied

except in cases where a set-off is claimed by way of defense: *Bellingham Bay etc. Co. v. Strand*, 23 Pac. Rep. 928 (Wash.).

**Answer is sufficient** in justice's court, which contains a general denial of all the allegations of the complaint, and requires evidence from the plaintiff: *Mintburn v. Burr*, 20 Cal. 49; *Sullivan v. Cary*, 17 Cal. 80; *Henderson v. Allen*, 23 Cal. 519.

*Pleadings shall be in writing when.*

§ 1473. [1758.] Except when otherwise specially provided, the pleadings in justices' courts may be oral or in writing.

*Pleadings not required to be in any particular form.*

§ 1474. [1759.] When the pleadings are oral, the substance of them shall be entered by the justice in his docket. When in writing, they shall be filed in his office, and a reference made to them in his docket. Pleadings shall not be required to be in any particular form, but shall be such as to enable a person of common understanding to know what is intended.

*Denial, what is equivalent to.*

§ 1475. [1760.] A statement, in an answer or reply, that the party has not sufficient knowledge or information in respect to a particular allegation in the previous pleadings of the adverse party to form a belief shall be deemed equivalent to a denial.

*Pleading written instrument.*

§ 1476. [1761.] When the cause of action or set-off arises upon an account or instrument for the payment of money only, it shall be sufficient for the party to deliver the account or instrument, or a copy thereof, to the court, and to state that there is due to him thereon, from the adverse party, a specified sum, which he claims to recover or set off. The court may, at the time of pleading, require that the original account or instrument be exhibited to the inspection of the adverse party, with liberty to copy the same; or if not so exhibited, may prohibit its being given in evidence.



*Pleadings to be verified.*

§ 1477. [1762.] Every complaint, answer, or reply shall be verified by the oath of the party pleading; or if he be not present, by the oath of his attorney or agent, to the effect that he believes it to be true. The verification shall be oral or in writing, in conformity with the pleading verified.

*Uncontroverted allegations are deemed to be true.*

§ 1478. [1763.] Every material allegation in a complaint, or relating to a set-off in an answer, not denied by the pleading of the adverse party, shall, on the trial, be taken to be true, except that when a defendant who has not been served with a copy of the complaint fails to appear and answer, the plaintiff cannot recover without proving his case.

*Objection to pleading, grounds of.*

§ 1479. [1764.] Either party may object to a pleading by his adversary, or to any part thereof, that is not sufficiently explicit for him to understand it, or that it contains no cause of action or defense, although it be taken as true. If the court deem the objection well founded, it shall order the pleading to be amended; and if the party refuse to amend, the defective pleading shall be disregarded.

*Variance to be disregarded when.*

§ 1480. [1765.] A variance between the proof on the trial and the allegations in a pleading shall be disregarded as immaterial, unless the court be satisfied that the adverse party has been misled to his prejudice thereby.

*Amendments of pleadings.*

§ 1481. [1766.] The pleadings may be amended at any time before the trial, or during the trial, or upon appeal, to supply any deficiency or omissions in the allegations or denials necessary to support the action or defense, when by such amendment substantial justice will be promoted. If the amendment be made after the issue, and it be made to appear to the satisfaction of the court that a continuance is necessary to the adverse party in consequence of such amendment, a continuance shall be granted. The court may also, in its discretion, require as a condition of an amendment the payment of costs to the adverse party.

*Set-off must be pleaded.*

§ 1482. [1767.] To entitle a defendant to any set-off he may have against the plaintiff, he must allege the same in his answer; and the statutes regulating set-offs in the superior court shall in all respects be applicable to a set off in a justice's court, if the amount claimed to be set off, after deducting the amount [found] due the plaintiff, be within the jurisdiction of the justice of the peace; judgment may, in like manner, be rendered by the justice, in favor of the defendant, for the balance found due the plaintiff.

*Proceedings where title of lands is put in issue.*

§ 1483. [1868.] If it appear on the trial of any cause before a justice of the peace, from the evidence of either party, that the title to lands is in question, which title shall be disputed by the other, the justice shall immediately make an entry thereof in his docket, and cease all further proceedings in the cause, and shall certify and return to the superior court of the county a transcript of all the entries made in his docket, relating to the cause, together with all the process and other papers relating to the action, in the same manner and within the same time as upon an appeal; and thereupon the parties shall file their pleadings, and the superior court shall proceed in the cause to final judgment and execution, in the same manner as if the said action had been originally commenced therein, and the cost shall abide the event of the suit.

## CHAPTER III.

### OF PROVISIONAL REMEDIES IN JUSTICE'S COURT.

- § 1484. Justice may issue warrant of arrest when.
- § 1485. Warrant of arrest not to issue until plaintiff has given bond.
- § 1486. Warrant of arrest, how to be served.
- § 1487. Officer making arrest to give plaintiff notice.
- § 1488. Defendant not to be held more than twenty-four hours before trial.
- § 1489. On continuance, defendant must give bond or remain in custody.
- § 1490. Plaintiff may claim delivery of property.
- § 1491. Affidavit is required when delivery is claimed — Contents of.
- § 1492. Order for delivery.
- § 1493. Execution of order for delivery.
- § 1494. Defendant may except to sureties.
- § 1495. Defendant may require return of property upon giving bond, etc.
- § 1496. Sureties shall justify.
- § 1497. Officer may break open building or inclosure.
- § 1498. Officer shall safely keep and deliver property.
- § 1499. Proceedings where property is claimed by third party.
- § 1500. Officer's return of order and affidavit.
- § 1501. Garnishment — Justice's court.
- § 1502. Garnishee summons.
- § 1503. Service of same.
- § 1504. Service upon defendant.
- § 1505. Liability of garnishee.
- § 1506. Ancillary action.
- § 1507. Examination of garnishee.
- § 1508. Trial, if answer of garnishee unsatisfactory.
- § 1509. Defendant may participate in trial.
- § 1510. Costs in garnishment.
- § 1511. Judgment against garnishee.
- § 1512. Costs against garnishee.
- § 1513. Final judgment — Negotiable instrument.
- § 1514. Default, etc., by garnishee.
- § 1515. Appearance after default.
- § 1516. Judgment in bar.

*Justice may issue warrant of arrest when.*

§ 1484. [1746.] A justice of the peace shall issue a warrant of arrest in all such cases within his jurisdiction, and for such causes and upon such proof, as is provided for an order for a warrant in the act regulating civil actions.

*Warrant of arrest not to issue until plaintiff has given bond.*

§ 1485. [1747.] Before issuing the warrant of arrest, the justice shall require a bond on part of the plaintiff, with one or more sureties, to the effect that if the defendant recover judgment the plaintiff will pay all costs that may be awarded to the defendant, and all damages which may be sustained by reason of the arrest, not exceeding the sum specified in the bond, which shall be at least one hundred dollars.

*Warrant of arrest, how to be served.*

§ 1486. [1748.] The warrant shall be served by arresting the defendant, and taking him before the justice of the peace who issued the same; but if such justice, at the return thereof, be absent or unable to try the action, the officer shall immediately take the defendant to the nearest justice of the same county, who shall take cognizance of the action, and proceed thereon as if the warrant had been issued by himself.

*Officer making arrest to give plaintiff notice.*

§ 1487. [1749.] The officer making the arrest shall immediately give notice to the plaintiff, his agent or attorney, and indorse on the warrant the time of the arrest and the time of serving notice on the plaintiff.

*Defendant not to be held more than twenty-four hours before trial.*

§ 1488. [1750.] When a defendant is brought before a justice on a warrant, he shall be detained in the custody of the officer until he shall be discharged according to law; but in no case shall the defendant be detained longer than twenty-four hours from the time he shall be brought before the justice, unless within that time the trial of the action shall be commenced, or unless it has been delayed at the instance of the defendant.

*On continuance, defendant must give bond or remain in custody.*

§ 1489. [1751.] If the defendant, on his appearance, demand a continuance, the same may be granted on condition that he remain in custody or execute and file with the justice a bond, with one or more sufficient sureties, to be approved by the justice, to the effect that he will render himself amenable to the process of the court, or that the



sureties will pay to plaintiff the amount of any judgment which he may recover in the action. On filing such bond, the justice shall order the defendant to be discharged from custody.

*Plaintiff may claim delivery of property.*

§ 1490. [1809.] The plaintiff in an action to recover the possession of personal property may, at the time of issuing such summons, or at any time before answer, claim the immediate delivery of such property as provided in this chapter.

“Chapter” substituted for “act.”

*Affidavit is required where delivery is claimed — Contents of.*

§ 1491. [1810.] When a delivery is claimed, an affidavit shall be made by the plaintiff, or by some one in his behalf, showing, —

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof by virtue of a special property therein, the facts in respect to which shall be set forth;

2. That the property is wrongfully detained by the defendant;

3. The alleged cause of the detention thereof, according to his best knowledge, information, and belief;

4. That the same has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or if so seized, that it is by statute exempt from such seizure; and

5. The actual value of the property.

*Order for delivery.*

§ 1492. [1811.] The justice shall thereupon, by an indorsement in writing upon the affidavit, order the sheriff or any constable of the county to take the same from the defendant and deliver it to the plaintiff upon receiving a proper bond.

*Execution of order for delivery.*

§ 1493. [1812.] Upon the receipt of the affidavit and order, with a bond, executed by two or more sufficient sureties, approved by the sheriff or constable, to the effect that they are bound in double the value of the property as stated in the affidavit, for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against the plaintiff, the sheriff or constable shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a

copy of the affidavit, order, and bond, by delivering the same to him personally if he can be found within the county, or to his agent from whose possession the property is taken, or if neither can be found in the county, by leaving them at the usual abode of either within the county, with some person of suitable age and discretion; or if neither have any known place of abode in the county, by putting them into the post-office, directed to the defendant at the post-office nearest to him.

**Liability of sureties.** — The sureties in an undertaking in replevin are not liable to the defendant for the value of the property, unless he recovers a judgment for the return of the property. A judgment in favor of the defendant which does not award him a return of the property does not impose any liability on the sureties: *Mitchum v. Stanton*, 49 Cal. 302. If, instead of following the statutory form of

undertaking, language be used limiting the liability of the sureties to a judgment for a return of the property rendered by the justice, and such judgment is not recovered in the justice's court, a recovery cannot be had on the undertaking, even if, on appeal, such judgment is rendered by the appellate court: *Mitchum v. Stanton*, 49 Cal. 302.

*Defendant may except to sureties.*

§ 1494. [1813.] The defendant may, within two days after the service of a copy of the affidavit, order, and bond, give notice to the officer that he excepts to the sufficiency of the sureties. If he fail to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify upon one day's notice before the justice; and the officer shall be responsible for the sufficiency of the sureties until the objection to them is either waived, as above provided, or until they justify, or new sureties be substituted, and they justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section.

*Defendant may require return of property upon giving bond, etc.*

§ 1495. [1814.] At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof upon giving to the officer a bond, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. If a return of the property be not so required within two days after the taking and serving of notice to the defendant, it shall be delivered to the plaintiff, except as provided in this chapter.

*Sureties shall justify.*

§ 1496. [1815.] The defendant's sureties, upon one day's notice to the plaintiff or his attorney, shall justify before the justice, and upon such justification the officer shall deliver the property to the defendant. The officer shall be responsible for the defendant's sureties until they justify, or until the justification is complete or ex-

pressly waived, and may retain the property until that time; but if they, or others in their place, fail to justify at the time appointed, he shall deliver the property to the plaintiff.

*Officer may break open building or inclosure.*

§ 1497. [1816.] If the property, or any part thereof, be concealed in a building or inclosure, the officer shall publicly demand its delivery; and if it be not delivered, he shall cause the building or inclosure to be broken open and take the property into his possession.

*Officer shall safely keep and deliver property.*

§ 1498. [1817.] When the officer shall have taken property as in this chapter provided, he shall keep it in a secure place, and deliver to the party entitled thereto, upon receiving his lawful fees for taking and his unnecessary expenses for keeping the same.

*Proceedings where property is claimed by third party.*

§ 1499. [1818.] If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or his right to the possession thereof, stating the ground of such title or right, and serve the same upon the officer before the delivery of the property to the plaintiff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the officer against such claim by a bond executed by two sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property, as specified in the affidavit of the plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and freeholders or householders of the county; and no claim to such property by any other person than the defendant or his agent shall be valid against the officer, unless made as aforesaid, and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity.

*Officer's return of order and affidavit.*

§ 1500. [1819.] The officer shall return the order and affidavit with his proceedings thereon to the justice within five days after taking the property mentioned therein.

*Garnishment — Justice's court.*

§ 1501. Whenever any action shall have been commenced by summons upon contract express or implied, or notice and complaint in a justice's court, if the plaintiff, or some one in his behalf, shall make and deliver to the officer having such summons, or notice and complaint, an affidavit stating that the affiant has good reason to believe



that some person (naming him) is indebted to the defendant, or has personal property in his possession or under his control belonging to the defendant, or when there is more than one defendant, to any or either of them, not by law exempt from sale on execution, and demand that he shall summon such person as garnishee, such officer shall summon such person in writing to appear before the justice on the return day of such summons, or notice and complaint, to answer touching his liability as garnishee. [January 31, 1888, § 1. *In effect immediately.*]

*Garnishee summons.*

§ 1502. The summons to the garnishee may be substantially as follows: —

State of Washington, } ss.  
                   — County.

The State of Washington to —.

Whereas, a summons or notice and complaint has been issued by —, a justice of the peace of said county, returnable on the — day of —, A. D. 18—, in favor of —, plaintiff, and against —, defendant; and whereas, the plaintiff (or A B in his behalf) has made oath that you have property in your possession or under your control belonging to the defendant (or are indebted to him), — now, therefore, you are hereby summoned to be and appear before the said justice at his office in said county on the return day of said summons (or notice and complaint), at — o'clock in the —noon of said day, then and there to answer, under oath, touching your liability as garnishee.

Given under my hand this — day of —, 18—.

—, Constable or Sheriff.

[January 31, 1888, § 2. *In effect immediately.*]

*Service of same.*

§ 1503. The officer shall serve such summons on the garnishee personally, and return the same, with the affidavit, to the justice at the same time that he shall make return of the service of the summons or notice and complaint, and state the day such summons was served on the garnishee. [January 31, 1888, § 3. *In effect immediately.*]

*Service upon defendant.*

§ 1504. In all cases when a summons or notice is required to be served upon any person or corporation, to summon, notify, or charge such person or corporation as garnishee in any action pending before a justice of the peace, a copy of such summons or notice shall be

served on the defendant within the time that such summons or notice is required to be served on such garnishee. If such defendant cannot be found within the jurisdiction of such justice of the peace, and shall have a known agent or attorney residing therein, the summons or notice shall be served on such agent or attorney, or upon some suitable person over the age of sixteen years, at the dwelling-house or place of abode of the defendant. [*January 31, 1888, § 4. In effect immediately.*]

*Liability of garnishee.*

§ 1505. The garnishee, from the time of the service of such summons, shall stand liable to the plaintiff to the amount of the personal property, money, credits, and effects in his hands or under his control belonging to the defendant, and the amount of his own indebtedness to the defendant, then due or to become due, and not by law exempt from sale on execution. [*January 31, 1888, § 5. In effect immediately.*]

*Ancillary action.*

§ 1506. The service of the garnishee summons shall be deemed the commencement of an action against such garnishee; and upon the return of the constable that such summons has been duly served, the justice shall enter an action in his docket in which the plaintiff in the original action shall be plaintiff and the garnishee defendant. [*January 31, 1888, § 6. In effect immediately.*]

*Examination of garnishee.*

§ 1507. On the appearance of the garnishee before the justice, the affidavit aforesaid shall be deemed a sufficient complaint in this action, and the justice shall forthwith proceed to examine the said garnishee and his witnesses touching the matters alleged in the affidavit, and shall reduce the answers of said garnishee and his witnesses to writing, and file the same with the papers in the case; such examination may be adjourned by said garnishee, as in case of adjournment in justice's court in civil actions. [*January 31, 1888, § 7. In effect immediately.*]

*Trial, if answer of garnishee unsatisfactory.*

§ 1508. If the plaintiff shall not be satisfied with the answers of the garnishee, or if either party shall desire a trial, the justice shall enter the fact in his docket, and the case shall be proceeded with and tried upon the issue formed by the affidavit and answer, as in other actions commenced by summons; and if, upon the trial of any such issue, property or effects shall be found in the hands of the garnishee, or it shall appear that such garnishee was indebted to the defendant, the justice or jury shall assess the value thereof, and the garnishee

may hold the same subject to the further order of the justice. [*January 31, 1888, § 8. In effect immediately.*]

*Defendant may participate in trial.*

§ 1509. The defendant in the original action may appear and defend the proceedings against the garnishee, upon the ground that the indebtedness of the garnishee, or any property held by him, is exempt from execution against such defendant, or for any other reason is not liable to garnishment, or upon any grounds upon which a garnishee might defend the same, and may participate in the trial of any issue between the plaintiff and the garnishee for the protection of his interests. [*January 31, 1888, § 9. In effect immediately.*]

*Costs in garnishment.*

§ 1510. If, in the action instituted against the garnishee, the plaintiff shall be nonsuited or discontinue his action; or if, upon the answer and trial of the issue between the plaintiff and garnishee, no property or effects shall be found in the hands of the garnishee, or nothing shall be found due from the garnishee to the defendant; or if, in the action against the principal defendant, the plaintiff shall be nonsuited or discontinue his action; or if, on the trial in such action, nothing shall be found due from the defendant to the plaintiff,—then in each of these cases the garnishee shall recover costs against the plaintiff, and no such costs shall be paid by the defendant. [*January 31, 1888, § 10. In effect immediately.*]

*Judgment against garnishee.*

§ 1511. If the plaintiff recover against the defendant in the original action, and the answer of the garnishee, when no issue is made thereon, or the finding of the court or jury on an issue, show that the garnishee, at the time of the service of the summons, had property in his possession belonging to the defendant, or that he was indebted to him, the justice shall enter an order in his docket requiring the garnishee, within ten days, to pay or deliver to the justice such property or the amount of such indebtedness, or so much thereof as may be necessary to satisfy such judgment, with costs thereof, and the costs of the garnishee proceedings; or if it appears, from such answer or finding, that the garnishee is to pay or deliver to the defendant any money or property in any other manner or at any other time than immediately, and at the time of service of the summons, the same belonging to the defendant, then the order of the justice shall be that such payment or delivery be so made to the justice for the benefit of the plaintiff. If such garnishee shall pay such indebtedness, and deliver such property as directed by such order, the costs of the garnishee shall be paid out of the money or property received by the



justice, unless the garnishee, upon an issue joined with him by the plaintiff, shall have been held liable in a greater amount of property or indebtedness than was disclosed in his answer, in which case he shall not have costs. And all property and effects, except money, delivered to the justice shall be by him ordered to be sold on the execution against the defendant. [*January 31, 1888, § 11. In effect immediately.*]

*Costs against garnishee.*

§ 1512. If the garnishee do not deliver over the property or pay the money so found in his hands and belonging to the defendant, as provided in the preceding section, then judgment shall be given against him for the value of such property or money, and costs of suit in the cause in which he is garnishee, and no such costs shall be paid by the defendant. [*January 31, 1888, § 12. In effect immediately.*]

*Final judgment — Negotiable instrument.*

§ 1513. No final judgment shall be rendered against the garnishee until final judgment be rendered against the defendant in the original action; but no judgment shall be rendered against a garnishee, or any money be required to be delivered by him to the justice, upon any liability arising out of a debt due by negotiable paper, unless such paper is delivered or the garnishee completely exonerated or indemnified from all liability thereon after he may have satisfied the judgment. [*January 31, 1888, § 13. In effect immediately.*]

*Default, etc., by garnishee.*

§ 1514. When a garnishee shall fail to appear, or, appearing, shall fail to make full answers upon oath to the interrogatories of the justice touching his liabilities as garnishee, the justice shall enter such fact in his docket, and he shall be adjudged to be indebted to the defendant; and if judgment shall be rendered in favor of the plaintiff, against the defendant, judgment in favor of the plaintiff shall be entered against such garnishee for the amount of the judgment against the defendant, and for all costs in the garnishment proceedings, and no such costs shall be paid by the defendant; or, on demand of the plaintiff, he may issue a warrant to arrest the garnishee, which shall be served in the same manner as warrants issued by justices of the peace in civil actions founded on tort, and the garnishee shall be held thereon until he shall make full and direct answers to such interrogatories; and the justice may continue the cause to some other day, if necessary for further proceedings. [*January 31, 1888, § 14. In effect immediately.*]

*Appearance after default.*

§ 1515. If the garnishee shall have failed to appear at the proper time, he may afterwards appear and answer at any time before final

judgment against him, if he shall first pay all costs in the garnishee suit which have accrued up to that time; and when he shall so appear, the justice shall cause the plaintiff to be notified thereof, so that he may be present at the examination. [*January 31, 1888, § 15. In effect immediately.*]

*Judgment in bar.*

§ 1516. In all actions brought by the defendant against the garnishee for the recovery of any property, credits, money, or effects delivered up or paid by order of any judgment rendered under this act, except costs rendered against the garnishee, such judgment may be pleaded in bar, and the same shall be conclusive between such parties. [*January 31, 1888, § 16. In effect immediately.*]

Sections 1501-1516, both inclusive, comprise "this act."

## CHAPTER IV.

### OF THE TRIAL OF CIVIL ACTIONS IN JUSTICE'S COURT.

- § 1517. Continuance — Not to exceed sixty days.
- § 1518. Justice to try cause unless jury is demanded.
- § 1519. Jury in justice's court.
- § 1520. Time of trial.
- § 1521. Selection of jury.
- § 1522. Summons for jurors.
- § 1523. Challenging jurors.
- § 1524. Challenges for cause.
- § 1525. Swearing jury.
- § 1526. Delivery of verdict.
- § 1527. Justice may discharge jury when.
- § 1528. Failure of juror to appear when summoned — Penalty.

*Continuance — Not to exceed sixty days.*

§ 1517. [1769.] When the pleadings of the parties shall have taken place, the justice shall, upon the application of either party if the defendant be not under arrest, and sufficient cause be shown on oath, continue the case for any time not exceeding sixty days. If the continuance be on account of absence of testimony, it shall be for such reasonable time as will enable the party to procure such testimony, and shall be at the cost of the party applying therefor, unless otherwise ordered by the justice; and in all other respects shall be governed by the law applicable to continuance in the superior court.

Continuance of case for more than that such continuance was by consent of both sixty days, by justice of the peace, will divest parties: *Nelson v. Campbell*, 24 Pac. Rep. 539 him of jurisdiction, unless his docket shows (Wash.).

*Justice to try cause unless jury is demanded.*

§ 1518. [1782.] Upon issue joined, if a jury trial be not demanded, the justice shall hear the evidence, and decide all questions of law and fact, and render judgment accordingly.

*Jury in justice's court.*

§ 1519. After the appearance of the defendant, and before the justice shall proceed to inquire into the merits of the cause, either party may demand a jury to try the action, which jury shall be composed of six good and lawful men having the qualifications of jurors in the superior court of the same county, unless the parties shall agree upon a less number; *provided*, that the party demanding the jury shall first pay to the justice the sum of six dollars, which shall be paid over by the justice to the jury before they are discharged, and said amount shall be taxed as costs against the losing party. [January 31, 1888, § 1. *In effect immediately.*]

*Time of trial.*

§ 1520. When a jury is demanded, the trial of the case must be adjourned until the time fixed for the return of the jury; if neither party desire an adjournment, the time must be determined by the justice, and must be on the same day, or within the next two days. The jury must be immediately selected as herein provided. [January 31, 1888, § 2. *In effect immediately.*]

*Selection of jury.*

§ 1521. The justice shall write in a panel the names of eighteen persons, citizens of the county, from which the defendant, his agent or attorney, must strike one name, the plaintiff, his agent or attorney, one, and so on alternately until each party shall have stricken six names, and the remaining six names shall constitute the jury to try such case; and if either party neglect or refuse to aid in striking the jury as aforesaid, the justice shall strike the name in behalf of such party. [January 31, 1888, § 3. *In effect immediately.*]

*Summons for jurors.*

§ 1522. The justice shall thereupon issue a summons for the jury, in which the following form shall be observed in substance:—

The State of Washington, }  
County of ——. }

The State of Washington to the Sheriff or Constable of said County.

You are hereby commanded to summon — to appear before me, at my office in — precinct, said county, on the — day of —, A. D. 18—, at — o'clock in the —noon, to serve as jurors in a case pending before me, then and there to be tried. And this they shall in no wise omit. And have you then and there this writ, with your doings thereon.

Given under by hand this the — day of —, A. D. —.

A B, Justice of the Peace.



Which summons shall be personally served upon the persons named, and the same shall be returned, with the names of the persons summoned, at the time appointed for the trial of the cause. [*January 31, 1888, § 4. In effect immediately.*]

*Challenging jurors.*

§ 1523. [1774.] Either party may challenge the jurors, but when there are several parties on either side, they shall join in a challenge before it can be made. The challenges shall be to individual jurors, and shall be peremptory or for cause. Each party shall be entitled to three peremptory challenges.

*Challenges for cause.*

§ 1524. [1775.] Challenges for cause may be taken on any ground that would be a good cause of challenge on the trial of an action in the superior court. Challenges for cause shall be tried by the justice.

**Challenges for cause:** See § 342-347, *ante*.

*Swearing jury.*

§ 1525. [1776.] When the jury is selected, the justice shall administer to them an oath or affirmation well and truly to try the cause.

*Delivery of verdict.*

§ 1526. [1777.] When the jury have agreed on their verdict, they shall deliver the same to the justice, publicly, who shall enter it on his docket.

*Justice may discharge jury when.*

§ 1527. [1778.] Whenever a justice shall be satisfied that a jury, sworn in any civil cause before him, having been out a reasonable time, cannot agree on their verdict, he may discharge them, and issue a new *venire* unless the parties consent that the justice may render judgment on the evidence before him, or upon such other evidence as they may produce.

*Failure of juror to appear when summoned — Penalty.*

§ 1528. [1779.] Every person who shall be duly summoned as a juror, and shall not appear nor render a reasonable excuse for his default, shall be subject to a fine not exceeding ten dollars.

## CHAPTER V.

### OF JUDGMENTS IN CIVIL ACTIONS IN JUSTICES' COURTS.

§ 1529. Judgment of dismissal with costs.

§ 1530. Judgment by default — Hearing of evidence.

§ 1531. Justice to render judgment on verdict.

§ 1532. Offer to allow judgment for specified sum, effect of, and refusal.

§ 1533. Set-off exceeding jurisdiction may be allowed to what amount.

§ 1534. Judgment for costs, how to be rendered.

#### *Judgment of dismissal with costs.*

§ 1529. [1780.] Judgment that the action be dismissed, without prejudice to a new action, may be entered, with costs, in the following cases:—

1. When the plaintiff voluntarily dismisses the action before it is finally submitted;

2. When he fails to appear at the time specified in the notice, upon continuance, or within one hour thereafter;

3. When it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county; but if the objection be taken and overruled, it shall be cause only of reversal or appeal; if not taken at the trial, it shall be deemed waived, and shall not be cause of reversal.

**Dismissal without prejudice.** — Where an action is brought against a corporation before a justice of the peace, and defendant shows that its principal office is in another county, it is *prima facie* entitled to a dismissal without prejudice: *Knoff v. Puget Sound etc. Colony*, 24 Pac. Rep. 27 (Wash.).

#### *Judgment by default — Hearing of evidence.*

§ 1530. [1781.] When the defendant fails to appear and plead at the time specified in the notice, or within one hour thereafter, judgment shall be given as follows:—

1. When the defendant has been served with a true copy of the complaint, judgment shall be given without further evidence for the sum specified therein;

2. In other cases, the justice shall hear the evidence of the plaintiff, and render judgment for such sum only as shall appear by the evidence to be just, but in no case exceed the amount specified in the complaint.

**Judgment by default, entered before time for answering has expired, is voidable:** *Harnish v. Bramer*, 71 Cal. 155. After the expiration of an hour from the time mentioned in the summons or notice in justice's court, defendant has no right to obtain a continuance if plaintiff demands judgment. If the justice grants a continuance on request of defendant's agent, but afterwards enters judgment, as he should have done, at the request of plaintiff, it is good: *McCoy v. Bell*, 20 Pac. Rep. 595 (Wash.). For failure to allow the hour above provided, judgment will be reversed on appeal: *Gaunt v. Perkins*, 8 Or. 354. Justice's court has no power to vacate or modify its own judgment, except as expressly provided by law: *Weimmer v. Sutherland*, 74 Cal. 341. After rendering judgment, all control of it is lost to the justice except entering it: *McCoy v. Bell*, 20 Pac. Rep. 595 (Wash.). In an action in a justice's court, the designation of a defendant, whose true name is John C. McDonald, as John McDonnell, does not invalidate a judgment by default obtained against him, nor subsequent proceed-

ings had thereon: *Allison v. Thomas*, 72 Cal. 562. So, also, a judgment by default, after a personal service of summons, is not void, although the summons fails to definitely state the nature of the cause of action, and does not notify the defendant to appear and answer at the office of the justice: *Dore v. Dougherty*, 72 Cal. 232.

Where two or more defendants are sued, a personal judgment can only be rendered against the one served with process, though the complaint alleges they are partners; but judgment by default may be rendered against the joint property of all, if they are jointly liable: *McCoy v. Bell*, 20 Pac. Rep. 595 (Wash.).

*Justice to render judgment on verdict.*

§ 1531. [1783.] Upon the verdict of a jury, the justice shall immediately render judgment thereon. When the trial is by the justice, judgment shall be entered immediately after the close of the trial, if the defendant has been arrested and is still in custody; in other cases it shall be entered within three days after the close of the trial.

**Judgment, entry of.** — If the jury find a verdict for a sum certain for the plaintiff, and the justice thereupon enters the verdict in his docket, but fails to enter up a judgment, it is an irregularity; but not such a one as renders a sale made upon an execution, which recites a judgment issued thereon, void. The formal entry of a judgment by a justice of the peace upon the verdict of a jury is a mere clerical duty which he may be compelled to perform;

and if he fails to do so a motion to set aside execution should be sustained; but an execution issued by the justice which recites a judgment is not void by reason of his failure to enter the judgment. A plea of former judgment, as a bar, is sustained by proof of a former trial before a justice, and the verdict of a jury entered on his docket, without any formal entry of the judgment: *Lynch v. Kelly*, 41 Cal. 232.

*Offer to allow judgment for specified sum — Effect of, and refusal.*

§ 1532. [1784.] If the defendant, at any time before the trial, offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with costs then accrued; but if he do not accept such offer before the trial, and fail to recover, on the trial of the action, a sum greater than the offer, such plaintiff shall not recover any costs that may accrue after he shall have been notified of the offer of the defendant, but such costs shall be adjudged against him, and if he recover, deducted from his recovery. But the offer and failure to accept it shall not be given in evidence to affect the recovery, otherwise than as to costs, as above provided.

*Set-off exceeding jurisdiction may be allowed to what amount.*

§ 1533. [1768.] When the set-off of the defendant proved shall exceed the claim of the plaintiff, and such excess in amount exceed the jurisdiction of a justice of the peace, the court shall allow such amount as is necessary to cancel the plaintiff's claim, and give the defendant a judgment for costs; but in such case the court shall not render judgment for any further sum in favor of the defendant.

*Judgment for costs, how to be rendered.*

§ 1534. [1785.] When the prevailing party is entitled to costs by this act, the justice shall add their amount to the judgment; or in case of the failure of the plaintiff to recover, or in case of dismissal of the action, he shall enter up judgment in favor of the defendant for the amount of such costs.



## CHAPTER VI.

## OF EXECUTIONS, AND PROCEEDINGS THEREON.

- § 1535. Stay of execution.
- § 1536. Bond for stay of execution.
- § 1537. Form of bond for stay.
- § 1538. Levy of execution against property of principal or bail.
- § 1539. Bail may collect from defendant.
- § 1540. Justice to revoke execution where judgment is stayed.
- § 1541. Set-off of mutual judgments.
- § 1542. Procedure as to set-off rendered before another justice.
- § 1543. Execution to issue for balance only after set-off.
- § 1544. No execution to issue after five years.
- § 1545. Execution to issue from succeeding justice.
- § 1546. Execution to another county.
- § 1547. Execution — Direction, date, and return.
- § 1548. Amount of debt, etc., to be stated by justice.
- § 1549. Execution may be renewed.
- § 1550. Notice of sale upon execution.
- § 1551. Sale upon execution — Return.
- § 1552. Officer must not buy at execution sale.
- § 1553. Execution may issue against the person when.
- § 1554. Garnishees may be examined under oath.
- § 1555. Execution may issue against prevailing party for costs, etc.
- § 1556. Property claimed by third person — Trial of right.
- § 1557. Claimant may resort to other remedies.

*Stay of execution.*

§ 1535. [1786.] The execution upon a judgment by a justice of the peace may be stayed in the manner hereinafter provided, upon reasonable notice to the opposite party, and for the following periods of time, to be calculated from the date of the judgment:—

1. If the judgment be for any sum not exceeding twenty-five dollars, exclusive of costs, one month.
2. If it be for more than twenty-five dollars, two months.

Justice can stay proceedings, upon motion, where the judgment is void, even after execution has issued thereon in another county: *Gates v. Lane*, 49 Cal. 269.

*Bond for stay of execution.*

§ 1536. [1787.] To entitle any person to such stay of execution, some responsible person, to be approved by the justice, and not being a party to the judgment, must, within five days after rendering of the judgment, enter into a bond before the justice, to the adverse party, in a sufficient sum to secure the payment of the judgment and costs, conditioned to be void upon such payment, at the expiration of the stay.

*Form of bond for stay.*

§ 1537. [1788.] Such bond shall be signed by the person entering into the same, and may be in the following form:—

Whereas, A B has obtained a judgment before J P, one of the justices of the peace in and for — county, on the — day of —, 18—, against C D, for — dollars,— now, therefore, I, E F, acknowledge myself bound to A B in the sum of — dollars, this bond to be void if such judgment shall be paid at the expiration of — month after the time it was rendered.

Dated the — day of —, 18—.

—, E. F.

*Levy of execution against property of principal or bail.*

§ 1538. [1789.] If, at the expiration of such stay, the judgment be not paid, the execution shall issue against both the principal and bail. If the principal do not satisfy the execution, and the officer cannot find sufficient property belonging to him upon which to levy, he shall levy upon the property of the bail, and in his return shall state what amount of money collected by him on the execution was collected from the bail, and the time when the same was received.

*Bail may collect from defendant.*

§ 1539. [1790.] After the return of such execution, the bail shall be entitled, on application to the justice, to have the judgment, or so much thereof as may have been collected from him in satisfaction of the execution, transferred to his use; and he may collect the same from the defendant by execution, together with the interest at the rate of twelve per cent per annum.

*Justice to revoke execution where judgment is stayed.*

§ 1540. [1791.] If judgment be stayed in the manner above provided after an execution has been issued thereon, the justice shall revoke such execution, in the same manner and with like effect as he is hereinafter directed to revoke an execution after an appeal has been allowed; and if the defendant have been committed, shall order him to be discharged from custody.

*Set-off of mutual judgments.*

§ 1541. [1792.] If there be mutual justices' judgments between the same parties, upon which the time for appealing has elapsed on judgment, on the application of either party, and reasonable notice given to the adverse party, one may be set off against the other by the justice before whom the judgment against which the set-off is proposed may be.

*Procedure as to set-off rendered before another justice.*

§ 1542. [1793.] If the judgment proposed as a set-off was rendered before another justice, the party proposing such set-off shall produce before such justice a transcript of such judgment, upon which there is a certificate of the justice before whom such may be, that it is unsatisfied in whole or in part, and that there is no appeal, and that such

transcript was obtained for the purpose of being set off against the judgment to which it is offered as a set-off. The justice granting such transcript shall make an entry thereof on his docket, and all further proceedings on such judgment shall be stayed, unless such transcript be returned with the proper justice's certificate thereon, that it has not been allowed in set-off.

*Execution to issue for balance only after set-off.*

§ 1543. [1794.] If any justice shall set off one judgment against another, he shall make an entry thereof on his docket, and execution shall issue only for the balance which may be due after such set-off. If a justice shall allow a transcript of a judgment rendered by another justice to be set off, he shall file such transcript among the papers relating to the judgment in which it is allowed in set-off. If he shall refuse such transcript as a set-off, he shall so certify on the transcript, and return the same to the party who offered it.

*No execution to issue after five years.*

§ 1544. [1795.] Execution for the enforcement of a judgment in a justice's court may be issued on the application of the party entitled thereto, in the manner hereinbefore prescribed; but after the lapse of five years from the date of the judgment no execution shall issue except by leave of the justice before whom such judgment may be, upon reasonable notice to the defendant.

**Final process may be issued to any part of the county:** See § 27, *ante*.

*Execution to issue from succeeding justice.*

§ 1545. [1796.] When any judgment shall have been rendered by any justice of the peace, and the same not be satisfied during his continuance in office, and the docket of such justice shall have been transferred to another justice, or to the successor of the justice rendering such judgment, the justice to whom the docket shall be delivered shall issue execution upon such unsatisfied judgment, in the same manner and with like effect as if he himself had rendered the judgment.

*Execution to another county.*

§ 1546. [1797.] If the defendant have not goods and chattels in the county in which judgment was rendered sufficient to satisfy the execution, the justice before whom such judgment may be shall, at the request of the party entitled, make out a certified transcript of the same, which may be delivered to a justice in any other county, who shall make an entry thereof in his docket, and issue execution thereon for the amount of the judgment, or such part as shall be unsatisfied, with costs as in other cases.

**Copy of justice's docket is not transcript of judgment:** *Bagley v. Ward*, 27 Cal. 371.



*Execution — Direction, date, and return.*

§ 1547. [1798.] The execution shall be directed (except when it is otherwise especially provided) to the sheriff or any constable of the county where the justice resides; shall be dated on the day it is issued, and made returnable within thirty days from the date; and it shall be against the goods and chattels of the person against whom the same is issued.

**Territorial extent of jurisdiction.** — A county where they are held is constitutional: provision that mesne and final process of justices' courts may be issued to any part of the *ante.* *Chipman v. Bowman*, 14 Cal. 158; see § 27,

*Amount of debt, etc., to be stated by justice.*

§ 1548. [1799.] Before any execution shall be delivered, the justice shall state in his docket, and also on the back of the execution, the amount of the debt, or damages and costs, and of the fees due to each person separately, and the officer receiving such execution shall indorse the time of the reception of the same.

*Execution may be renewed.*

§ 1549. [1800.] If an execution be not satisfied, it may, at the request of the plaintiff, be renewed from time to time by the justice who issues the same, or by the justice to whom his docket is transferred, by an indorsement thereon to that effect, signed by him, and dated when the same shall be made. If any part of such execution has been satisfied, the indorsement of renewal shall express the sum due on the execution. Every such indorsement shall renew the execution in full force in all respects for thirty days, and no longer; and an entry of such renewal shall be made in the docket of the justice.

*Notice of sale upon execution.*

§ 1550. [1801.] The officer, after taking goods and chattels into his custody by virtue of an execution, shall, without delay, give public notice by at least three advertisements, put up at three public places in the county, of the time and place when and where they will be exposed for sale. Such notice shall describe the goods and chattels taken, and shall be put up at least ten days before the day of sale.

*Sale upon execution — Return.*

§ 1551. [1802.] At the time and place so appointed, if the goods and chattels be present for inspection of bidders, the officer shall expose them to sale at public vendue to the highest bidder; he shall return the execution and have the money before the justice, at the time of making such return, ready to be paid over to the persons respectively entitled thereto.

*Officer must not buy at execution sale.*

§ 1552. [1803.] No officer shall directly or indirectly purchase

any goods or chattels at any sale made by him upon execution, and every such purchase shall be absolutely void.

*Execution may issue against the person when.*

§ 1553. [1804.] If the action be one in which the defendant might have been arrested upon a warrant, an execution against the person of such defendant may be issued, after the return of an execution against his property unsatisfied in whole or in part. An execution against the person may likewise be issued after such return, where the defendant has been arrested upon a warrant and not discharged according to law.

*Garnishees may be examined under oath.*

§ 1554. [1805.] If there be no property found, or if the goods and chattels levied on be not sufficient to satisfy such execution, the officer shall, on demand of the plaintiff, summon, in writing, as garnishees, such persons as may be named to the plaintiff or his agent, to appear before the justice on the return day of the execution, to answer such interrogatories as may be put to them, touching their liabilities as garnishees, and the like proceedings shall be had thereon before the justice to final judgment as in the proceedings by attachment.

*Execution may issue against prevailing party for costs, etc.*

§ 1555. [1806.] Any justice of the peace may issue an execution against the prevailing party, to collect fees and costs for which such party may be liable, after an execution has been first issued against the other party, and returned "no property found."

*Property claimed by third person — Trial of right.*

§ 1556. [1807.] If any property levied on be claimed by any other person than the defendant in the execution, and the claimant make affidavit of his title or right to the possession of the same, stating the ground of such title or right, and serve the same upon the sheriff or constable while the property is in his possession, said sheriff or constable shall not be bound to keep the property, unless the plaintiff, on demand, indemnify him in the same manner as provided in this act for cases where property held under attachment is claimed by persons not parties to the suit; and when such claim is made, the sheriff or constable shall immediately file the claimant's affidavit with the justice, and notify the plaintiff thereof, and unless the property be at once released, the justice shall set the case for trial upon the allegations of the claimant's affidavit, and the case shall proceed and be determined in the same manner as provided in this act for cases where property held under attachment is claimed by persons not parties to the suit.

*Claimant may resort to other remedies.*

§ 1557. [1808.] Nothing contained in the last section shall be so construed as to prevent the claimant of property levied on by execution from resorting to any legal remedy he may choose to pursue, instead of proceeding in the manner therein prescribed.

**Setting aside execution sale:** See *Far- rington v. Brown*, 65 Cal. 320. An order of a justice of the peace refusing to set aside a sale of property under execution will be presumed to have been correct, unless the contrary ap- pears. The party aggrieved could have the action of the justice reviewed by the superior court on appeal: *Petersen v. Weissbein Brothers*, 65 Cal. 42.

## CHAPTER VII.

### FORMS IN CIVIL ACTIONS IN JUSTICE'S COURT.

§ 1558. Forms — Equivalents may be used.

*Forms — Equivalents may be used.*

§ 1558. [1885.] The following or equivalent forms may be used by justices of the peace in civil actions and proceedings under this chapter, to wit:—

#### FORM OF A WARRANT.

The State of Washington, )  
County of ———. ) ss.

To the Sheriff or any Constable of said County.

In the name of the state of Washington, you are hereby com- manded to take the body of C D, if he be found in your county, and bring him forthwith before the undersigned, one of the justices of the peace in and for said county, at his office in ———, to answer A B in a civil action; and you are hereby commanded to give notice thereof to the said plaintiff, or his agent or attorney; and have you there and then this writ.

Given under my hand this ——— day of ———, 18—.

J P, Justice of the Peace.

#### FORM OF SUBPENA.

The State of Washington, )  
County of ———. ) ss.

To ———.

In the name of the state of Washington, you are hereby required to appear before the undersigned, one of the justices of the peace in and for said county, on the ——— day of ———, 18—, at ——— o'clock in the ———noon, at his office in ———, to give evidence in a certain cause, then and there to be tried, between A B, plaintiff, and C D, defendant, on the part of (the plaintiff or defendant, as the case may be).

Given under my hand this ——— day of ———, 18—.

J P, Justice of the Peace.



## FORM OF EXECUTION.

The State of Washington, }  
County of ———.        } ss.

To the Sheriff or any Constable of said County.

Whereas, judgment against C D, for the sum of ——— dollars, and ——— dollars costs of suit, was recovered on the ——— day of ———, 18—, before the undersigned, one of the justices of the peace in and for said county, at the suit of A B, — these are, therefore, in the name of the state of Washington, to command you to levy on the goods and chattels of the said C D (excepting such as the law exempts), and make sale thereof, according to law, to the amount of said sum and costs upon this writ, and the same return to me within thirty days, to be rendered to the said A B for his debt, interests, and costs.

Given under my hand this ——— day of ——— 18—.

J P, Justice of the Peace.

## FORM OF VENIRE FOR A JURY.

The State of Washington, }  
—— County.                } ss.

To the Sheriff or any Constable of said County.

In the name of the state of Washington, you are hereby commanded to summon six good and lawful men of your county, to be and appear before the undersigned, one of the justices of the peace in and for said county, on the ——— day of ———, 18—, at ——— o'clock in the ——— noon of said day, at his office in ———, to make a jury for the trial of a civil action, between A B, plaintiff, and C D, defendant; and have you then and there this writ.

Given under my hand this ——— day of ———, 18—.

J P, Justice of the Peace.

## FORM OF EXECUTION AGAINST THE BODY.

The State of Washington, }  
—— County.                } ss.

To the Sheriff or any Constable of said County.

Whereas, judgment against C D for the sum of ——— dollars, and for ——— dollars costs of suit, was recovered on the ——— day of ———, 18—, before the undersigned, one of the justices of the peace in and for said county, at the suit of A B, and an execution against his property returned unsatisfied, — these are, therefore, in the name of the state of Washington, to command you to take the body of the said C D, and him convey and deliver to the keeper of the jail of said county, who is hereby commanded to receive and keep the said C D in safe custody in prison until the aforesaid sum and all legal expenses be paid and

satisfied, or until he be discharged therefrom by due course of law; and of this writ make due return within thirty days.

Given under my hand this — day of —, 18—.

J P, Justice of the Peace.

FORM OF EXECUTION AGAINST PRINCIPAL AND SURETY AFTER EXPIRATION OF STAY OF EXECUTION.

The State of Washington, }  
County of —. } ss.

To the Sheriff or any Constable of said County.

Whereas, judgment against C D for the sum of — dollars, and for — dollars costs of suit, was recovered on the — day of —, 18—, before the undersigned, one of the justices of the peace in and for said county, at the suit of A B; and whereas, on the — day of —, 18—, E F became surety to pay said judgment and costs, in — month from the date of the judgment aforesaid, agreeably to law, in the payment of which the said C D and E F have failed,—these are, therefore, in the name, etc. (as in the common form).

FORM OF ORDER IN REPLEVIN.

The State of Washington, }  
County of —. } ss.

To the Sheriff or any Constable of said County.

In the name of the state of Washington, you are hereby commanded to take the personal property mentioned and described in the within affidavit, and deliver the same to the plaintiff upon receiving a proper undertaking, unless before such delivery the defendant enter into a sufficient undertaking for the delivery thereof to the plaintiff, if delivery be adjudged.

Given under my hand this — day of —, 18—.

J P, Justice of the Peace.

FORM OF A WRIT OF ATTACHMENT.

The State of Washington, }  
County of —. } ss.

To the Sheriff or any Constable of said County.

In the name of the state of Washington, you are commanded to attach and safely keep the goods and chattels, moneys, effects, and credits of C D (excepting such as the law exempts), or so much thereof as shall satisfy the sum of — dollars, with interest and cost of suit, in whosoever hands or possession the same may be found in your county, and to provide that the goods and chattels so attached may be subject to further proceeding thereon as the law requires; and of this writ make legal service and due return.

Given under my hand this — day of —, 18—.

J P, Justice of the Peace.

## FORM OF UNDERTAKING FOR ARREST.

Whereas, an application has been made by A B, plaintiff, to J P, one of the justices of the peace in and for — county, for a warrant to arrest C D, defendant, founded upon an affidavit of the said plaintiff, setting forth that C D (here state the cause for the arrest), — now, therefore, we, A B, plaintiff, and E F, acknowledge ourselves bound to C D in the sum of — dollars to pay all costs that may be awarded to the said defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum of — dollars.

Dated this — day of —, 18—.

A B, E F.

## FORM OF UNDERTAKING IN REPLEVIN.

Whereas, A B, plaintiff, has commenced an action before J P, one of the justices of the peace in and for — county, against C D, defendant, for the recovery of certain personal property, mentioned and described in the affidavit of the plaintiff, to wit (here set forth the property claimed), — now, therefore, we, A B, plaintiff, E F, and G H, acknowledge ourselves bound unto C D in the sum of — dollars for the prosecution of the action for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against the plaintiff.

Dated the — day of —, 18—.

A B, E F, G H.

## FORM OF UNDERTAKING IN ATTACHMENT.

Whereas, an application has been made by A B, plaintiff, to J P, one of the justices of the peace in and for — county, for a writ of attachment against the personal property of C D, defendant, — now, therefore, we, A B, plaintiff, and E F, acknowledge ourselves bound to C D in the sum of — dollars that if the defendant recover judgment in this action the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the said attachment, and not exceeding the sum of — dollars.

Dated the — day of — 18—.

A B, E F.

## FORM OF UNDERTAKING TO DISCHARGE ATTACHMENT.

Whereas, a writ of attachment has been issued by J P, one of the justices of the peace in and for — county, against the personal property of C D, defendant, in an action in which A B is plaintiff, — now, therefore, we, C D, defendant, E F, and G H, acknowledge ourselves bound unto J K, constable, in the sum of — dollars (double the value of the property), engaging to deliver the property attached, to wit (here set forth a list of articles attached), or pay the value thereof to the sheriff or constable to whom the execution upon a judgment obtained by plaintiff in the aforesaid action may be issued.

Dated this — day of — 18—.

C D, E F, G H.



FORM OF UNDERTAKING TO INDEMNIFY CONSTABLE ON CLAIM OF PROPERTY BY A THIRD PERSON.

Whereas, L M claims to be owner of and have the right to possession of certain personal property, to wit (here describe it), which has been taken by J K, constable in — county, upon an execution by J P, justice of the peace in and for the county of —, upon a judgment obtained by A B, plaintiff, against C D, defendant, — now, therefore, we, A B, plaintiff, E F, and G H, acknowledge ourselves bound unto the said J K, constable, in the sum of — dollars to indemnify the said J K against such claim. A B, E F.

## CHAPTER VIII.

### OF PRACTICE IN CRIMINAL ACTIONS IN JUSTICE'S COURT.

- § 1559. Justice to issue warrant of arrest when.
- § 1560. Proceedings where one is arrested for an offense committed in view of justice.
- § 1561. Either side may demand jury.
- § 1562. Proceedings upon verdict of guilty.
- § 1563. Defendant may plead guilty.
- § 1564. Justice to summon witnesses.
- § 1565. No judgment to be given without evidence.
- § 1566. Continuance to be granted, how — Costs, etc.
- § 1567. Judgment, how to be rendered and satisfied.
- § 1568. Stay of execution — Manner of procuring.

*Justice to issue warrant of arrest when.*

§ 1559. [1888.] Any justice shall, on complaint on oath in writing before him charging any person with the commission of any crime or misdemeanor of which he has jurisdiction, issue a warrant for the arrest of such person, and cause him to be brought forthwith before him for trial.

*Proceedings where one is arrested for offense committed in view of justice.*

§ 1560. [1889.] When any offense is committed in view of any justice, he may, by verbal direction to any constable, or if no constable be present, to any citizen, cause such constable or citizen to arrest such offender, and keep him in custody for the space of one hour, unless such offender shall sooner be taken from such custody by virtue of a warrant issued on complaint on oath. But such person so arrested shall not be confined in jail nor put upon any trial until arrested by virtue of such warrant. And on the return of any warrant issued by him, it shall be the duty of the justice to docket the cause, and unless continuance be granted, forthwith to hear and determine the cause, and either acquit, convict and punish, or hold to bail the offender, if the offense be bailable, and prove to be one which should be tried in the superior court, or in default of bail, commit him to jail, as the facts and law may justify.

*Either side may demand jury.*

§ 1561. In all trials for offenses within the jurisdiction of a justice of the peace, the defendant or the state may demand a jury, which shall consist of six or a less number, agreed [upon] by the state and accused, to be impaneled and sworn as in civil cases, or the trial may be by the justice. When the complaint is for a crime or misdemeanor in the exclusive jurisdiction of the superior court, the justice hears the case as a committing magistrate, and no jury shall be allowed. [February 17, 1891, § 1.]

**Jury, number of.** — The legislature may provide for a jury of any number less than twelve in courts not of record: See Const., sec. 21, art. 1.

*Proceedings upon verdict of guilty.*

§ 1562. Such justice or jury, if they find the prisoner guilty, shall assess his punishment; or if, in their opinion, the punishment they are authorized to assess is not adequate to the offense, they may so find, and in such case the justice shall order such defendant to enter [into] recognizance to appear in the superior court of the county, and shall also recognize the witnesses, and proceed as in proceedings by a committing magistrate. [February 17, 1891, § 2.]

*Defendant may plead guilty.*

§ 1563. [1892.] The defendant may plead guilty to any offense charged.

*Justice to summon witnesses.*

§ 1564. In all cases arising under this chapter, if the offense charged involve injury to a particular person who is within the county, it shall be the duty of the justice of the peace to summon the injured person, and all others whose testimony may be deemed material, as witnesses at the trial, and to enforce their attendance by attachment if necessary. [February 17, 1891, § 3.]

*No judgment to be given without evidence.*

§ 1565. No justice shall assess a fine, or enter a judgment thereon, until a witness or witnesses have been examined to state the circumstances of the transaction. [February 17, 1891, § 4.]

**Defendant has right to testify** in his own behalf, and to meet the witnesses against him face to face: See Const., sec. 22, art. 1.

*Continuance to be granted, how — Costs, etc.*

§ 1566. Continuance may be granted, either on application of the defendant or the prosecuting witness, under the same rules as in civil cases; the cost of such continuance shall abide the event of the prosecution in all cases, and the justice shall recognize the defendant and the witnesses to appear from time to time, in the same manner as is provided in other criminal examinations before him. [February 17, 1891, § 5.]

*Judgment, how to be rendered and satisfied.*

§ 1567. In all cases of conviction, unless otherwise provided in this chapter, the justice shall enter judgment for the fine and costs against the defendant, and may commit him to jail, to be placed at hard labor until the judgment is satisfied, or the payment thereof be secured as provided by section fifteen hundred and sixty-eight, and further proceedings therein shall be had as in like cases in the superior court; but the defendant shall not be imprisoned for a longer aggregate time than one day for every three dollars of the fine and costs; and a defendant who has been committed shall be discharged at any time upon payment of such part of the fine and costs as remains unpaid after deducting from the whole amount any previous payment, and three dollars for every day he has been imprisoned upon the commitment. [February 17, 1891, § 6.]

*Stay of execution — Manner of procuring.*

§ 1568. [1897.] Every defendant may stay the execution for the fine and costs for thirty days by procuring sufficient sureties, to be approved by the justice, to enter into recognizance before him for the payment of the fine and costs; the entry of such recognizance shall be made on the docket of the justice, and signed by the sureties, and shall have the same effect as a judgment, and if the same be not paid in thirty days, the justice shall proceed as in like cases in the superior court.

## CHAPTER IX.

### FORMS IN CRIMINAL ACTIONS.

§ 1569. Forms in criminal actions — Equivalents may be used.

*Forms in criminal actions — Equivalents may be used.*

§ 1569. The following or equivalent forms may be used by justices of the peace in criminal proceedings under this act: —

#### FORM OF WARRANT.

The State of Washington, )  
                     — County.        } ss.

To the Sheriff or any Constable of said County.

Whereas, A B has this day complained in writing under oath to the undersigned, one of the justices of the peace in and for said county, that on the — day of — 18—, at —, in said county (here insert the substance of the complaint, whatever it may be), — therefore, in the name of the state of Washington, you are commanded forthwith to apprehend the said C D, and bring him before me, to be dealt with according to law.

Given under my hand this — day of —, 18—.

J P, Justice of the Peace.



## FORM OF A SEARCH-WARRANT.

The State of Washington, {  
     — County.                   } ss.

To the Sheriff or any Constable of said County.

Whereas, A B has this day made complaint on oath to the undersigned, one of the justices of the peace in and for said county, that the following goods and chattels, to wit (here describe them), the property of the said A B, have been within — days past, or were on the — day of —, by some person or persons unknown, stolen, taken, and carried away out of the possession of the said A B, in the county aforesaid; and also, that the said A B verily believes that the said goods or a part thereof are concealed in or about the house of C D, in said county (describe the premises to be searched),— therefore, in the name of the state of Washington, you are commanded that, with the necessary and proper assistance, you enter into the said house (describe the premises to be searched), and then diligently search for the said goods and chattels; and if the same or any part thereof be found on such search, bring the same, and also the same [said] C D, forthwith before me, to be disposed of according to law.

Given under my hand this — day of —, 18—.

J P, Justice of the Peace.

FORM OF COMMITMENT WHERE JUSTICE ON THE TRIAL SHALL FIND THAT  
 HE HAS NOT JURISDICTION IN THE CASE.

The State of Washington, {  
     — County.                   } ss.

To any Constable and the Keeper of the Jail of said County.

Whereas, C D, of —, etc., has been brought this day before the undersigned, one of the justices of the peace in and for said county, charged, on the oath of A B, with having, on the — day of —, 18—, in said county, committed the offense of (here state the offense charged in the warrant), and in the progress of the trial of said charge, it appearing to the said justice that the said C D has been guilty of the offense of (here state the new offense found on the trial), committed at the time and place aforesaid; and whereas the said C D has failed to give bail in the sum of — dollars, for his appearance to answer at the next session of the superior court, as required by me,— therefore, in the name of the state of Washington, etc. (as in the last form), to receive the said C D into your custody in the said jail, and him there safely keep until he be discharged by due course of law.

Given under my hand this — day of —, 18—.

J P, Justice of the Peace.

## FORM OF WARRANT TO KEEP THE PEACE.

The State of Washington, }  
                     — County.       } ss.

To the Sheriff or any Constable of said County.

Whereas, A B has this day complained in writing under oath to the undersigned, one of the justices of the peace in and for said county, that he has just cause to fear and does fear C D, late of the said county, will (here state the threatened injury or violence, as sworn to), — therefore, in the name of the state of Washington, you are commanded to apprehend the said C D, and bring him forthwith before me, to show cause why he should not give surety to keep the peace and be of good behavior towards all people of this state, and the said A B especially, and further to be dealt with according to law.

Given under my hand this — day of —, 18—.

J P, Justice of the Peace.

## FORM OF COMMITMENT UPON SENTENCE.

The State of Washington, }  
                     County of —.       } ss.

To any Constable and the Keeper of the County Jail of said County.

Whereas, at a justice's court held at my office in said county for the trial of C D, for the offense hereinafter stated, the said C D was convicted of having on the — day of —, 18—, in said county, committed (here state the offense), and upon conviction the said court did adjudge and determine that the said C D should be imprisoned in the county jail of said county, for — days,—therefore, you, the said constable, are commanded, in the name of the state of Washington, forthwith to convey and deliver the said C D to the said keeper; and you, the said keeper, are hereby commanded to receive the said C D into your custody in said jail and him there safely keep until the expiration of said — days, or until he shall thence be discharged by due course of law.

Dated this — day of —, 18—.

J P, Justice of the Peace.

## FORM OF CERTIFICATE OF CONVICTION.

The State of Washington, }  
                     County of —.       } ss.

At a justice's court held at my office in said county before me, one of the justices of the peace in and for said county, for the trial of C D, for the offense hereinafter stated, the said C D was convicted of having on the — day of —, 18—, in said county committed (here insert the offense), and upon conviction, the said court did adjudge and determine that the said C D should pay a fine of — dollars (or

be imprisoned, as the case may be), and the said fine has been paid to me.

Given under my hand this — day of —, 18—.

J P, Justice of the Peace.

#### FORM OF AN EXECUTION.

The State of Washington, )  
County of —. } ss.

To the Sheriff or any Constable of said County.

Whereas, at a justice's court held at my office in said county for the trial of C D for the offense hereinafter stated, the said C D was convicted of having on the — day of —, 18—, in said county, committed (here state the offense), and upon conviction the said court did adjudge and determine that the said C D should pay a fine of — dollars, and — dollars costs; and whereas, the said fine and costs have not been paid,— these are, therefore, in the name of the state of Washington, to command you to levy on the goods and chattels, etc. (as in execution in civil cases). [*February 17, 1891, § 7.*]

### CHAPTER X.

#### OF PROCEEDINGS TO PREVENT THE COMMISSION OF CRIMES.

- § 1570. Duty of justice when complaint is made to him of threats, etc.
- § 1571. Witnesses to be examined and testimony to be written when.
- § 1572. Magistrate to issue warrant when.
- § 1573. Justice to require recognizance in cases of apprehended danger.
- § 1574. Justice may commit defendant to jail when.
- § 1575. Magistrate to discharge when costs to complainant.
- § 1576. Costs, how the payment of, may be enforced, etc.
- § 1577. Defendant to be discharged upon giving security.
- § 1578. Recognizance to be transmitted and filed.
- § 1579. Recognizance without process may be ordered by justice for certain offenses.
- § 1580. Portion of penalty on recognizance may be remitted when.
- § 1581. Surety may surrender principal when — Effect of.

*Duty of justice when complaint is made to him of threats, etc.*

§ 1570. [1904.] Whenever complaint shall be made to any such magistrate that any person has threatened to commit an offense against the property or person of another, the magistrate shall examine the complaint, and any witness who may be produced on oath, and reduce such complaints to writing, and the same shall be subscribed by the complainant.

*Witnesses to be examined and testimony to be written when.*

§ 1571. It shall be the duty of every magistrate examining a person charged with an offense, or with an intention to commit an offense, to examine all the witnesses he shall deem material, and reduce their testimony to writing, a copy of which, whether the accused is



discharged, committed, or held to bail, or shall take an appeal, he shall transmit to the clerk of the court having jurisdiction of the offense. [February 17, 1891, § 8.]

*Magistrate to issue warrant when.*

§ 1572. [1906.] If, upon the examination, it shall appear that there is just cause to fear that such offense may be committed, the magistrate shall issue a warrant, under his hand, reciting the substance of the complaint, and requiring the officer to whom it may be directed forthwith to apprehend the person complained of and bring him before such magistrate, or some other magistrate or court having jurisdiction of the cause.

*Justice to require recognizance in cases of apprehended danger.*

§ 1573. [1907.] The magistrate before whom any person is brought upon charge of having made threats as aforesaid shall, as soon as may be, hear and examine the complaint; and if it shall appear that there is just cause to fear that any such offense will be committed by the party complained of, he shall be required to enter into recognizance, with sufficient sureties, in such sum as the magistrate shall direct, towards all the people of the state, and especially towards the person requiring such security, for such term as the magistrate shall order, not exceeding one year, but he shall not be ordered to recognize for his appearance at the superior court unless he is charged with some offense for which he ought to be held to answer at said court.

*Justice may commit defendant to jail when.*

§ 1574. [1908.] If the person so ordered to recognize shall fail to enter into such recognizance, the magistrate shall commit him to the county jail during the period for which he was required to give security, or until he shall so recognize, stating in the warrant the cause of commitment, with the sum and time for which security was required.

*Magistrate to discharge when — Costs to complainant.*

§ 1575. [1909.] If, upon examination, it shall appear that there is not just cause to fear that any such offense will be committed by the party complained of, he shall be forthwith discharged; and if the magistrate shall deem the complaint unfounded, frivolous, or malicious, he may order the complainant to pay the costs of prosecution, who shall thereupon be answerable to the magistrate and the officer for their fees, as for his own debt.

**No just reason to fear.** — The question is had: *State v. Steward*, 48 Ind. 146; *State v. Stryer*, 35 Ind. 379.

*Costs, how the payment of, may be enforced, etc.*

§ 1576. [1910.] When no order respecting the costs is made by the magistrate, they shall be allowed and paid in the same manner as costs before justices in criminal prosecutions; but in all cases where a person is required to give good security for the peace, or for his good behavior, the magistrate may further order that the costs of prosecution, or any part thereof, shall be paid by such person, who shall stand committed until such costs are paid, or he is otherwise legally discharged.

*Defendant to be discharged upon giving security.*

§ 1577. [1915.] Any person committed for not finding sureties or refusing to recognize as required by the magistrate may be discharged by any judge or justice of the peace, on giving such security as was required.

*Recognizances to be transmitted and filed.*

§ 1578. Every recognizance taken pursuant to the foregoing provisions shall be transmitted to the superior court for the county within ten days, and shall be there filed of record by the clerk. [February 17, 1891, § 9.]

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*Recognizance without process may be ordered by justice for certain offenses.*

§ 1579. Every person who shall, in the presence of any magistrate, or before any judge of a court of record, make an affray, or threaten to kill or beat another, or to commit any violence or outrage against his person or property, and every person who, in the presence of such judge or magistrate, shall contend with hot and angry words to the disturbance of the peace, may be ordered, without process or other proof, to recognize for keeping the peace or being of good behavior for a term not exceeding three months, and in case of refusal, may be committed as before directed. [February 17, 1891, § 10.]

*Portion of penalty on recognizance may be remitted when.*

§ 1580. [1918.] Whenever, upon a suit brought on any such recognizance, the penalty thereof shall be adjudged forfeited, the court may remit such portion of the penalty, on the petition of any defendant, as the circumstances of the case shall render just and reasonable.

*Surety may surrender principal when—Effect of.*

§ 1581. [1919.] Any surety in recognizance to keep the peace or for good behavior, or both, shall have the same authority and right to take and surrender his principal as if he had been bail for him in a civil cause, and upon such surrender shall be discharged and exempt from all liability for any act of the principal, subsequent to such sur-

render, which would be a breach of the condition of the recognizance; and the person so surrendered may recognize anew, with sufficient sureties, before any justice of the peace, for the residue of the term, and thereupon shall be discharged.

## CHAPTER XI.

### OF THE EXAMINATION OF PERSONS CHARGED WITH CRIME BEFORE MAGISTRATES.

- § 1582. Examination of offenses before magistrate.
- § 1583. Officer may pursue and retake escaped prisoner in another county.
- § 1584. Recognizance with or without examination.
- § 1585. Hearings and adjournments — Bail.
- § 1586. Testimony of witnesses to be reduced to writing, and signed.
- § 1587. How to compel defendant's appearance to answer information or indictment.
- § 1588. The defendant is entitled to discharge when — Costs to be taxed against complainant when.
- § 1589. Defendant must be recognized to appear before a justice when.
- § 1590. Bail must justify when required.
- § 1591. Defendant to be discharged on bail, when and when not.
- § 1592. Magistrates may associate other magistrates.
- § 1593. Witnesses to be recognized when.
- § 1594. Justice may require witnesses to give sureties when.
- § 1595. Recognizance of minor or married woman, or substitute therefor.
- § 1596. Commitment of witnesses for failure to give bond, etc. — Taking of depositions.
- § 1597. Duties of justice upon committing or holding defendant.
- § 1598. Offenses may be compromised and recognizances discharged upon acknowledgment of satisfaction.
- § 1599. Default on recognizance shall be recorded and action commenced.
- § 1600. Abstract of costs to be furnished with papers.

#### *Examination of offenses before magistrate.*

§ 1582. [1921.] Upon complaint being made to any justice of the peace, or judge of the superior court, that a criminal offense has been committed, he shall examine on oath the complainant, and any witness provided by him, and shall reduce the complaint to writing, and shall cause the same to be subscribed by the complainant; and if it shall appear that any offense has been committed of which the superior court has exclusive jurisdiction, the magistrate shall issue a warrant reciting the substance of the accusation, and requiring the officer to whom it shall be directed forthwith to take the person accused and bring him before the person issuing the warrant, unless he shall be absent or unable to attend thereto, then before some other magistrate of the county, to be dealt with according to law, and in the same warrant may require the officer to summon such witnesses as shall be therein named, to appear and give evidence on the examination.

**Rights of accused.** — In criminal prosecutions the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy, and to testify in his own behalf, etc.: See Const., sec. 22, art. 1.



*Officer may pursue and retake escaped prisoner in another county.*

§ 1583. [1922.] If any person against whom a warrant may be issued for an alleged offense committed in any county shall, either before or after the issuing of such warrant, escape from or be out of the county, the sheriff or other officer to whom such warrant may be directed may pursue and apprehend the party charged in any county in this state, and for that purpose may command aid and exercise the same authority as in his own county.

*Recognizance with or without examination.*

§ 1584. The magistrate before whom such accused person shall be brought, when the offense is bailable, may, at the request of such person, with or without examination, allow him to enter into recognizance, with sufficient sureties, to be approved by the magistrate, conditioned for his appearance in the superior court having jurisdiction of the offense. [February 17, 1891, § 11.]

*Hearings and adjournments — Bail.*

§ 1585. [1924.] If the defendant shall not enter into recognizance with sureties, the magistrate shall proceed to hear and examine the complaint, and may adjourn the examination from time to time, not exceeding in all ten days from the time such defendant shall have been brought before him, and in case of such adjournment the magistrate may, if the offense be bailable, take a recognizance, with sufficient sureties for the appearance of the defendant at such further examination; and if he fail to enter into such recognizance, he shall be ordered into custody until the time appointed for such examination.

*Testimony of witness to be reduced to writing, and signed.*

§ 1586. [1933.] The testimony of the witness examined shall be reduced to writing by the magistrate, or under his direction, when he shall think it necessary, and shall be signed by the witnesses.

*How to compel defendant's appearance to answer information or indictment.*

§ 1587. Any person who may according to law be committed to jail, or become recognized, or held to bail with sureties for his appearance in court to answer to any indictment, may in like manner so be committed to jail, or become recognized and held to bail for his appearance to answer to any information or indictment, as the case may be. [January 29, 1890, § 5. In effect immediately.]

*Defendant is entitled to discharge when — Costs to be taxed against complainant when.*

§ 1588. [1925.] If it should appear, upon the whole examination, that no offense has been committed, or that there is not probable cause for charging the defendant with an offense, he shall be discharged; and if in the opinion of the magistrate the complaint was

malicious or without probable cause, and there was no reasonable ground therefor, the costs shall be taxed against the party making the complaint.

*Defendant must be recognized to appear before a justice when.*

§ 1589. If it shall appear that an offense has been committed of which a justice of the peace has jurisdiction, and one which would be sufficiently punished by a fine not exceeding one hundred dollars, if the magistrate having the complaint is a justice of the peace, he shall cause the complaint to be ordered, and proceed as in like cases before a justice of the peace; or if any other magistrate, he shall certify the papers, with a statement of the offense appearing to be proved, to the nearest justice of the peace, and shall, by order, require the defendant and the witnesses to enter into recognizances, with sufficient sureties, to be approved by the magistrate, for their appearance before such justice at the time and place stated in the order; and such justice shall proceed to the trial of the action as if originally commenced before him. [February 17, 1891, § 12.]

See § 1562.

*Bail must justify when required.*

§ 1590. [1169.] Bail shall, when required, justify as in civil cases.

*Defendant to be discharged in bail, when and when not.*

§ 1591. If it appear that a bailable offense has been committed, the magistrate shall order the defendant to enter into recognizance, with sufficient sureties, for his appearance in the superior court, to answer the charge, and if he shall not do so, or the offense be not bailable, he shall commit him to jail. The justice of the peace who committed the person, or the judge of the superior court to which the party is held to answer, may admit to bail in the amount required, and approve the sureties. The recognizance shall be conditioned in effect that the defendant will appear in the superior court to answer said charge whenever the same shall be prosecuted, and at all times, until discharged according to law, render himself amenable to the orders and process of the superior court, and if convicted, render himself in execution of the judgment. [February 17, 1891, § 13.]

**Bailable offenses — Constitutional provision.** — All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great: Const., sec. 20, art. 1. In cases not within the above exception, bail is a matter of right, which no court can properly refuse: *People v. Tinder*, 19 Cal. 539. Bail should be accepted in all cases if it will secure the presence of the defendant at the trial and sentence. The danger of escape increases in proportion to the severity of the impending punishment and the danger of conviction; and

in determining the question of accepting bail, and the amount thereof, these two elements should be taken into consideration: 1 Bishop's Crim. Proc., sec. 255; *People v. Cunningham*, 3 Park. Cr. 520; *People v. Van Horne*, 8 Barb. 158. A person charged with murder committed by the administration of drugs and mechanical means, with intent to produce an abortion, from the effects of which death resulted, is entitled to be admitted to bail: *Ex parte Wolf*, 57 Cal. 94; see also *People v. McLaughlin*, 41 Cal. 212, for a capital case, where defendant was held entitled to be admitted to bail, it

appearing that on the first trial the jury were unable to agree, and had been discharged without the defendant's consent.

**Bail, application for, what look into.** — On applications for admissions to bail, the law presumes the defendant guilty: *Ex parte Ryan*, 44 Cal. 555; *Ex parte Duncan*, 54 Cal. 75. In the determination, however, of this question, the principal consideration being the question of probable guilt, the court or judge will look into the depositions taken before the coroner, and also those taken before the committing magistrate: 1 Bishop's Crim. Proc., sec. 257; *Rex v. Pepper*, Comb. 298; *Rex v. Horner*, 1 Leach, 4th ed., 270; *State v. Dew*, Tayl. 142. But see *People v. Dixon*, 4 Park. Cr. 651. So the testimony of the witnesses before the grand jury may be considered on an application for bail: *Ex parte Bramer*, 37 Tex. 1; *Street v. State*, 43 Miss. 1. The mere fact that a grand jury has found an indictment for murder does not preclude the court or judge from an inquiry into the facts of the case to ascertain whether the offense may not be of such grade as to entitle the prisoner to bail: *Lynch v. People*, 38 Ill. 494; *People v. Beigler*, 3 Park. Cr. 316.

**Amount of bail.** — In fixing the amount of bail, the sole purpose which should guide the court should be to cause the appearance of the accused to answer the charge against him: *Ex parte Duncan*, 54 Cal. 75.

**Excessive bail.** — Excessive bail shall not be required: Wash. Const., sec. 14, art. 1; U. S. Const., Amendment 8. In order to constitute it "excessive," it must be *per se* unreasonably great, and clearly disproportionate to the offense involved, or the peculiar circumstances appearing must show it to be so in the particular case: *Ex parte Ryan*, 44 Cal. 558. The sum of one hundred and twelve thousand dollars is not excessive bail for ten distinct felonies, such being the sum alleged to have been received by the defendant by reason of the felonies: *Ex parte Duncan*, 53 Cal. 410. Where defendant is held to answer a charge of assault with intent to commit murder, the sum of fifteen thousand dollars is not excessive bail: *Ex parte Ryan*, 44 Cal. 555. See *Ex parte McLaughlin*, 41 Cal. 212, 220, where the defendant in a capital case was admitted to bail by the supreme court in the sum of ten thousand dollars.

*Magistrates may associate other magistrates.*

§ 1592. [1928.] Any magistrate to whom complaint is made, or before whom any defendant is brought, may associate with himself one or more magistrates of the same county, and they may, together, execute the powers and duties before mentioned; but no fees shall be taxed for such associates.

*Witnesses to be recognized when.*

§ 1593. Where the person arrested is held to bail or committed to jail or forfeits his recognizance, the magistrate shall recognize the witnesses for the prosecution to be and appear in the superior court to which the party is recognized, bailed, or committed, whenever their attendance shall be required. [February 17, 1891, § 14.]

**Witnesses for defendant.** — In all criminal prosecutions the accused is entitled to have compulsory process to compel the attendance of witnesses in his own behalf: See Const., sec. 22, art. 1.

*Justice may require witnesses to give sureties when.*

§ 1594. [1930.] If the magistrate shall be satisfied that there is good cause to believe that any such witness will not perform the condition of his recognizance unless other security be given, such magistrate may order the witness to enter into recognizance with such sureties as may be deemed necessary for his appearance at court.

*Recognizance of minor or married woman, or substitute therefor.*

§ 1595. [1931.] When any married woman or a minor is a material witness, any other person may be allowed to recognize for the appearance of such witness, or the magistrate may, in his discretion, take the recognizance of such married woman or minor in a sum not



exceeding fifty dollars, which shall be valid and binding in law, notwithstanding the disability of coverture or minority.

*Commitment of witnesses for failure to give bond, etc. — Taking of depositions.*

§ 1596. All witnesses required to recognize with or without sureties shall, if they refuse, be committed to the county jail by the magistrate, there to remain until they comply with such orders or be otherwise discharged according to law; *provided*, that when the magistrate is satisfied that any witness required to recognize with sureties is unable to comply with such order, he shall immediately take the deposition of such witness and discharge him from custody upon his own recognizance. The testimony of the witness shall be reduced to writing by the justice or some competent person under his direction, and he shall take only the exact words of the witness; the deposition, except the cross-examination, shall be in the narrative form, and upon the cross-examination the questions and answers shall be taken in full. The defendant must be present in person when the deposition is taken, and shall have an opportunity to cross-examine the witnesses; he may make any objections to the admission of any part of the testimony, and all objections shall be noted by the justice; but the justice shall not decide as to the admissibility of the evidence, but shall take all the testimony offered by the witness. The deposition must be carefully read to the witness, and any corrections he may desire to make thereto shall be made in presence of the defendant, by adding the same to the deposition as first taken; it must be signed by the witness, certified by the justice, and transmitted to the clerk of the superior court, in the same manner as depositions in civil actions. And if the witness is not present when required to testify in the case, either before the grand jury or upon the trial in the superior court, the deposition shall be submitted to the judge of such superior court, upon the objections noted by the justice, and such judge shall suppress so much of said deposition as he shall find to be inadmissible, and the remainder of the deposition may be read as evidence in the case, either before the grand jury or upon the trial in the court. [February 17, 1891, § 15.]

*Duties of justice upon committing or holding defendant.*

§ 1597. It shall be the duty of all magistrates within this state, before whom any person or persons shall be committed or held to bail to answer to [for] any crime, to return their proceedings, duly certified, including a copy of all recognizances taken by them, to the clerk of the superior court within ten days after the final hearing and commitment, or holding to bail, as aforesaid; and any justice of the peace who shall fail or neglect to make such return shall not be entitled to receive any fees or costs in such case. [February 17, 1891, § 16.]

*Offense may be compromised, and recognizances discharged upon acknowledgment of satisfaction.*

§ 1598. [1935.] When any person shall be committed to prison, or shall be under examination or recognizance to answer any charge for a misdemeanor for which the party injured may have a remedy by civil action, except where the offense was committed upon a sheriff or other officer, justice, or violently or with intent to commit a felony, if the party injured shall appear before the magistrate who made the commitment or took the recognizance or is conducting the examination, and acknowledge in writing that he has received satisfaction for the injury, the magistrate may, in his discretion, on payment of all costs which may have accrued, discharge the recognizance or supersede the commitment by an order under his hand, and may also discharge all recognizance and supersede the commitment of all witnesses in the case.

**Compromising offenses.** — Except as otherwise provided by statute, the law permits a compromise of any offense, though made the subject of a criminal prosecution, for which offense the injured party might recover damages in an action; but if the offense is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution. Nor can such an agreement be made valid by the court consenting that the prosecution may be compromised: *Keir v. Leeman*, 6 Q. B. 308; 2 Ben. & Heard's Lead. Crim. Cas. 216. There can be no compromise of a criminal charge where the person charged has not been arrested nor in any way held to answer the charge: *Saxon v. Conger*, 6 Or. 388.

*Default on recognizance shall be recorded and action commenced.*

§ 1599. [1936.] When any person under recognizance in any criminal prosecution, either to appear and answer before a justice, or to testify in any court, shall fail to perform the condition of any recognizance, his default shall be recorded; and it shall be the duty of the prosecuting attorney to proceed at once, by action against the person bound by recognizance, or such of them as he may elect.

*Abstract of costs to be furnished with papers.*

§ 1600. [1937.] In all cases where any magistrate shall order a defendant to recognize for his appearance before a justice of the peace or the superior court, he shall forward with the papers in the case an abstract of the costs that have accrued in the case, and such costs shall be subject to the final determination of the case.

## CHAPTER XII.

### OF PROCEEDINGS FOR CONTEMPT BEFORE JUSTICES OF THE PEACE

- § 1601. Cases in which justice may punish for contempt.
- § 1602. Punishment for contempt.
- § 1603. One charged with contempt must be heard — Warrant may issue when.
- § 1604. Summary arraignment of one charged with contempt.
- § 1605. Form of warrant for contempt.
- § 1606. Form of judgment for contempt.
- § 1607. Warrant of commitment for contempt to be issued.

#### *Cases in which justice may punish for contempt.*

§ 1601. [1842.] In the following cases, and no others, a justice of the peace may punish for contempt:—

1. Persons guilty of disorderly, contemptuous, and insolent behavior towards such justice while engaged in the trial of a cause, or in rendering judgment, or in any judicial proceedings, which tend to interrupt such proceedings, or impair the respect due to his authority;

2. Persons guilty of any breach of the peace, noise, or disturbance, tending to interrupt the official proceedings of such justice;

3. Persons guilty of resistance or disobedience to any lawful order or process made or issued by him.

#### *Punishment for contempt.*

§ 1602. [1843.] Punishment for contempt may be by fine not exceeding twenty-five dollars, or by imprisonment in the county jail not exceeding two days, at the discretion of the justice, unless otherwise provided by statute.

“**Two days.**” — But § 788, *ante*, applies to courts of justices of the peace, who can commit a defendant until he obeys an order to deliver property under § 526, *ante*: *Ex parte Latimer*, 47 Cal. 131.

**Provisions applicable, etc.** — It is not only those provisions which have been made

applicable to justices' courts by special enactment, but also those provisions which are in their nature applicable to the organization, powers, and course of proceedings in justices' courts, which apply to these courts: *Ex parte Latimer*, 47 Cal. 131.

#### *One charged with contempt must be heard — Warrant may issue when.*

§ 1603. [1844.] No person shall be punished for a contempt before a justice of the peace until an opportunity shall have been given to him to be heard in his defense; and for that purpose, the justice may issue his warrant to bring the offender before him.

#### *Summary arraignment of one charged with contempt.*

§ 1604. [1845.] If the offender be present, he may be summarily arraigned by the justice, and proceeded against in the same manner as if a warrant had been previously issued, and the offender arrested thereon.



*Form of warrant for contempt.*

§ 1605. [1846.] The warrant for contempt may be in the following form:—

The State of Washington, }  
                     — County.       } ss.

To the Sheriff or any Constable of said County.

In the name of the state of Washington, you are hereby commanded to apprehend A B, and bring him before J P, one of the justices of the peace of said county, at his office in said county, to show cause why he should not be convicted of a contempt alleged to have been committed on the — day of —, A. D. 18—, before the said justice, while engaged as a justice of the peace in a judicial proceeding.

Dated this — day of —, A. D. 18—.

J P, Justice of the Peace.

*Form of judgment for contempt.*

§ 1606. [1847.] Upon the conviction of any person for contempt, an entry thereof shall be made in the docket of such justice, stating the particular circumstances of the offense, and the judgment rendered thereon, and may be in the following form:—

The State of Washington, }  
                     — County.       } ss.

Whereas, on the — day of —, A. D. 18—, while the undersigned, one of the justices of the peace for said county, was engaged in the trial of an action between C D, plaintiff, and E F, defendant, in said county, A B, of the said county, did interrupt the said proceedings and impair the respect due to the authority of the undersigned, by (here describe the cause particularly); and whereas, the said A B was thereupon required by the undersigned to answer for the said contempt, and show cause why he should not be convicted thereof; and whereas, the said A B did not show cause against the said charge, — be it therefore ordered that the said A B is adjudged to be guilty, and is convicted of the contempt aforesaid, and is adjudged by the undersigned to pay a fine of — dollars (or be imprisoned, etc.).

Dated this — day of —, A. D. 18—.

J P, Justice of the Peace.

*Warrant of commitment for contempt to be issued.*

§ 1607. [1848.] If any person convicted of a contempt be adjudged to be imprisoned, a warrant of commitment shall be issued by the justice. If he be adjudged to pay a fine, a process may be issued to collect the same; and when so collected, it shall forthwith be paid by the justice into the county treasury.

## CHAPTER XIII.

### OF PROCEEDINGS AGAINST VAGRANTS.

- § 1608. Vagrancy defined.
- § 1609. Proceedings for examination of vagrant.
- § 1610. Arrest of vagrants without warrant.
- § 1611. Officers must confine vagrant until morning.
- § 1612. Bond for good behavior to be required.
- § 1613. Record to be filed in superior court.
- § 1614. Release of bond for good behavior.
- § 1615. New sureties may be required.
- § 1616. Discharge on bond after commitment.
- § 1617. Trial in the superior court.
- § 1618. Court may order confinement of vagrant at hard labor.
- § 1619. Court may provide material for labor.
- § 1620. Disposition of proceeds of vagrant's labor.

#### *Vagrancy defined.*

§ 1608. [1271.] The following persons are vagrants: All persons who tell fortunes, or who keep houses where lost and stolen goods may be found; all common prostitutes, and keepers of bawdy-houses or houses for the resort of prostitutes; all habitual drunkards, gamblers, or other disorderly persons; all persons wandering about and having no visible calling or business to maintain themselves; all persons going about as collectors of alms for charitable institutions under any false or fraudulent pretense; all persons playing or betting in any street, or public or open place, at or with any table or instrument of gaming at any game or pretended game of chance.

#### *Proceedings for examination of vagrants.*

§ 1609. Upon complaint made on oath to any justice of the peace against any person as being such vagrant within his local jurisdiction, as defined in the last preceding section, he shall issue a warrant for the arrest of such person, and the complaint, warrant, arrest and examination shall be governed by the provisions of this code relating to the examination and commitment for trial of persons charged with offenses, so far as the same may be applicable. [*Feb. 17, 1891, § 17.*]

#### *Arrest of vagrant without warrant.*

§ 1610. [1273.] All peace-officers shall arrest any vagrant whom they may find at large, and take him before some justice of the peace of the county, city, or town in which the arrest is made.

#### *Officer must confine vagrant till morning.*

§ 1611. [1274.] If the arrests authorized in the last two sections are made during the night, the officer must keep the person arrested in confinement until the next morning.

*Bond for good behavior to be required.*

§ 1612. [1275.] If it appear, by the confession of such person, or by competent testimony, that such person is a vagrant, the justice of peace before whom he is brought may require of such person a bond, with sufficient surety, for good behavior for the term of three months thereafter.

*Record to be filed in superior court.*

§ 1613. [1276.] The justice shall make up, sign, and file with the clerk of the superior court of the county a record of conviction of such person as a vagrant, specifying generally the nature and circumstances of the charge, and shall, in default of such security being given, by warrant under his hand, commit such vagrant to the jail of the county, city, or town, as the case may be, until such security be found, or such vagrant be discharged, according to law.

*Breach of bond for good behavior.*

§ 1614. [1277.] The committing of any of the acts which constitute such person so bound a vagrant shall be deemed a breach of the condition of such bond for good behavior.

*New sureties may be required.*

§ 1615. [1278.] On a recovery upon any such bond, the court before which such recovery may be had may, in its discretion, either require new sureties for good behavior, or may commit such vagrant to the county jail of the county for any time not exceeding six months.

*Discharge on bond after commitment.*

§ 1616. [1279.] Any person committed to jail for not finding sureties for good behavior may be discharged by any magistrate upon giving such sureties for good behavior as were originally required of such person.

*Trial in superior court.*

§ 1617. [1280, 1281.] The superior court to which the papers are returned shall, on demand of the defendant, impanel a jury to inquire into and determine the truth of the charge made against him; and the rules and regulations of law governing said court in the trials of misdemeanors shall be applicable to and govern it in the trial herein contemplated. If no jury be demanded, the superior court may revise such conviction, and discharge such vagrant from the bond or confinement absolutely, or upon sureties for good behavior, in its discretion.

*Court may order confinement of vagrant at hard labor.*

§ 1618. [1282.] Such superior court may, in its discretion, order



any such vagrant to be kept in the county jail for any time not exceeding six months at hard labor.

*Court may provide material for such labor.*

§ 1619. [1283, 1284.] If there be no means in such jail for employing offenders at hard labor, such court may direct the keeper thereof to furnish such employment as it shall specify to such vagrant as may be committed thereto, either by a justice or any court, and for that purpose to purchase any necessary raw materials and implements, not exceeding such amount as the court shall prescribe, and to compel such persons to perform such work as shall be allotted to them. The expenses incurred in pursuance of such order shall be audited by the board of commissioners of the county, and paid out of the county treasury.

*Disposition of proceeds of vagrant's labor.*

§ 1620. [1285.] One half of the net proceeds of such labor shall be paid to the person earning the same, upon his discharge from imprisonment, and the other half shall be paid into the county treasury for the use of the county.

## CHAPTER XIV.

### OF CERTIORARI, AND PROCEEDINGS THEREON.

§ 1621. *Certiorari* may issue to remove proceedings to superior court.

§ 1622. *Certiorari*, when and in what manner obtained.

§ 1623. Writ to be issued by clerk.

§ 1624. Writ to be served on justice — Stay of proceedings.

§ 1625. Service of writ, and return thereof.

§ 1626. Superior court may compel justice to amend return.

§ 1627. Argument of case presented by writ and return.

§ 1628. Judgment, how to be rendered — Execution.

§ 1629. Restitution to be made if judgment is reversed.

*Certiorari may issue to remove proceedings to superior court.*

§ 1621. [1849.] If any person shall conceive himself injured by error in any process, proceeding, judgment, or order given by any justice of the peace within this state, it shall be lawful for such person to remove such process, proceeding, judgment, or order to the superior court, as hereinafter provided.

*Certiorari, when and in what manner obtained.*

§ 1622. [1850.] Within twenty days after the rendition of the judgment, or if the error be committed after judgment, then within twenty days after such error was committed, the party applying for such *certiorari*, his agent or attorney, shall file in the office of the clerk of the superior court for the proper county an affidavit stating that

in his belief there is reasonable cause for granting such *certiorari* for error in such judgment or proceeding (setting forth the ground of error alleged), and that the application is made in good faith, and not for the purpose of delay; and further, shall execute a bond to the adverse party, with one or more sureties, to be approved by the clerk, in double the amount of the judgment and costs rendered before the justice, to the effect that the party applying will prosecute the writ of *certiorari* to final judgment, and will abide any order the court may make therein.

*Writ to be issued by clerk.*

§ 1623. [1851.] Upon complying with the provisions of the preceding section, the party applying shall be entitled to such writ, which shall be issued by the clerk as of course, and no application to the superior court, or the judge thereof, shall be necessary in the premises.

*Writ to be served on justice — Stay of proceedings.*

§ 1624. [1852.] The writ of *certiorari* shall be served on the justice within ten days after it has been issued; and if a bond be executed in pursuance of the last section, and a certificate of the clerk to that effect be served on the justice, all further proceedings in law in such case shall cease; and if the execution shall have issued on such judgment, the justice shall immediately recall the same.

*Service of writ, and return thereof — Filing of writ and papers.*

§ 1625. [1853.] Upon the service of a writ of *certiorari* to reverse a judgment, it shall be the duty of the party serving the same to deliver at the same time to the justice a copy of the affidavit on which the *certiorari* was procured, and the justice shall make a special return as to all the facts contained in such affidavit and of the proceedings in the case, and annex a copy thereof to the writ, and shall file the same with the clerk of the superior court within ten days after the service of the writ, together with all the papers in the action; and he shall also certify the time when the writ was served upon him.

*Superior court may compel justice to amend return.*

§ 1626. [1854.] The superior court shall have power to compel such justice to make or amend such return by rule, attachment, or *mandamus*, as the case may require.

*Argument of case presented by writ and return.*

§ 1627. [1855.] When the writ of *certiorari* and return shall be filed with the clerk, the case may be brought on for argument before the superior court at any time thereafter, according to the statutes relating thereto.

*Judgment, how to be rendered — Execution.*

§ 1628. [1856.] The court shall, after hearing the case, give judgment as the right of the matter may appear, without regarding technical omissions, imperfections, or defects in the proceedings before the justice which did not affect the merits, and may affirm or reverse the judgment in whole or in part, and issue execution as upon other judgments rendered before said court.

**Application for writ of certiorari is sufficient** when it shows that a cause before a justice of the peace was continued to a day certain, which fell on Sunday, and that afterwards the cause proceeded without new notice to the defendant, and without his personal appearance. It is error to dismiss the application because the justice, by such continuance, lost jurisdiction over the person of the defendant, which could not be regained without a new notice, or by the waiver of such notice by voluntary appearance: *Taylor v. Ringer*, 3 Wash. 539.

*Restitution to be made if judgment is reversed.*

§ 1629. [1857.] If a judgment rendered before a justice be collected, and afterwards be reversed by the court above, such court shall award restitution of the amount so collected, with interest from the time of collection, and execution may issue therefor.

## CHAPTER XV.

### OF APPEALS FROM JUSTICES' COURTS.

- § 1630. Appeal to superior court.
- § 1631. Appeal, how taken — Bond to be given, etc.
- § 1632. Upon appeal, proceedings are to be stayed after bond is given.
- § 1633. Property taken to be released upon presentation of certificate of appeal.
- § 1634. Appellant to furnish transcript — Superior court acquires jurisdiction when.
- § 1635. Issue to be tried in superior court on same pleadings.
- § 1636. Justice may be compelled to furnish certified transcript of proceedings.
- § 1637. Appeal not to be dismissed for defective bond, etc.
- § 1638. Judgment to be against appellant and sureties when.
- § 1639. Defendant may appeal, when and how — To be committed until bond is given.
- § 1640. Appellant not required to advance fees — Failure to prosecute appeal, effect of.
- § 1641. Justice to recognize witnesses — Duty of justice when appeal is taken.
- § 1642. Witnesses to be recognized.
- § 1643. Proceedings on appeal — New bond — Costs.
- § 1644. Failure of defendant to prosecute appeal, effect of.

*Appeal to superior court.*

§ 1630. Any person considering himself aggrieved by any judgment or decision of a justice of the peace in a civil action or proceeding may, in person or by his agent, appeal therefrom to the superior court of the same county where the judgment was rendered or the decision made. [February 24, 1891, § 1.]

*Appeal, how taken — Bond to be given, etc.*

§ 1631. Such appeal shall be taken by filing a notice of appeal with the justice and serving a copy on the adverse party or his attorney, and unless such appeal be by a county, city, or school district, filing



a bond or undertaking, as herein provided, within twenty days after the judgment is rendered or the decision made. No appeal, except when such appeals are by a county, city, or school district, shall be allowed in any case, unless a bond or an undertaking shall be executed on the part of the appellant and filed with and approved by the justice, with one or more sureties, in the sum of one hundred dollars, to the effect that the appellant will pay all costs that may be awarded against him on the appeal; or if a stay of proceedings before the justice be claimed, except by a county, city, or school district, a bond or undertaking, with two or more sureties, to be approved by the justice, in a sum equal to twice the amount of the judgment and costs, to the effect that the appellant will pay such judgment, including costs, as may be rendered against him on the appeal. [*February 24, 1891, § 2.*]

**Notice of appeal.** — The superior court acquires jurisdiction through the notice of appeal: *Chipman v. Bronson*, 3 Or. 320; and where it is not properly served, returned properly indorsed, and filed, and the proper undertaking given, the court acquires no jurisdiction: *Strang v. Keith*, 1 Or. 312; *State v. Zingsem*, 7 Or. 137. If on the appeal the notice prove insufficient, the only judgment which can be given is one of dismissal: *Neppach v. Jordan*, 13 Or. 246.

On appeal from a judgment of a justice's court, a notice which is in writing and makes known to the opposite party that an appeal is taken in the particular case is a sufficient compliance with this section: *Lancaster v. McDonald*, 14 Or. 264.

An objection to the sufficiency of the service of the notice of appeal when not made in the

court below will not be considered in the appellate court: *Lancaster v. McDonald*, 14 Or. 264.

Immaterial discrepancies between the notice of appeal filed with the justice, and the copy of the same served upon the appellee, will not defeat the appeal: *McKilver v. Manchester*, 1 Wash. 255.

**Destruction of records.** — Where the records in the justice's office are destroyed by fire before the transcript is certified to the upper court, but after the appeal has been properly taken, plaintiffs are entitled to have the cause docketed in the superior court, in order to show the facts and supply the missing records, after which the appeal should be heard as in other cases. The justice's court is not the proper one to supply the destroyed records: *Mullen v. Mullen*, 1 Wash. 192.

*Upon appeal, proceedings are to be stayed after bond is given.*

§ 1632. Upon appeal being taken, and a bond filed to stay all proceedings, the justice shall allow the same, and make an entry of such allowance in his docket, and all further proceedings on the judgment before the justice shall thereupon be suspended; and if in the meantime execution shall have been issued, the justice shall give the appellant a certificate that such appeal has been allowed. [*Feb. 24, '91, § 3.*]

*Property taken to be released upon presentation of certificate of appeal.*

§ 1633. [1862.] On such certificate being presented to the officer holding the execution, he shall forthwith release the property of the defendant that may have been taken on execution; and if the body of the defendant have been taken on execution, he shall be discharged from imprisonment.

*Appellant to furnish transcript — Superior court acquires jurisdiction when.*

§ 1634. Within ten days after the appeal has been taken in a civil action or proceeding, the appellant shall furnish the superior court with a transcript of all the entries made in the justice's docket relat-

ing to the case, together with all the process and other papers relating to the action, and file[d] with the justice, which shall be certified by such justice to be correct; and upon the filing of such transcript, the superior court shall become possessed of the cause, and shall proceed in the same manner, as near as may be, as in actions originally commenced in that court, except as herein otherwise provided. [February 24, 1891, § 4.]

*Issue to be tried in superior court on same pleadings.*

§ 1635. [1864.] The issue before the justice shall be tried in the superior court without other or new pleadings, unless otherwise directed by the court.

Unless issues are changed thereby, allowed on appeals from justice's courts: *New amendments in pleadings should be liberally* *berg v. Farmer*, 1 Wash. 182.

*Justice may be compelled to furnish certified transcript of proceedings.*

§ 1636. Upon an appeal being taken and allowed, the superior court may, by rule and attachment, compel the justice to make and deliver to the appellant a certified transcript of the proceedings, upon paying to such justice the fees allowed by law for making such transcript, and whenever the court is satisfied that the return of the justice is substantially erroneous or defective, it may, by rule and attachment, compel him to amend the same. [February 24, 1891, § 5.]

**Transcript.** — The proceedings should be chronologically arranged in the transcript: *Thompson v. Lynch*, 43 Cal. 482. If the transcript does not contain the judgment appealed from, the appeal cannot be entertained: *People v. Sing Lum*, 60 Cal. 6. It must show that an undertaking has been filed in due time: *Franklin v. Reiner*, 8 Cal. 340; and that notice of appeal has been duly served, etc.: *Hildreth v. Gwindon*, 10 Cal. 491; and that the amount in controversy is sufficient to authorize an appeal: *Hoyt v. Stearns*, 39 Cal. 93. It is sufficient, when the style of the court and title of the cause is given in the first paper, to afterwards give the name of the document, and at the head say, "Title of cause." And where a paper is verified or acknowledged, and no point is made on the verification or acknowledgment,

to say, "Duly verified," or "Duly acknowledged." The date of the paper, date of filing, date of service, etc., and every indorsement that may be important, should of course appear. The rest may with advantage be omitted: *Marriner v. Smith*, 27 Cal. 654. The court can only act upon a transcript of the record as it exists in the lower court, duly authenticated, and cannot alter it: *Bond v. Hickman*, 29 Cal. 461; *Boston v. Haynes*, 31 Cal. 107; *Buckman v. Whitney*, 24 Cal. 267; *Buckman v. Whitney*, 28 Cal. 555; *Satterlee v. Bass*, 36 Cal. 521; *People v. Woods*, 43 Cal. 177; *Thompson v. Patterson*, 54 Cal. 542. The verity of the record cannot be attacked by using affidavits in the appellate court: *People v. Jordan*, 4 West Coast Rep. 138

*Appeal not to be dismissed for defective bond, etc.*

§ 1637. [1866.] No appeal allowed by a justice shall be dismissed on account of the bond being defective, if the appellant will, before the motion is determined, execute and file in the superior court such a bond as he should have executed at the time of taking the appeal, and pay all costs that shall have accrued by reason of such defect.

*Judgment to be against appellant and sureties when.*

§ 1638. [1867.] In all cases of appeal to the superior court, if, on the trial anew in such court, the judgment be against the appellant in whole or in part, such judgment shall be rendered against him and his sureties in the bond for the appeal.

**Sureties on appeal bond** from justice's court, by signing the bond, submit themselves to the jurisdiction of the court, and are con- cluded by the judgment rendered against the principal and themselves without further notice: *Cline v. Mitchell*, 23 Pac. Rep. 1013 (Wash.).

*Defendant may appeal, when and how—To be committed until bond is given.*

§ 1639. Every person convicted before a justice of the peace of any offense may appeal from the judgment, within ten days thereafter, to the superior court. The appeal shall be taken by orally giving notice thereof at the time the judgment is rendered, or by serving a written notice thereof upon the justice at any time after the judgment, and within the time allowed for taking the appeal; when the notice is given orally, the justice shall enter the same in his docket. The appellant shall be committed to the jail of the county until he shall recognize or give a bond to the state, in such reasonable sum with such sureties as said justice may require, with condition to appear at the court appealed to, and there prosecute his appeal, and to abide the sentence of the court thereon, if not revised by a higher court. [February 24, 1891, § 6.]

*Appellant not required to advance fees—Failure to prosecute appeal, effect of.*

§ 1640. The appellant in a criminal action shall not be required to advance any fees in claiming his appeal, nor in prosecuting the same; but if convicted in the appellate court, or if sentenced for failing to prosecute his appeal, he may be required, as a part of the sentence, to pay the costs of prosecution. If the appellant shall fail to enter and prosecute his appeal, he shall be defaulted on his recognizance, if any was taken, and the superior court may award sentence against him for the offense whereof he was convicted, in like manner as if he had been convicted thereof in that court; and if he not then in custody, process may be issued to bring him into court to receive sentence. [February 24, 1891, § 7.]

**Fees, payment of, etc.**—In no instance shall any accused person before final judgment be compelled to advance money or fees to secure his right of appeal, or any other constitutional rights guaranteed to him: See Const., sec. 22, art. 1.

*Justice to recognize witnesses—Duty of justice when appeal is taken.*

§ 1641. Upon an appeal being taken in a criminal action, the justice shall require the witnesses to give recognizances for their appearance in the superior court, or if they are not present, indorse their names on the copy of proceeding. He shall, on such appeal, make and certify a copy of the conviction and other proceedings in the case, and transmit the same, together with the recognizance and an abstract bill of the costs, to the clerk of the court appealed to, who shall issue a subpoena for the witnesses, if they are not under recognizance. [February 24, 1891, § 8.]



*Witnesses to be recognized.*

§ 1642. An appeal may be taken from the order of a magistrate requiring a person to give security to keep the peace, or for good behavior. Such appeal shall be taken in the same manner and subject to the same conditions as appeals from justices' courts in criminal actions, and the magistrate may require recognizances of the appellant and the witness, as in appeals in such criminal actions. [February 24, 1891, § 9.]

*Proceedings on appeal — New bond — Costs.*

§ 1643. [1913.] The court before which such appeal is prosecuted may affirm the order of the justice or discharge the appellant, or may require the appellant to enter into a new recognizance, with sufficient sureties, in such sum and for such time as the court shall think proper, and may also make such order in relation to the costs of prosecution as may be deemed just and reasonable.

*Failure of defendant to prosecute appeal, effect of.*

§ 1644. If any party appealing from such order of a magistrate shall fail to prosecute his appeal, his recognizance shall remain in full force and effect, as to any breach of the condition, without an affirmation of the judgment or order of the magistrate, and also shall stand as security for costs which shall be ordered by the court appealed to to be paid by the appellant. [February 24, 1891, § 10.]

## TITLE XVII.

## OF EVIDENCE.

## CHAPTER I. — OF THE COMPETENCY OF WITNESSES.

## II. — OF THE MANNER OF COMPELLING THE ATTENDANCE OF WITNESSES.

## III. — OF THE EXAMINATION OF PARTIES.

## IV. — OF DEPOSITIONS.

## V. — OF DOCUMENTARY EVIDENCE.

## VI. — OF PROCEEDINGS TO PERPETUATE TESTIMONY.

## VII. — OF OATHS AND AFFIRMATIONS.

## VIII. — OF THE RESTORATION OF LOST RECORD EVIDENCE.

## CHAPTER I.

## OF THE COMPETENCY OF WITNESSES.

§ 1645. Who may testify. .

§ 1646. Witness not to be excluded by reason of interest — Exception.

§ 1647. Conviction for crime, effect of, as to exclusion of witness and credibility.

§ 1648. Who are incompetent to testify.

§ 1649. Persons who shall not be examined as witnesses.

*Who may testify.*

§ 1645. [388.] Every person of sound mind and suitable age and discretion, except as hereinafter provided, may be a witness in any action or proceeding.

**Competency of witnesses.** — No witness can be excluded in any case on account of nationality or color: *People v. Maguire*, 45 Cal. 57. An attorney of record who is a witness in a cause may sum it up before the court or jury: *Branson v. Caruthers*, 49 Cal. 382. But see the rules of the courts as to asking leave to do this. One who has been convicted of felony may testify: *People v. McLane*, 60 Cal. 412. Where persons are jointly indicted, but separately tried, each may be a witness for the other: *People v. Lubra*, 5 Cal. 183; *People v. Newberry*, 20 Cal. 439. When a justice before whom a suit is pending is a witness, it is proper to transfer it: *Davis v. Gallen*, 2 Cal. 360.

Although a juror is not disqualified to become a witness, public policy prohibits a juror from impeaching his own verdict by affidavit: *People v. Doyell*, 48 Cal. 90. An interpreter may be a witness to testify what was sworn to at a previous trial: *People v. Lee Ah Yute*, 60 Cal. 95; and see *People v. Ramirez*, 56 Cal. 534; the court saying: "We know of no reason why a person who is a witness in a case should be disqualified from acting as interpreter at the examination of other witnesses in the case." An agent is competent to testify as to his authority in the performance of acts for his reputed principal: *Tomlinson v. Spencer*, 5 Cal. 291. A restriction upon the competency

of a witness must be strictly construed in favor of life, liberty, and public justice: *People v. Awa*, 27 Cal. 638. The tendency of modern decisions with reference to the competency of witnesses is to relax rather than to extend the rule of exclusion: *Smith v. Richmond*, 19 Cal. 476. Where two persons are jointly indicted, and are tried separately, each defendant is a competent witness for his co-defendant: *People v. Newberry*, 20 Cal. 439. A party who objects to a witness called by the opposite party on the ground of incompetency may adopt either of two modes to show that incompetency. He may examine the witness upon his *voir dire* as to the alleged incompetency, or he may object to the witness on the ground of the incompetency, and prove it by other witnesses: *People v. Anderson*, 26 Cal. 129. Where a witness stated that he did not understand the "obligation of an oath," and thereupon the judge explained it to him, and he was allowed to testify, *held*, that he was competent to be a witness: *Fuller v. Fuller*, 17 Cal. 605. No person is held incompetent to be a witness in this state on account of his opinions on matters of religious belief: *People v. Sanford*, 43 Cal. 29. Where the deposition of a witness is taken, objections to his competency must be taken at the time, and not reserved till the trial, or they will be deemed waived: *Jones v. Love*, 9 Cal.

68. A witness who has a very imperfect knowledge of the language employed in the conversation, and who did not understand the whole of the conversation in which the supposed confession was made by the accused, is incompetent to testify as to such confession: *People v. Gelabert*, 39 Cal. 663.

**Children:** See § 1648, *infra*. There is no precise age within which children are excluded. It is essential that they should possess sufficient intelligence to receive just impressions of the facts respecting which they are examined, sufficient capacity to relate them correctly, and sufficient instruction to appreciate the nature and obligation of an oath. It is for the court to decide the question of their competency, when they are offered as witnesses. If over fourteen years of age, the presumption is that they possess the requisite knowledge and understanding; but if under that age, the presumption is otherwise, and it must be removed upon their examination by the court, or under its direction, in its presence, and in the presence of the parties, before they can be sworn: *People v. Bernal*, 10 Cal. 67; *Commonwealth v. Hutchinson*, 10 Mass. 225; *Jackson v. Gridley*, 18 Johns. 104; *Den v. Van Cleve*, 5 N. J. L. 589; *Rex v. Williams*, 7 Car. & P. 320; 1 East P. C. 442.

See *People v. Welsh*, 63 Cal. 167, where a child nine years of age testified on behalf of the prosecution. A deaf and dumb child nine years of age, who has no idea of the sanctity of an oath, and who cannot be made to understand questions asked, cannot be a witness: *Terry v. Duran*, 2 West Coast Rep. 274 (N. M.).

**Deaf-mutes.** — A deaf-mute is not incompetent if he can receive and communicate impressions. If he be proved to be a person of sufficient understanding, he may be sworn and give evidence by means of an interpreter: *Rustin's Case*, 1 Leach Crim. Cas. 455. As a better method, he may, if he can, communicate his ideas in writing: *Morrison v. Lennord*, 3 Car. & P. 127; but otherwise he may testify by means of signs: *State v. De Wolf*, 8 Conn. 93; 20 Am. Dec. 90; *Snyder v. Nations*, 4 Blackf. 295; *Commonwealth v. Hill*, 14 Mass. 207.

**Persons prohibited from testifying:** See § 1649, *infra*. The incompetency of a wife to testify for or against her husband in a criminal case is limited to cases in which one or both are parties. Where two persons are charged by separate informations with the same offense, the wife of the one not on trial is a competent witness for the other touching matters implicating her husband: *People v. Langtree*, 64 Cal. 256. In ordinary cases, proof that a man and woman cohabited a long time as husband and wife, mingled in society as such, and represented each other as such, is, in absence of evidence to the contrary, sufficient proof of a marriage between the parties: *People v. Anderson*, 26 Cal. 129. A woman living with defendant as his wife, but not married to him, is a competent witness against him: *People v. Alviso*, 55 Cal. 230. Declarations of a wife made to a third person are not admissible as evidence against her husband: *People v. Simonds*, 19 Cal. 276. But evidence of acts and exclamations of the prisoner's wife at the time of the killing, and in his presence

or hearing, are admissible: *People v. Murphy*, 45 Cal. 143.

**Examination of witnesses.** — It is in the discretion of the court to confine the cross-examination of a witness within reasonable limits, and when protracted to an unreasonable extent, the court may prohibit its continuance: *Reed v. Clark*, 47 Cal. 194. And it is no abuse of discretion for the court to refuse to permit a witness in re-examination to be further questioned on a point concerning which he had already fully testified: *Brumagim v. Bradshaw*, 39 Cal. 24. The general rules are, that a witness cannot be cross-examined except as to facts and circumstances connected with matters testified to by him on his direct examination, and that a party who has not yet opened his case cannot do so by a cross-examination of his adversary's witness: *Thornton v. Hook*, 36 Cal. 223; *People v. Miller*, 33 Cal. 99; *Aiken v. Mendenhall*, 25 Cal. 212; see *People v. Parton*, 49 Cal. 632. The matter of permitting a party to recall a witness for further cross-examination rests greatly in the discretion of the court: *People v. Keith*, 50 Cal. 137. If a question put to a witness is collateral or irrelevant, his answer cannot be contradicted by the party who asked the question, but is conclusive against him: *People v. McKeller*, 53 Cal. 65; *People v. Bell*, 53 Cal. 119. Where the prosecution proves declarations and conversations of defendant, he has the right, on cross-examination, to question the witness as to all he said at the time, and has also the right to call other witnesses to prove all that was said or occurred at the time: *People v. Strong*, 30 Cal. 151. It is relevant to inquire of a witness, on cross-examination, whether he has not on a former occasion given a different account of the matter: *People v. Robles*, 29 Cal. 421; see, generally, *Chamberlin v. Vance*, 51 Cal. 75; *Harper v. Lamping*, 33 Cal. 641; *Steinburg v. Meany*, 53 Cal. 452; *Jackson v. Feather R. W. Co.*, 14 Cal. 18; *Jones v. Love*, 9 Cal. 68. A witness, on cross-examination, may be asked if he has not been convicted of a felony, and the party asking the question may also introduce the record of his conviction: *People v. Chin Mook Sow*, 51 Cal. 597. A witness may be interrogated as to any circumstance which tends to impeach his credibility, by showing that he is biased against the party conducting the cross-examination, or that he has an interest in the result adverse to such party: *People v. Benson*, 52 Cal. 380.

**Impeachment of witness.** — A witness called to impeach another may answer that he would not believe such other on oath: *Sterens v. Irwin*, 12 Cal. 306. But it is not essential to the impeachment of the witness that such answer should be obtained: *People v. Tyler*, 35 Cal. 553. Belief or personal knowledge cannot be substituted for general reputation for the purpose of impeaching a witness: *People v. Methvin*, 53 Cal. 68. It is not an abuse of discretion for the court to limit one side to eight witnesses called to impeach a witness for the other side: *People v. Murray*, 41 Cal. 66. Evidence of bad character for chastity is not admissible for the purpose of impeaching the testimony of a witness: *People v. Yslas*, 27 Cal. 630. Where a witness is sought to be impeached by proof of contradictory statements alleged to have been made by him, the time



and place and precise matter of the contradictory statements must be brought to the knowledge of the witness on cross-examination: *Baker v. Joseph*, 16 Cal. 173; *People v. Garnett*, 29 Cal. 622; *People v. Devine*, 44 Cal. 452. And this rule applies to letters written by the witness: *Leonard v. Kingsley*, 50 Cal. 628; see *People v. Doyell*, 48 Cal. 85. If one side introduces evidence tending to show that a witness was suborned, the other side may introduce testimony to show the good character of the witness: *People v. Ah Fat*, 48 Cal. 61. If a question is put to a witness which is collateral or irrelevant, his answer cannot be contradicted by the party who asked the question, but is conclusive against him: *People v. Bell*, 53 Cal. 119.

**Memory of witness.** — A book-keeper called as a witness has a right to refer to the books kept by him, to refresh his memory: *Treadwell v. Wells*, 4 Cal. 260. A witness may, while on the stand, refresh his memory by a reference to a written memorandum made by him at the time or soon after the occurrence which he is relating: *People v. Cotta*, 49 Cal. 166.

**Opinions of witnesses.** — The opinions of witnesses are generally admissible only when they relate to matters of science or art, or to skill in some particular profession or business: *Hastings v. Steamer Uncle Sam*, 10 Cal. 341. But a witness, though not an expert, who details a conversation had between himself and another, may also, in connection therewith, state his opinion, impression, or belief as to the state of mind of such person as these seemed to the witness at the time of the conversation: *People v. Sanford*, 43 Cal. 29. There is no rule of law fixing the precise amount of experience or degree of skill necessary to constitute an expert. All that is open to inquiry and proof at the trial. The judge must, in the first instance, pass upon the admissibility of the witness; and then, if admitted, the jury judge of the weight and credit to be given to the testimony. The question is mainly one of fact, and it is only when there appears some error in law in determining the question of admissibility, or when there is no competent evidence to prove proper qualification of the witness, that the

decision of the presiding judge is reversed on exceptions: *Commonwealth v. Williams*, 105 Mass. 68. A physician testifying as an expert may give an opinion founded upon his reading and study alone: *Taylor v. Railway*, 48 N. H. 304; *State v. Wood*, 53 N. H. 483. On a trial for forgery committed by altering a check, by extracting writing therefrom and writing new words or figures in place thereof, a witness who is not called as a scientific expert may testify as to the chemical effect a powder found in the possession of the defendants had on writing in a check similar to that by the alteration of which the forgery was committed; and the check upon which the effect testified to by the witness was produced may be exhibited to the jury: *People v. Brotherton*, 47 Cal. 388.

**Privileges of witness.** — Where the answer of a witness would subject him to criminal punishment, he is not privileged from answering on the ground that his answer would disgrace him, but solely on the ground that he is not compelled to criminate himself: *Ex parte Rowe*, 7 Cal. 184. A party to an action who becomes a witness in his own behalf has the same and no greater privileges than any other witness. He may refuse to answer a question when the answer would tend to degrade his character: *People v. Reinhart*, 39 Cal. 449. The privilege not to answer is personal to the witness, and is not in any sense the privilege of the party calling him: *Clark v. Reese*, 35 Cal. 89. He must assert his privilege at the proper time, and it is not the duty of the court, independently of any objection on the part of the witness, to inform him that he is not obliged to criminate himself: *People v. Hackley*, 24 N. Y. 83; *Commonwealth v. Shaw*, 4 Cush. 594. If he discloses a part of the transaction with which he was criminally concerned, without claiming his privilege, he must disclose the whole. He cannot, after voluntarily testifying in chief, decline to be cross-examined, on the ground that his answers may criminate or disgrace him: *People v. Freshour*, 55 Cal. 375; *Norfolk v. Gaylord*, 28 Conn. 309; *People v. Carroll*, 3 Park. Cr. 73; *Commonwealth v. Price*, 10 Gray, 472.

### *Witness not to be excluded by reason of interest—Exception.*

§ 1646. No person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the action, as a party thereto or otherwise; but such interest may be shown to affect his credibility; *provided, however*, that in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person, or as the guardian or conservator of the estate of any insane person, or of any minor under the age of fourteen years, then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statement made to him by any such deceased or insane person, or by any such minor under the age of fourteen years; *provided further*, that this exclusion shall not apply

to parties of record who sue or defend in a representative or fiduciary capacity, and who have no other or further interest in the action. [March 20, 1890, § 1.]

Where witness is interested, the court is not bound to take his testimony as conclusive, although it is not contradicted: *Nulty v. Hurd*, 86 N. Y. 547. The interest of a witness, where it has any effect at all, except as otherwise specially provided in this section, goes to the question of credibility, and that must be left to the court, jury, or referee trying the question of fact: *Nulty v. Hurd*, 86 N. Y. 547; *Dunn v. People*, 29 N. Y. 523; 86 Am. Dec. 329. An attorney who has opened a case and examined witnesses is a competent witness for his client: *Follansbee v. Walker*, 13 Am. Rep. 671; and may sum up the cause be-

fore the court or jury: *Branson v. Caruthers*, 49 Cal. 382. But when an attorney becomes a witness for his client in a suit which he is conducting for him, it is competent to show that he has an agreement with his client entitling him to a retainer and a certain portion of the amount to be recovered: *Moats v. Rymer*, 41 Am. Rep. 703. Adverse party has a right to be examined as a witness where the assignor of a contract or thing in action has been so examined: *Glasford v. Shield*, 1 Wash. 224.

In action by administrator against the son of deceased, a brother of the defendant may testify: *McCoy v. Ayers*, 2 Wash. 307.

*Conviction for crime, effect of, as to exclusion of witness and credibility.*

§ 1647. No person offered as a witness shall be excluded from giving evidence by reason of conviction of crime, but such conviction may be shown to affect his credibility; provided, that any person who shall have been convicted of the crime of perjury shall not be a competent witness in any case, unless such conviction shall have been reversed, or unless he shall have received a pardon. [Feb. 24, '91, § 1.]

**Conviction for crime.** — One who has been convicted of a felony may testify: *People v. McLane*, 60 Cal. 412; and a person found guilty and sentenced is competent, as well as

one found guilty but not sentenced: *People v. McGloin*, 91 N. Y. 241. And the rule applies as to conviction of felony in another state: *National Trust Co. v. Gleason*, 33 Am. Rep. 632.

*Who are incompetent to testify.*

§ 1648. [391.] The following persons shall not be competent to testify: —

1. Those who are of unsound mind, or intoxicated at the time of their production for examination; and
2. Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

**Persons of unsound mind.** — If the mental defect is merely temporary, and a lucid interval occur, or a cure be effected, competency is restored: *Livingston v. Kiersted*, 10 Johns. 362; *Evans v. Hettich*, 7 Wheat. 453. Whether persons otherwise sane who labor under mental delusions of a particular character are competent witnesses is for the judge to decide, and the jury are to determine the value of the testimony of the witness: *Holcomb v. Holcomb*, 28 Conn. 177. If the witness can discern right from wrong, and has power to speak from memory, it is held that he is competent: *Coleman v. Commonwealth*, 25 Gratt. 865.

**Children.** — There is no precise age at which children are incompetent to testify so that they should by reason of their age be excluded; if they possess sufficient intelligence to observe facts and narrate them, and have been or can be instructed intelligibly as to the nature of an oath, they may testify: *State v. Jackson*, 9 Or. 451. If over fourteen years of age, the presumption is that they possess the

requisite knowledge and understanding; but if under that age the presumption is otherwise, and it must be removed upon their examination by the court, or under its direction, in its presence, and in the presence of the parties, before they can be sworn: *People v. Bernal*, 10 Cal. 67; *Commonwealth v. Hutchinson*, 10 Mass. 225; *Jackson v. Griddle*, 18 Johns. 104; *Den v. Van Clere*, 5 N. J. L. 589; *Rex v. Williams*, 7 Car. & P. 320. The testimony of children of seven and nine years has been received: *Commonwealth v. Hutchinson*, 10 Mass. 225; *State v. Whittier*, 22 Me. 341; and even at as young an age as five years: *Rex v. Brasier*, 1 Leach Crim. Cas. 237. A deaf and dumb child nine years of age, who has no idea of the sanctity of an oath, and who cannot be made to understand questions asked, cannot be a witness: *Terry v. Duran*, 2 West Coast Rep. 274 (N. M.). A child of any age may doubtless be a witness, if capable of distinguishing between good and evil, and "of receiving just impressions of the facts," etc.: See *State v.*



*Whittier*, 38 Am. Dec. 272. It is difficult to formulate a rule that will apply to the competency of all children as witnesses, because it is always necessary to satisfy the judge as to the propriety of admitting a child of tender years as a witness, and that is the only purpose of the preliminary examination of the child: *State v. Whittier*, 38 Am. Dec. 272. A conviction will not be reversed because a witness six years of age was permitted to testify against the prisoner: *State v. Richie*, 26 Am. Rep. 100. A child of seven years of age who does not understand the process of being sworn as a witness, nor the consequences of perjury in this life or after death, is not a competent witness: *Holst v. State*, 59 Am. Rep. 770. See also, as to making witnesses of children,

*Kelly v. State*, 51 Am. Rep. 422; *Carter v. State*, 35 Am. Rep. 4. As to the postponement of a case for the purpose of instructing a child so as to qualify it to testify, see *Taylor v. State*, 58 Am. Rep. 656; *Commonwealth v. Lynes*, 56 Am. Rep. 709; *Holst v. State*, 59 Am. Rep. 770, 772. A divorce will not be granted upon the testimony of young children of the parties: *Crowner v. Crowner*, 38 Am. Rep. 245. And the supreme court of the United States has rebuked the introduction of children as witnesses in angry family quarrels: *Tobey v. Leonards*, 2 Wall. 423, 438. The witness himself is never questioned in modern practice as to his religious belief: Note to *Carter v. State*, 35 Am. Rep. 7.

*Persons who shall not be examined as witnesses.*

§ 1649. [392.] The following persons shall not be examined as witnesses:—

1. A husband shall not be examined for or against his wife without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either, during marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other.

2. An attorney or counselor shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

3. A clergyman or priest shall not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

4. A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him to prescribe or act for the patient.

5. A public officer shall not be examined as a witness as to communications made to him in official confidence, when the public interest would suffer by the disclosure.

**Husband and wife.**—A statute quite similar in its provisions to the various subdivisions of this section has been held to admit of no other construction than that, where the evidence comes within the prohibition of the statute, its reception, if objected to, can be justified only when the patient, penitent, or client, as the case may be, waives the protection the statutes give him: *Westover v. Etna Life Ins. Co.*, 99 N. Y. 56, 60. And this principle of construction would, of course, apply to the first subdivision of this section concerning

husband and wife. The code of California has swept away all distinctions between confidential and other communications between husband and wife, and extends the privilege to any communication made by one to the other during marriage; and no disclosure can be forced from either spouse without the consent of the one against whom the disclosure is sought to be used. The privilege applies to the communication, in whatever manner it may be sought: *People v. Mullings*, 83 Cal. 138; and though the parties have been divorced: *Id.* So



a statute removing the disability of witnesses, on the ground of interest, does not render a husband and wife competent witnesses the one for or against the other: *Gee v. Scott*, 26 Am. Rep. 331. But where, by statute, they are excluded as witnesses "for or against each other," in an action against them for slanderous words spoken by the wife, she is competent to testify in her own behalf, and he in his: *Mouster v. Harding*, 5 Am. Rep. 195. A husband consents to his wife's being a witness when he calls her to the witness-stand, and she is sworn and examined: *Columbia and Puget Sound R. R. Co. v. Hawthorn*, 3 Wash. 353; or when he offers in evidence a deed witnessed by her: *Tillotson v. Prichard*, 6 Am. St. Rep. 95. In an action between husband and wife, the wife may testify in her own behalf: *Rivenburgh v. Rivenburgh*, 47 Barb. 423. So under a statute similar to the last clause of the first subdivision of this section, a husband or wife may testify against the other, where one of them has been indicted for adultery: *Roland v. State*, 35 Am. Rep. 743; note to *State v. Boyd*, 27 Am. Dec. 379, showing when married persons are admitted to testify as to matters criminating each other. The wife is a competent witness against the husband as to acts of violence committed by him upon her: See note last cited; and where he is charged with assault and battery upon her, she may be compelled to testify against him: *Turner v. State*, 45 Am. Rep. 412. As to the prohibition of the statute, it is of no consequence when the relation commenced; the result is the same. Thus if one marry a party after being actually summoned as a witness, she is incompetent: *Pedley v. Wellesley*, 3 Car. & P. 558. It is held that dissolution of the marriage by death or divorce will not render the party competent to testify to communications made by one to the other during marriage: *Stein v. Bowman*, 13 Pet. 209; *Terry v. Belcher*, 1 Bail. 568; *Dickerman v. Graves*, 53 Am. Dec. 41; *Babcock v. Booth*, 38 Am. Dec. 578.

It is said that in collateral proceedings, where their interests are not involved, they may be examined (except as to confidential communications), notwithstanding the evidence of one directly contradicts the other: *Fitch v. Hill*, 11 Mass. 286; *Baring v. Reeder*, 1 Hen. & M. 154; see *State v. Briggs*, 11 Am. Rep. 270.

**Communications to and by attorneys.**—The above doctrine was affirmed in *Landsberger v. Gorham*, 5 Cal. 450. But statements made by the client to other persons, or by other persons to him, in the attorney's presence, are not privileged, and the attorney is bound to disclose them: *Gallagher v. Williamson*, 23 Cal. 331. If it appears by extraneous evidence, or from the very nature of the transaction, that confidence was not and (on the maxims by which human nature is ordinarily governed) could not have been contemplated, then the fact may be proved by the testimony of the attorney: *Hager v. Shindler*, 29 Cal. 63; *Gower v. Emery*, 18 Me. 82. If a client, pending the relation, communicates to his attorney a fact foreign to the object for which the attorney was retained, the communication is not privileged, where the attorney is a party to the transaction; especially if it is a fraud or fraudulent transaction, whether aware of the fraudulent intention or not: *Hager v. Shindler*, 29

Cal. 63. An attorney must state by whom he was employed: *Satterlee v. Bliss*, 36 Cal. 507; *Chirac v. Reinicker*, 11 Wheat. 280; 1 Greenl. Ev., sec. 245; *Gower v. Emery*, 18 Me. 82; *Brown v. Payson*, 6 N. H. 448; *Beckwith v. Benner*, 6 Car. & P. 681. The rule given in the section has a tendency to prevent the full disclosure of the truth, and ought to be strictly construed: *Satterlee v. Bliss*, 36 Cal. 507; *Foster v. Hall*, 12 Pick. 90; 22 Am. Dec. 400; *Gower v. Emery*, 18 Me. 82. When the attorney witness was unable to state whether admissions were made to him as counsel of an accused person or whilst the latter was under examination as a witness in his own behalf, it was held that the court should have excluded the testimony of its own motion. The accused should have had the benefit of the doubt: *People v. Atkinson*, 40 Cal. 285. On this subject, see notes to *Coveny v. Tannahill*, 37 Am. Dec. 296; *Gallagher v. Williamson*, 83 Am. Dec. 117.

**Priest** may be examined with respect to facts brought to his knowledge on a preliminary examination, and with a view to learn whether a party was in a proper condition of mind to make a confession: *Estate of Toomes*, 54 Cal. 509.

**Physician or surgeon.**—In an action upon a policy of insurance, which contained a clause avoiding it in case the insured committed suicide or died by his own hand, it appeared that the insured hanged himself. The plaintiff claimed that he was insane at the time. A physician who attended the deceased a short time before his death was asked by plaintiff as a witness, "How did you find him?" Defendant objected to this as coming within the prohibition of the code, which was similar to the above section concerning physicians, etc., and the court overruled the objection. This was held to be error. The point was urged that plaintiff, being the personal representative of the assured, had a right to waive the privilege of the statute, but the court held that any party to an action can object to evidence coming within the prohibition, and that the objection could only be waived by the patient himself: *Westover v. Aetna Life Ins. Co.*, 99 N. Y. 56. Compare *Campau v. North*, 33 Am. Rep. 433, and notes 435-439, showing other New York statutory constructions. The statute excludes information derived from the sense of sight, as well as the sense of hearing, and it is not requisite to its exclusion that formal proof should be given, in the first instance, that the information was necessary to enable the physician to prescribe: *Grattan v. Metropolitan Ins. Co.*, 80 N. Y. 281. On the trial of an indictment for murder for poisoning one W., a physician who was called to attend W. while sick from the poison was examined as a witness for the prosecution, and stated what he learned from his own examination and the statements of W., although objection was taken under a like section of the statute. It was held that the ruling was correct; that the object of the statute was to protect the patient, not to shield one charged with his murder; and a conviction was affirmed: *Pierson v. People*, 79 N. Y. 424.

**Public officials.**—Communications between public officials need not be disclosed if the public interest would suffer: 1 Burr's Trial, 186, 187; *Gray v. Pentland*, 2 Serg. & R. 23.

## CHAPTER II.

### OF THE MANNER OF COMPELLING THE ATTENDANCE OF WITNESSES.

- § 1650. Attendance of witness may be compelled when — Tender of fees.
- § 1651. Subpœna *duces tecum*.
- § 1652. Issuance of subpœna.
- § 1653. Service of subpœna -- Proof of, how to be made.
- § 1654. Person present may be required to testify as if subpœnaed.
- § 1655. Liability of witness for failure to attend after service of subpœna.
- § 1656. Attachment may issue to bring witness.
- § 1657. To whom attachment shall be directed, and how executed.
- § 1658. Manner of obtaining testimony of convict witness.
- § 1659. Order of court upon application to procure convict's testimony can only be made upon affidavit.

*Attendance of witness may be compelled when — Tender of fees.*

§ 1650. No person shall be obliged to attend as a witness before any court of record, judge, justice of the peace, commissioner, referee, or other officer, in any civil action or proceeding out of the county in which he resides, unless his residence be within twenty miles of such court, judge, justice of the peace, commissioner, referee, or other officer; and no person shall be obliged to attend as a witness in any civil action or proceeding in a justice's court, unless his residence be within twenty miles of such court, whether within the county or not. Nor shall any person be compelled to attend as a witness in any civil action or proceeding, unless the fees be paid or tendered to him which are allowed by law for one day's attendance as a witness, and for traveling to and returning from the place where he is required to attend, provided such fees be demanded by him at the time of service of the subpœna. [*February 24, 1891, § 2.*]

Personal attendance of witness who resides outside of the county in which the action is brought, and whose residence is not within twenty miles of the place of trial, cannot be compelled under this section; but his deposition can be taken in accordance with law, and his attendance before the officer appointed to take such deposition can be compelled: *Butcher v. Vaca Valley R. R. Co.*, 56 Cal. 589; see §§ 1598, 1602.

*Subpœna duces tecum.*

§ 1651. [394.] The subpœna may require not only the personal attendance of the person to whom it is directed at a particular time and place to testify as a witness, but may also require him to bring with him any books, documents, or things under his control; but no public officer or person having the possession or control of public records or papers which by law are required to be kept in any particular office or place shall be compelled to produce the same in any court.

*Issuance of subpœna.*

§ 1652. [395.] The subpœna shall be issued as follows:—

1. To require attendance before a court of record, or at the trial of



an issue therein, it shall be issued in the name of the state of Washington, and be under the seal of the court before which the attendance is required, or in which the issue is pending.

2. To require attendance out of such a court before a judge, justice of the peace, commissioner, referee, or other officer authorized to administer oaths or to take testimony in any matter under the laws of this state, it shall be issued by such judge, justice of the peace, commissioner, referee, or other officer before whom the attendance is required.

3. To require attendance before a commissioner appointed to take testimony by a court of any other state, territory, or count[r]y, it may be issued by any judge or justice of the peace, in places within their respective jurisdictions.

All process must run in the name of the state: Const., art. 4, sec. 27.

**Attendance before United States land officials.** — A writ of mandate will not lie to compel a judge of the superior court to issue a subpoena to certain persons, commanding them

to appear and testify before the register and receiver of a United States land-office, in a proceeding before such officers, involving the right to purchase certain public lands of the United States: *Boom v. De Haven*, 72 Cal. 280.

*Service of subpoena — Proof of, how to be made.*

§ 1653. [396.] Such subpoena may be served by any suitable person over eighteen years of age, by exhibiting and reading it to the witness, or by giving him a copy thereof, or by leaving such copy at the place of his abode. When service is made by any other person than an officer authorized to serve process, proof of service shall be made by affidavit.

*Person present may be required to testify as if subpoenaed.*

§ 1654. [397.] A person present in court, or before a judicial officer, may be required to testify in the same manner as if he were in attendance upon a subpoena issued by such court or officer.

*Liability of witness for failure to attend after service of subpoena.*

§ 1655. [398, 399.] If any person duly served with a subpoena, and obliged to attend as a witness, shall fail to do so, without any reasonable excuse, he shall be liable to the aggrieved party for all damages occasioned by such failure, to be recovered in a civil action. Such failure to attend as required by the subpoena shall also be considered a contempt, and, upon due proof, the witness may be punished by a fine not exceeding fifty dollars, and stand committed until said fine and costs are paid, or until discharged by due course of law.

**Contempt.** — This section does not authorize the superior court in which an action is pending to punish a person for contempt because he has refused to obey a subpoena issued

by a notary public, before whom his deposition was to have been taken: *Lexinsky v. Superior Court*, 72 Cal. 510.

*Attachment may issue to bring witness.*

§ 1656. [400.] The court, judge, justice of the peace, or other



officer, in such case, may issue an attachment to bring such witness before them to answer for contempt, and also testify as witness in the cause in which he was subpoenaed.

*To whom attachment shall be directed, and how executed.*

§ 1657. Such attachment may be directed to the sheriff or any constable of any county in which the witness may be found, and shall be executed in the same manner as a warrant; and the fees of the officer for issuing and serving the same shall be paid by the person against whom the same was issued, unless he show reasonable cause, to the satisfaction of the justice, for his omission to attend; in which case the party requiring such attachment shall pay all such costs. [February 24, 1891, § 3.]

*Manner of obtaining testimony of convict witness.*

§ 1658. [401.] If the witness be a prisoner confined in a jail or prison within this state, an order for his examination in prison, upon deposition, or for his temporary removal and production before a court or officer, for the purpose of being orally examined, may be issued.

*Order of court, upon application to procure convict's testimony, can only be made upon affidavit.*

§ 1659. [402.] Such order can only be made upon affidavit, showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.

## CHAPTER III.

### OF THE EXAMINATION OF PARTIES.

§ 1660. Examination of party to action — Compelling attendance of, as witness.

§ 1661. Interrogatories may be filed to obtain testimony of adverse party, and when.

§ 1662. Answers to interrogatories to be filed, and when.

§ 1663. Adverse party may be examined as witness though interrogatories have been filed.

§ 1664. Testimony of party is not conclusive.

§ 1665. Penalty for refusal of party to give testimony.

*Examination of party to action — Compelling attendance of, as witness.*

§ 1660. [403.] A party to an action or proceeding may be examined as a witness, at the instance of the adverse party, or of one of several adverse parties, and for that purpose may be compelled in the same manner and subject to the same rules of examination as any other witness to testify at the trial, or he may be examined on a commission.

*Interrogatories may be filed to obtain testimony of adverse party, and when.*

§ 1661. [404.] Instead of the examination being had at the trial,

as provided by the last section, the plaintiff, at the time of filing his complaint or afterwards, and the defendant, at the time of filing his answer or afterwards, may file in the clerk's office interrogatories for the discovery of facts and documents material to the support or defense of the action, to be answered on oath by the adverse party.

*Answers to interrogatories to be filed, and when.*

§ 1662. [405.] Such interrogatories shall be answered, and such answers filed in the clerk's office, within twenty days after the same are served on the party interrogated, unless for cause shown a further time be allowed by the court, or judge thereof.

*Adverse party may be examined as witness though interrogatories have been filed.*

§ 1663. A party to an action or proceeding, having filed interrogatories to be answered by the adverse party, as prescribed by the last two sections, shall not thereby be precluded from examining such adverse party as a witness at the trial, nor from taking his deposition to be read at the trial. [February 24, 1891, § 4.]

*Testimony of party is not conclusive.*

§ 1664. The testimony of a party, upon examination at the trial, or by deposition, or upon interrogatories filed, may be rebutted by adverse testimony. [February 24, 1891, § 5.]

*Penalty for refusal of party to give testimony.*

§ 1665. If a party refuse to attend and testify at the trial, or to give his deposition, or to answer any interrogatories filed, his complaint, answer or reply may be stricken out, and judgment taken against him, and he may also, in the discretion of the court, be proceeded against as in other cases for a contempt; *provided*, that the preceding sections shall not be construed so as to compel any person to answer any question where such answer may tend to criminate himself. [February 24, 1891, § 6.]

## CHAPTER IV.

## OF DEPOSITIONS.

- § 1666. Cases in which depositions may be taken.  
§ 1667. Time at which parties may commence to take depositions.  
§ 1668. Manner of taking depositions — Notice.  
§ 1669. Court may shorten time of notice.  
§ 1670. Witness may be subpoenaed and compelled to appear before officer taking deposition.  
§ 1671. Depositions, how taken out of state.  
§ 1672. Commission to take depositions — To whom and how issued.  
§ 1673. Notice by publication, when and how to be given.  
§ 1674. Depositions to be written, signed, and certified to.  
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§ 1676. Depositions, how to be used on trial — Objections to evidence upon the taking — Form of.  
§ 1677. Deposition shall not be used when.  
§ 1678. Deposition taken in one cause may be used in another when.  
§ 1679. Depositions lawfully taken in court below may be used on appeal.

*Cases in which depositions may be taken.*

§ 1666. [409.] The testimony of a witness may be taken by deposition, to be read in evidence in an action, suit, or proceeding pending in any court in this state, in the following cases:—

1. When the witness resides out of the subdistrict, and more than twenty miles from the place of trial;
2. When the witness is about to leave the subdistrict, and go more than twenty miles from the place of trial, and there is a probability that he will continue absent when the testimony is required;
3. When the witness is sick, infirm, or aged, so as to make it probable that he will not be able to attend at the trial;
4. When the witness resides out of the state.

The statute reported to meet the present organization of the courts having failed to pass, the section as it stands in the code of 1881 is restored.

*Time at which parties may commence to take depositions.*

§ 1667. [410.] Either party may commence taking testimony by depositions at any time after service of summons upon the defendants.

*Manner of taking depositions — Notice.*

§ 1668. Either party may have the deposition of a witness taken in this state before any judge of the superior court, justice of the peace, clerk of the supreme or superior court, mayor of a city, or notary public, by serving on the adverse party or his attorney previous notice of the time and place of examination. The notice shall be served such time before the time when the deposition is to be taken as to allow the adverse party sufficient time by the usual route of



travel to attend, and three days for preparation, exclusive of the day of service, and the examination may, if so stated in the notice, be adjourned from day to day. The notice shall specify the action or proceeding, the name of the court or tribunal in which the deposition is to be used, and the time and place of taking the deposition. It shall be served upon the adverse party, his agent, or attorney of record, or be left at his usual place of abode. [*February 24, 1891, § 7.*]

**Notice of taking deposition.** — A deposition taken upon an order without such notice, where the opposite party has not had reasonable notice, ought not to be read in evidence: *Ellis v. Jaszynsky*, 5 Cal. 444. It was held that where a deposition was taken *ex parte*, though after notice, and the witness therefor was not subjected to a cross-examination, the language used by him would be suspiciously regarded: *Spring v. Carr*, 6 Cal. 17. It being objected by plaintiff to a deposition, — 1. That the copy of the order of the judge fixing the time for taking it did not mention the notice to be given the adverse party; 2. That no correct copy of said order was served; 3. That no sufficient notice to take the deposition was ever given, — the objection was overruled because the original order of the judge, made on affidavit, fixed the time of notice at three

days, and because plaintiff's counsel acknowledged service in writing of a copy thereof, more than three days before the taking of the deposition; and it was held that there was no error in the above ruling: *Attwood v. Fricot*, 17 Cal. 37. Proof of service of the notice may be made orally as well as by affidavit: *Hobbs v. Duff*, 43 Cal. 488. A notice of the taking of a deposition in a city, but not specifying any place in the city where it will be taken, is insufficient: *Lucas v. Richardson*, 68 Cal. 618. An order shortening the time for which notice of the taking of a deposition shall be given must designate a definite time of notice: *Howell v. Howell*, 66 Cal. 390. An order providing for the taking of a deposition at a certain hour of the day on which the order was made, and directing a service of the notice "forthwith," is not sufficiently definite: *Id.*

*Court may shorten the time of notice.*

§ 1669. The court, or a judge thereof, or in an action or proceedings before a justice of the peace, the justice, may, upon sufficient cause being shown by affidavit, prescribe a shorter time for notice than that specified in the last preceding section. A copy of the order shortening the time must be served with the notice. [*Feb. 24, '91, § 8.*]

*Witness may be subpœnaed and compelled to appear before officer taking deposition.*

§ 1670. Any witness may be subpœnaed and compelled, by any officer authorized to take depositions, to appear and give his deposition at any place within twenty miles of the abode of such witness, in like manner as he may be subpœnaed and compelled to attend as a witness in any court, and he shall suffer the same penalties for a failure to attend as are prescribed in section sixteen hundred and fifty-five. [*February 24, 1891, § 9.*]

*Depositions, how taken out of state.*

§ 1671. [412.] Depositions may be taken out of the state by a judge, justice, or chancellor or clerk of any court of record, a justice of the peace, notary public, mayor, or chief magistrate of any city or town, or any person authorized by a special commission from any court of this state.

**Witness out of state.** — Where the parties stipulate that the deposition of a witness out of the state may be taken by a designated person, and when taken may be used on the

trial, they are afterwards estopped from objecting that the deposition was not taken under a commission issued by the trial court: *Palmer v. Uncas M. Co., Holm v. Uncas M. Co.*, 70 Cal. 614.

*Commission to take depositions—To whom and how issued.*

§ 1672. Any superior court in this state, or any judge thereof, is authorized to grant a commission to take depositions within or without this state. The commission must be issued to a person or persons therein named, by the clerk, under the seal of the court granting the same, and depositions under it must be taken upon written interrogatories, unless the parties otherwise agree. Before any such commission shall be granted, the person intending to apply therefor shall serve upon the adverse party a notice of his intention to make such application, stating the time when and the place where such application will be made, which notice shall be served in the same manner and for the same time as provided in section sixteen hundred and sixty-eight, unless the court or judge, for sufficient cause shown by affidavit, prescribe a shorter time. At the time the application is presented, the court or judge shall settle the interrogatories. The clerk, upon issuing the commission, shall attach the interrogatories thereto, and immediately forward the same to the commissioner. [February 24, 1891, § 10.]

*Notice of publication, when and how to be given.*

§ 1673. When the party against whom the deposition is to be read is absent from or a non-resident of the state, and has no agent or attorney of record therein, he may be notified of the taking of the deposition [or] of the application for a commission, by publication. The publication must be made three consecutive weeks, in some newspaper printed in the county where the action or proceeding is pending, if there be any printed in such county, and if not, in some newspaper printed in this state, of general circulation in that county. The publication must contain all that is required in the written or printed notice, and may be proved in the manner prescribed in case of the publication of summons. [February 24, 1891, § 11.]

*Deposition to be written, signed, subscribed, and certified to.*

§ 1674. The deposition shall be written by the officer taking the same, or by the witness, or by some disinterested person, in the presence and under the direction of such officer. When completed, it shall be carefully read to or by the witness, corrected if desired, and subscribed by him. If taken upon notice, it shall be certified by the officer substantially as follows:—

State of Washington, }  
County of ———. } ss.

I, A, B, justice of the peace in and for said county (or judge, clerk, etc., as the case may be), do hereby certify that the above deposition was taken before me, and reduced to writing by myself (or witness, as the case may be), at ———, in said county, on the ——— day of ———, 18—, at ——— o'clock, in pursuance of notice hereto annexed; that the

above-named witness, before examination, was sworn (or affirmed) to testify the truth, the whole truth, and nothing but the truth, and that the said deposition was carefully read to (or by) said witness, and then subscribed by him.

A B, Justice of the Peace.

Dated at — the — day of — 18—.

If the deposition be taken upon a commission, the commission[er] shall testify [certify] it in substantially the same manner, and annex to it the commission and interrogatories. [*February 24, 1891, § 12.*]

**Certificate.** — It was held that the certificate to a deposition must state that the deposition was read to the witness before signing; it must set forth an actual compliance with all the requirements of the statute: *Williams v. Chaulbourne*, 6 Cal. 559. Where the certificate did not state that the depositions were read to the witnesses before signing, but that the depositions were corrected by the notary under the direction of the witnesses, this was held sufficient: *Higgins v. Wortell*, 18 Cal. 333. The omission of the commissioner to append a date to his final certificate was held of no con-

sequence where at the end of the deposition there was a certificate signed by the commissioner, in the ordinary form, to the effect that the deposition was sworn to and subscribed by the witness on a particular day: *Elin v. Hill*, 27 Cal. 373. There is no necessity for the statutory certificate to be appended to the deposition of each witness, when two or more give their depositions for the same party at the same time, and before the same officer. One certificate, in due form, to all such depositions, when securely attached together, is sufficient: *Pralus v. Pacific etc. Mfg. Co.*, 35 Cal. 30.

### *Transmission and delivery of depositions.*

§ 1675. The deposition, whether taken upon notice or upon a commission, shall be inclosed in a sealed envelope, by the officer taking the same, and directed to the clerk of the court, arbitrators, referee, or justice of the peace before whom the action is pending, or to such persons as the parties, in writing, may agree upon, and either delivered to the clerk of the court or other person, or transmitted through the mail or by some private person. [*February 24, 1891, § 13.*]

**Deposition being opened by clerk, and not be received in evidence:** *Phelps v. Steamship City of Panama*, 1 Wash. 615.

### *Depositions, how to be used on trial — Objections to evidence upon the taking — Form of.*

§ 1676. [418.] Such deposition may be used by either party upon the trial, or other proceeding, against any party giving or receiving the notice, subject to all legal exceptions to the competency or credibility of the witness, or the manner of taking the deposition. But if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was taken at the time of the examination. It shall be the duty of the person taking the deposition to propound to the witness every question proposed by either party, and to note all objections to the form of any interrogatory, and when any interrogatory is objected to on account of form, unless the form is amended and the objection waived, he shall write after the question, and before the answer, the words "objected to"; and when any witness declines to answer a question on the ground that it will criminate himself, that fact shall also be noted after the question, if written down. The deposition may be taken in



the form of a narrative, or by question and answer, or partly in either form, as either party present at the examination shall require. When taken by question and answer, the officer shall first write down the question and then the answer, as nearly as may be, in the language of the witness; but when the deposition is read to the witness previous to signing it, he shall be permitted to amend his answer to any question, or any part of his deposition; such amendment, however, unless both parties shall otherwise agree, shall not be made by way of interlining or erasing, but shall be added at the end of the deposition under the title "amendment by the witness," and such amendment shall intelligibly refer to the part so amended.

**Objections to evidence, etc.** — Objection to a deposition cannot be made unless taken when it is offered in evidence: *Jones v. Love*, 9 Cal. 70; *Hobbs v. Duff*, 43 Cal. 485. A motion cannot be made to suppress the reading of a deposition; the objection must be made when it is offered in evidence: *Mills v. Dunlap*, 3 Cal. 94. Depositions are subject to all legal exceptions at the trial, except the single objections to the form of an interrogatory in case the parties attend the examination: *Lawrence v. Fulton*, 19 Cal. 690. The defendant annexed to interrogatories proposed by the plaintiff, and attached to the commission, certain objections, but it did not appear that he brought them to the attention of the court, and had a ruling thereon at the trial. The supreme court held there was no ground for saying that the court erred in overruling those objections: *Farrell v. Palmer*, 36 Cal. 191. An objection to the admission in evidence of a deposition, on the grounds that the witness had neglected to answer certain interrogatories put by the party objecting, and that the deposition was not complete or responsive, in order to be available, must call the attention of the court to the particular interrogatories which the witness had refused to answer, or the answer to

which was evasive or not fully responsive: *Gassen v. Hendrick*, 74 Cal. 444. The deposition taken on the preliminary examination sufficiently shows the grounds on which the magistrate sustained an objection to a question put to a witness, when it appears therefrom that the objection to the question was, that it was "irrelevant and immaterial," and the objection as made was sustained: *People v. Riley*, 75 Cal. 98. If the magistrate taking the deposition erroneously excludes a question asked, the error does no injury if the testimony sought to be elicited is immaterial: *People v. Kent*, 50 Cal. 137. Where the notice on which it is sought to take a deposition is insufficient, the remedy is by objection to the deposition when offered in evidence. The court cannot quash the subpoenas: *Pfister v. Superior Court*, 64 Cal. 400.

**Amending answer, effect of.** — If after depositions have been taken an amended answer is filed, the depositions will not be rejected on the trial on account of the filing of the amended answer, if the material issues made by both answers as to the subject-matter on which the depositions were taken are substantially the same: *Pio Pico v. Cuyas*, 47 Cal. 175.

*Deposition shall not be used when.*

§ 1677. If it appear at the trial that the reason for taking the deposition no longer exist, the deposition shall not be read in evidence, unless the party offering it show that another of the causes specified by section sixteen hundred and sixty-six then exists, or that the witness is dead, or cannot safely attend at the trial on account of sickness, age, or other bodily infirmity. [February 24, 1891, § 14.]

**Depositions, generally.** — Testimony that inquiries were made at the former place of business of an alleged absent witness, and at other places, of various people who had known him, and that they said that they did not know where he was, but understood that he was in another state, is sufficient to admit his deposition: *Renton v. Monnier*, 77 Cal. 449; see also *People v. Riley*, 75 Cal. 98. A deposition taken under a stipulation which provides for the admission of the deposition without conditions is governed by the stipulation, and not by the statutory provisions: *People v. Grundell*, 75 Cal.

301; see also *Robinson v. Placerville and Sacramento R. R. Co.*, 65 Cal. 263. When depositions have been taken, the party upon whose application they were taken is not bound to offer them in evidence at the trial, but may resort to other evidence. His failure to use the depositions is not a ground of surprise for which a new trial should be granted: *Heath v. Scott*, 65 Cal. 548. Answers to interrogatories in a deposition, if based upon statements made by other persons to the witness, are hearsay, and should be stricken out on motion: *Amano v. Lowell*, 66 Cal. 306.

Error in admitting depositions in evidence, without preliminary proof that the witnesses resided out of the county where the cause was being tried, is, however, waived, if the party against whom the depositions were offered dis-

pensed with the formal proof of such fact on the trial, and accepted the verbal statement of the opposing counsel as to their non-residence: *Estate of Learned*, 70 Cal. 140.

*Depositions taken in one cause may be used in another when.*

§ 1678. [420.] When the plaintiff in any action shall discontinue it, or when it shall be dismissed for any cause, and another action shall afterwards be commenced for the same cause between the same parties, or their respective representatives, all depositions lawfully taken in the first action may be used in the other, in the same manner and subject to the same conditions and objections as if originally taken for such other action; *provided*, that the deposition shall have been duly filed in the court where the first action was pending, and shall have remained in the custody of the court from the termination of the first action until the commencement of the other.

**Reading deposition in another action.**  
—Depositions taken in another court between the same parties, and in regard to the same subject-matter, may be read in evidence upon parol proof of the existence of such former action: *Ayer's Ex'r v. Chisum*, 1 West Coast Rep. 520 (N. M.). So the deposition is ad-

missible, notwithstanding the complaint has been amended subsequent to the taking thereof, provided the subject-matter remains the same: *Anthony v. Savage*, 2 West Coast Rep. 674 (Utah). But a deposition in another action between different parties to prove a marriage is inadmissible: *Murray v. Murray*, 6 Or. 26.

*Depositions lawfully taken in court below may be used on appeal.*

§ 1679. When any action shall have been appealed from one court to another, and is to be tried anew in the appellate court, all depositions lawfully taken to be used in the court from which the appeal was taken may be used in the appellate court in the same manner and subject to such exceptions for informality or irregularity, and none other, as were taken in writing to such depositions in the court below; and when an action is removed from one court to another by change of venue, all depositions previously taken in the action must be certified to the court to which the action is removed, and may be used in that court in the same manner and subject to the same exceptions as if originally taken for use therein. [*Feb. 24, 1891, § 15.*]

## CHAPTER V.

### OF DOCUMENTARY EVIDENCE.

§ 1680. Court records, etc., as evidence.

§ 1681. Records of executive and ministerial officers.

§ 1682. Certificate of residence, etc., by land-officers shall be admitted as evidence.

§ 1683. How seal of court or public office may be affixed.

§ 1684. Printed copy of statute laws, when and to what extent admissible in evidence.

§ 1685. Certified copies of deeds and other instruments shall be received in evidence when.

§ 1686. Court may order inspection and copy of writings — Penalty — Construction of section.

§ 1687. Writing may be read in evidence without proof of genuineness when.

#### *Court records, etc., as evidence.*

§ 1680. [430.] The records and proceedings of any court of the United States, or any state or territory, shall be admissible in evidence in all cases in this state when duly authenticated by the attestation of the clerk, prothonotary, or other officer having charge of the records of such court, with the seal of such court annexed.

Judicial records of states, etc.: See 181; *Bruckman v. Taussig*, 4 West Coast Rep. *Thompson v. Manrow*, 1 Cal. 428; *Parke v.* 670 (Col.).  
*Williams*, 7 Cal. 249; *Low v. Burrows*, 12 Cal.

#### *Records of executive and ministerial officers.*

§ 1681. Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state, when duly certified by the respective officers having by law the custody thereof, under their respective seals, where such officers have official seals, shall be admitted in evidence in the courts of this state. [February 24, 1891, § 16.]

#### *Certificate of residence, etc., by land-officers shall be admitted as evidence.*

§ 1682. [433.] Any certificate of residence and cultivation of the public lands issued by the surveyor-general of Oregon or state of Washington, or by the register and receiver of either of the land-offices therein, or any certificate, receipt, or exemplification of the records of either of said offices issued to any settler upon or purchaser of said lands, or in any way affecting the rights of parties to lands in this state, issued or given in pursuance of law, or as evidence of any matter recorded in either of said offices, or any copies of maps, plats, or diagrams of land claims of every nature or kind, or plats of the public surveys, certified by either of said officers, shall be admitted as evidence in all the courts of this state. In actions affecting real estate, such certificate shall be *prima facie* evidence that the title of the lands mentioned or described in such receipt is in the person or persons named therein.

#### *How seal of court or public office may be affixed.*

§ 1683. [434.] A seal of court or public office, when required to any writ, process, or proceeding to authenticate a copy of any record



or document, may be affixed by making an impression directly on the paper, which shall be as valid as if made upon a wafer or on wax.

*Printed copy of statute laws, when and to what extent admissible in evidence.*

§ 1684. [435.] Printed copies of the statute laws of any state, territory, or foreign government, if purporting to have been published under the authority of the respective governments, or if commonly admitted and read as evidence in their courts, shall be admitted in all courts in this state, and on all other occasions, as presumptive evidence of such laws.

*Certified copy of deeds and other instruments shall be received in evidence when.*

§ 1685. [431.] Whenever any deed, conveyance, bond, mortgage, or other writing shall have been recorded or filed in pursuance of law, copies of record of such deed, conveyance, bond, or other writing, duly certified by the officer having the lawful custody thereof, with the seal of the office annexed, if there be such seal, if there be no such seal, then with the official certificate of such officer, shall be received in evidence to all intents and purposes as the originals themselves.

**Certified copies as evidence, etc.** — Certified copies from the office of the secretary of state of the articles consolidating two or more railroads are, and so are the original articles, admissible to prove the consolidation: *Vance v. Kohlberg*, 50 Cal. 346.

A certified copy of the record of a power of attorney which is entitled to record is admissible in evidence: *Jones v. Marks*, 47 Cal. 242. And it will not render the copy inadmissible that the power which purported to be executed by four persons was executed by but one: *Spect v. Gregg*, 51 Cal. 198.

It is not competent to show by parol that the certificate by the custodian of the record is false: *People v. Hagar*, 52 Cal. 171. It is

for the court to determine the sufficiency or regularity of the certificate: *Dyer v. Hudson*, 11 Pac. C. L. J. 2.

That the party producing the certified copy of a deed need not account for the absence of the original, see *Gethin v. Walker*, 59 Cal. 502.

A United States patent for land may be proved by producing from the recorder's office the book in which it is recorded, without proof of the loss of the original: *Vance v. Kohlberg*, 50 Cal. 346.

Copy of a certified copy is not admissible: *Dyer v. Hudson*, 11 Pac. C. L. J. 2; 3 West Coast Rep. 206. But as to parol proof of contents of lost copy of answer, see *Williams v. Gallick*, 2 West Coast Rep. 537 (Or.).

*Court may order inspection and copy of writings — Penalty — Construction of section.*

§ 1686. [428.] Any court, or judge thereof, in which an action is pending may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any book, document, or paper in his possession, or under his control, containing evidence relating to the merits of the action or defense therein. If compliance with the order be refused, the court may exclude the book, document, or paper from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume it to be such as he alleges it to be, and the court may also punish the party refusing as for contempt. This section shall not be

construed to prevent a party from compelling another to produce books, papers, or documents where he is examined as a witness.

Parol evidence of contents of notice to produce writings, etc., is admissible, without notice upon the opposite party, upon whom it was served, to produce it: *Gethin v. Walker*, 59 Cal. 502.

*Writing may be read in evidence without proof of genuineness when.*

§ 1687. [429.] If either party, at any time before trial, allow the other an inspection of any writing material to the action, whether mentioned in the pleadings or not, and deliver to him a copy thereof, with notice that he intends to read the same in evidence on the trial of the cause, it may be so read without proof of its genuineness or execution, unless denied by affidavit before the commencement of the trial. If such denial be made of any writing not mentioned in the pleadings, the court may give time to either party to procure evidence, when necessary for the furtherance of justice.

## CHAPTER VI.

### OF PROCEEDINGS TO PERPETUATE TESTIMONY.

§ 1688. Statement to procure order allowing examination of witness, what to contain — Filing.

§ 1689. Hearing of application — Notice, personal service of, and by publication.

§ 1690. Examination of witness to be allowed when.

§ 1691. Deposition, how to be taken and returned — Interrogatories.

§ 1692. Deposition to be filed when returned — How used — Objections.

*Statement to procure order allowing examination of witness, what to contain — Filing.*

§ 1688. When any person shall be desirous to perpetuate the testimony of any witness he shall make a statement in writing, setting forth briefly and substantially his title, claim or interest in or to the subject concerning which he desires to perpetuate the evidence, and the names of all the persons interested or supposed to be interested therein, and also the name of the witness proposed to be examined, which statement shall be under oath, and filed in the superior court. If the subject of the proposed deposition relate to real property within this state, the statement shall be filed in the county where the lands, or any part thereof, lie; in other cases, in the county where the parties interested, or some of them, reside. Upon such statement, an application may be made to such court, or judge thereof, to allow the examination of such witness. [February 24, 1891, § 17.]

*Hearing of application — Notice, personal service of, and by publication.*

§ 1689. [424.] The court or judge shall appoint a time and place for hearing such application, and shall order notice thereof and of the statement to be served on all persons mentioned therein as adversely

interested in the matter; the notice shall be served personally on all those living in the state at least twenty days before the time of hearing the application; upon those who are not residents of the state, it shall be served by publication or otherwise, in the same manner as a notice is served upon a non-resident.

*Examination of witness to be allowed when.*

§ 1690. If upon hearing of the parties, or of the applicant alone, should no adverse party appear, the court or judge shall be satisfied that there is sufficient cause for taking the deposition, an order shall be made allowing the examination of the witness; and such court or judge may direct a commission to issue therefor in like manner as a commission to take the testimony of witnesses in actions or proceedings pending in such court. [February 24, 1891, § 18.]

*Deposition, how to be taken and returned—Interrogatories.*

§ 1691. [426.] The deposition of such witness, whether residing in this state or not, shall be taken upon written interrogatories filed by the applicant and cross-interrogatories filed by any party adversely interested, if he shall think fit, and it shall be taken and returned substantially in the same manner as if taken upon commission to be used in any cause pending in the same court.

*Deposition to be filed when returned—How used—Objections.*

§ 1692. [427.] The deposition, when returned, shall be filed in the office of the clerk of the court by whom the commission was issued; and if a trial be had between the person at whose request the deposition was taken and the person named in the statement, or any of them, or their successors in interest, upon proof of the death or insanity of the witness, or his inability to attend the trial by reason of age, sickness, or settled infirmity, the deposition, or a certified copy thereof, may be used by either party, subject to all legal objections. But if the parties attend at the examination, no objections to the form of the interrogatory shall be made at the trial, unless the same were taken at the time of the examination.



## CHAPTER VII.

## OF OATHS AND AFFIRMATIONS.

- § 1693. Persons authorized to take testimony and administer oaths.  
§ 1694. Oath, how to be administered.  
§ 1695. Peculiar form of swearing may be adopted in certain cases.  
§ 1696. Person may be sworn according to ceremonies of his religion, when  
§ 1697. Person may affirm and not swear, when.  
§ 1698. Affirmation equivalent to oath, when.

*Persons authorized to take testimony and administer oaths.*

§ 1693. Every court, judge, clerk of a court, justice of the peace, or notary public is authorized to take testimony in any action, suit, or proceeding, and such other persons in particular cases as authorized by law. Every such court or officer is authorized to administer oaths and affirmations generally, and every such other persons in such particular case as authorized. [December 21, 1869, § 1. In effect immediately.]

See § 32, subdivision 7, and § 39, subdivision 3.

*Oath, how to be administered.*

§ 1694. An oath may be administered as follows: The person who swears holds up his hand, while the person administering the oath thus addresses him: "You do solemnly swear that the evidence you shall give in the issue (or matter) now pending between — and — shall be the truth, the whole truth, and nothing but the truth, so help you God." If the oath be administered to any other than a witness giving testimony, the form may be changed to: "You do solemnly swear you will true answers make to such questions as you may be asked," etc. [December 21, 1869, § 2. In effect immediately.]

*Peculiar form of swearing may be adopted in certain cases.*

§ 1695. Whenever the court or officer before which a person is offered as a witness is satisfied that he has a peculiar form of swearing connected with or in addition to the usual form of administration, which, in witness's opinion, is more solemn or obligatory, the court or other officer may, in its discretion, adopt that mode. [December 21, 1869, § 3. In effect immediately.]

*Person may be sworn according to ceremonies of his religion, when.*

§ 1696. When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the ceremonies of his religion, if there be any such. [December 21, 1869, § 4. In effect immediately.]

*Person may affirm and not swear, when.*

§ 1697. Any person who has conscientious scruples against taking

an oath may make his solemn affirmation, by assenting, when addressed, in the following manner: "You do solemnly affirm that," etc., as in section sixteen hundred and ninety-four. [*December 21, 1869, § 5. In effect immediately.*]

*Affirmation equivalent to oath, when.*

§ 1698. Whenever an oath is required, an affirmation as prescribed in the last section is to be deemed equivalent thereto, and a false affirmation is to be deemed perjury equally with a false oath. [*December 21, 1869, § 6. In effect immediately.*]

## CHAPTER VII.

### OF THE RESTORATION OF LOST RECORD EVIDENCE.

- § 1699. Copy of lost court record may be substituted for original when.
- § 1700. Court records lost or destroyed — How replaced.
- § 1701. Suit to restore lost records — Subsequent proceedings, and effect thereof.
- § 1702. Hearing of application — Admission of oral testimony, etc.
- § 1703. Time for appeal, etc. — How extended where judgment or order is destroyed.
- § 1704. Costs, how taxed upon application to restore lost record.
- § 1705. Proceedings for restoration of lost or destroyed probate records.
- § 1706. Costs, by whom to be paid.

*Copy of lost court record may be substituted for original when.*

§ 1699. Whenever a pleading, process, return, verdict, bill of exceptions, order, entry, stipulation, or other act, file, or proceeding in any action or proceeding pending in any court of this state shall have been lost or destroyed by fire or otherwise, or is withheld by any person, such court may, upon the application of any party to such action or proceeding, order a copy or substantial copy thereof to be substituted.

Presented to the governor for his approval approval or objection within the time prescribed March 28, 1890, and not returned with either by the constitution, article 3, section 12.

*Court records lost or destroyed — How replaced.*

§ 1700. Whenever the record required by law of the proceedings, judgment, or decree in any action or other proceeding of any court in this state in which a final judgment has been rendered, or any part thereof, is lost or destroyed by fire or otherwise, such court may, upon the application of any party interested therein, grant an order authorizing such record or parts thereof to be supplied or replaced,—1. By a certified copy of such original record or part thereof, when the same can be obtained; 2. By a duly certified copy of the record in the supreme court of such original record of any action or proceeding that may have been removed to the supreme court, and remain recorded or filed in said supreme court; 3. By the original pleadings, entries, papers, and files in such action or proceeding, when the same can be obtained; 4. By an agreement in writing, signed by all the parties to such action or proceeding, their representatives or attorneys, that a substituted copy of such original record is substantially correct.

See note to § 1699, *ante*.

*Suit to restore lost records — Subsequent proceedings, and effect thereof.*

§ 1701. Whenever the record required by law, or any part thereof, of the proceedings or judgment or decree in any action or other proceeding of any court in this state in which the final judgment has been rendered is lost or destroyed by fire or otherwise, and such loss can-



not be supplied or replaced as provided in section seventeen hundred, any person or party interested therein may make a written application to the court to which said record belongs, setting forth the substance of the record so lost or destroyed, which application shall be verified in the manner provided for the verification of pleadings in a civil action, and thereupon summons shall issue, and actual service, or service by publication, shall be made upon all persons interested in or affected by said original judgment or final entry, in the manner provided by law for the commencement of civil actions, provided the parties may waive the issuing or service of summons, and enter their appearance to such application; and upon the hearing of such application, without further pleadings, if the court finds that such record has been lost or destroyed, and that it is enabled, by the evidence produced, to find the substance, or effect thereof, material to the preservation of the rights of the parties thereto, it shall make an order allowing a record, which record shall recite the substance and effect of said lost or destroyed record, or part thereof, and the same shall thereupon be recorded in said court, and shall have the same effect as the original record would have if the same had not been lost or destroyed, so far as it concerns the rights of the parties so making the application, or persons or parties so served with summons, or entering their appearance, or persons claiming under them by a title acquired subsequently to the filing of the application.

See note to § 1699, *ante*.  
**Court where the "record belongs."**— and probate courts, after the second Monday of January, 1891, belong in the superior courts:  
 By the constitution, the records of the district Art. 27, secs. 8, 10.

*Hearing of application—Admission of oral testimony, etc.*

§ 1702. Upon the hearing of the application provided in section seventeen hundred and one, the court may admit in evidence oral testimony, and any complete or partial abstract of such record, docket entries, or indexes, and any other written evidence of the contents or effect of such records and published reports concerning such actions or proceedings, when the court is of opinion that such abstracts, writings, and publications were fairly and honestly made before the loss of such records occurred.

See note to § 1699, *ante*.

*Time for appeal, etc.—How extended where judgment or order is destroyed.*

§ 1703. Whenever a lost or destroyed judgment or order is one to which either party has a right of appeal, the time intervening between the filing of the application mentioned in section seventeen hundred and one and the final order of the court thereon shall be excluded in computing the time within which such proceeding or appeal may be taken as provided by law.

See note to § 1699, *ante*.

*Costs, how taxed upon application to restore lost record.*

§ 1704. The costs to be taxed upon an application to restore a lost or destroyed record shall be the same as are provided for like service in civil actions, and may be adjudged against either or any party to such proceeding or application, or may, in the discretion of the court, be apportioned between such parties.

See note § 1699, *ante*.

*Proceedings for restoration of lost or destroyed probate records.*

§ 1705. In case of the loss or destruction by fire or otherwise of the records, or any part thereof, of any probate court, or superior court having probate jurisdiction, the superior court may proceed, upon its own motion, or upon application in writing of any party in interest, to restore the records, papers, and proceedings of either of said courts relating to the estates of deceased persons, including recorded wills, wills probated or filed for probate in such courts, all marriage records, and all other records and proceedings, and for the purpose of restoring said records, wills, papers, or proceedings, or any part thereof, may cause citations or other process to be issued to any and all parties to be designated by him, and may compel the attendance in court of any and all witnesses whose testimony may be necessary to the establishment of any such record or part thereof, and the production of any and all written or documentary evidence which may be by him deemed necessary in determining the true import and effect of the original record, will, paper, or other document belonging to the files of said court; and may make such orders and decrees establishing such original record, will, paper, document, or proceeding, or the substance thereof, as to him shall seem just and proper.

See note to § 1699, *ante*.

*Costs, by whom to be paid.*

§ 1706. The costs incurred in the superior courts in proceedings under this chapter shall be paid by the party or parties interested in such proceedings, or in whose behalf such proceedings are instituted.

See note to § 1699, *ante*.

## TITLE XVIII. OF CONSTRUCTION.

§ 1707. Provisions will be liberally construed.

§ 1708. Laws continued.

§ 1709. Word "person" includes what.

§ 1710. Term indicating "officer," how construed.

§ 1711. Words importing number and gender, how construed.

§ 1712. Word "month" construed to mean "calendar month."

### *Provisions to be liberally construed.*

§ 1707. The provisions of this code shall be liberally construed, and shall not be limited by any rule of strict construction. [*February 24, 1891, § 1.*]

Provisions of code are to be liberally construed, etc.: *Paije v. Carroll*, 61 Cal. 211, 215; *People v. Soto*, 49 Cal. 67; *Ex parte Gutierrez*, 45 Cal. 429.

### *Laws continued.*

§ 1708. The provisions of a statute, so far as they are substantially the same as those of a statute existing at the time of their enactment, must be construed as continuations thereof. [*February 24, 1891, § 1.*]

### *Word "person" includes what.*

§ 1709. The term "person" may be construed to include the United States, this state, or any state or territory, or any public or private corporation, as well as an individual. [*February 24, 1891, § 1.*]

### *Term indicating "officer," how construed.*

§ 1710. [755.] Whenever any term indicating an officer is used it shall be construed, when required, to mean any person authorized by law to discharge the duties of such officer.

### *Words importing number and gender, how construed.*

§ 1711. Words importing the singular number may also be applied to the plural of persons and things; words importing the plural may be applied to the singular; and words importing the masculine gender may be extended to females also. [*February 24, 1891, § 1.*]

### *Word "month" construed to mean "calendar month."*

§ 1712. The word "month" or "months," whenever the same occurs in the statutes of this state now in force, or in statutes hereinafter enacted, or in any contract made in this state, shall be taken and construed to mean "calendar month." [*February 24, 1891, § 1.*]



# PENAL CODE.

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## CHAPTER I.—OF CRIMES AGAINST THE PERSON.

### II.—OF CRIMES AGAINST PROPERTY.

### III.—OF CRIMES AGAINST THE PUBLIC PEACE.

### IV.—OF CRIMES AGAINST PUBLIC JUSTICE.

### V.—OF CRIMES AGAINST PUBLIC POLICY.

### VI.—OF CRIMES BY AND AGAINST PUBLIC OFFICERS.

### VII.—OF CRIMES AGAINST PUBLIC DECENCY AND GOOD MORALS.

### VIII.—OF CRIMES AGAINST PUBLIC HEALTH.

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### XI.—OF UNLAWFUL DESTRUCTION OF GAME AND FISH.

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### XIII.—OF THE PUNISHMENT OF MISDEMEANORS.

### XIV.—OF ATTEMPTS TO COMMIT CRIMES.

## CHAPTER I.

### OF CRIMES AGAINST THE PERSON.

- § 1. Murder in first degree defined.
- § 2. Placing obstruction, etc., upon railroad, whereby death ensues, is murder in first degree.
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- § 39. Punishment for horsewhipping, etc.

### *Murder in first degree defined.*

§ 1. Every person who shall purposely, and of deliberate and pre-meditated malice, or in the perpetration, or attempt to perpetrate, any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill another, shall be deemed guilty of murder in the first degree, and upon conviction thereof, shall suffer death. But this shall in no case prevent the exercise of the pardoning power of the governor, or the authority to commute the punishment from that of death to imprisonment for life. [March 2, 1891, § 1.]

**Degrees of murder.** — Murder is divided into different degrees, distinguished from each other by the malice which accompanies the act. The difference in degrees results from the condition of the mind in which the design is executed, not from the speed with which it is executed: *Halbert v. State*, 3 Tex. App. 656. This division into degrees seeks only to graduate the punishment in proportion to the atrocity of the crime: *Commonwealth v. Wicke*, 2 Va. Cas. 387. Presumptively every killing is murder, but so far as the degree is concerned, no presumption arises from the mere fact of the killing, considered apart from the circumstances: *People v. Belencia*, 21 Cal. 544. It is not the province of the court to instruct the jury as to the degree of murder established by the evidence, and it should be left to the jury to determine that question: *People v. Hunt*, 59 Cal. 430; *People v. Woody*, 45 Cal. 289; *People v. Gibson*, 17 Cal. 283; but if there is no evidence of facts or circumstances such as would, under the law, reduce the crime charged to manslaughter, the judge may so inform the jury: *State v. Garraud*, 5 Or. 216. The jury may find the party guilty of less than mur-

der, — say, manslaughter: *People v. Estrado*, 49 Cal. 171. A party indicted for murder in the first degree may be convicted of any included inferior offense: *State v. Grant*, 7 Or. 414; *State v. Wintzingerode*, 9 Or. 153. And such conviction acquits him of the higher offense: *Morehead v. State*, 34 Ohio St. 412. Plea of not guilty does not admit degree of crime charged if charge be proven: *State v. Whitney*, 7 Or. 386.

**Murder in the first degree.** — All murder committed with express malice or in the commission of a felony within the classes described in this section is murder in the first degree: *State v. Garraud*, 5 Or. 216; *State v. Brown*, 7 Or. 186. Killing in the course of commission of one of the named felonies is murder in the first degree, because in such a case a purpose to kill is incontrovertibly implied from the crime in which the defendant was engaged at the time: *State v. Brown*, 7 Or. 186. Killing by poison is murder in the first degree: *Cox v. State*, 5 Tex. App. 493; *People v. Sanchez*, 24 Cal. 17; and if the jury bring in a verdict of manslaughter, it will be set aside: *People v. Dailey*, 59 Cal. 600. It is not enough merely

to prescribe poison, but it must be swallowed pursuant to directions: *Robbins v. State*, 8 Ohio, 133; but putting poison for that purpose where deceased would take it constitutes the crime: *Sumpter v. State*, 11 Fla. 247. Participating in a lynching is murder in the first degree: 1 Wharton's Crim. Law, 8th ed., sec. 399. Mere threats against life will not justify killing, nor reduce it to manslaughter: *Harris v. State*, 47 Miss. 318. Belief by the accused that the deceased had seduced the former's wife cannot reduce murder from the first to the second degree: *People v. Hurtado*, 63 Cal. 288. See *People v. Mortier*, 58 Cal. 262, where the evidence was of murder in the first degree. Administering drugs to produce an abortion, if it results in the death of the woman, is not murder in the first degree, unless the drug was administered with intent to kill the woman: *Commonwealth v. Keeper*, 2 Ashm. 227. Killing of a person when intentionally shooting at another constitutes murder: *State v. Johnson*, 7 Or. 164. Evidence of concealment of weapons is admissible to show intent, though they were not used: *State v. Wintzingerode*, 9 Or. 153.

**Killing in perpetration of felonies named** in this section is murder, though the accused did not himself inflict the mortal wound, if present aiding and abetting the act: *United States v. Ross*, 1 Gall. 624; *People v. Woody*, 45 Cal. 289; *Ruloff v. People*, 45 N. Y. 213; and it has been held that one participating in a robbery is guilty of murder in the first degree if another who is acting with him in the commission of the robbery commits murder, even though the former does not intend to take life, and prohibits his associates from so doing: *State v. Johnson*, 7 Or. 210; *People v. Vasquez*, 49 Cal. 561; but see *People v. Knapp*, 12 Mich. 112, where it is held otherwise. A defendant charged with murder, who is convicted, is not prejudiced by an instruction that if the killing was committed after the robbery was committed, he should be acquitted, though the instruction is itself erroneous: *State v. Brown*, 5 Or. 186.

**Indictment for murder, sufficiency of:** See notes to § 1244, Code of Procedure.

**Malice and premeditation.** — It is said that express malice is shown by killing another with a sedate and deliberate mind and a formed design, and without circumstances of extenuation, excuse, or justification: *Evans v. State*, 6 Tex. App. 613; *Summers v. State*, 5 Tex. App. 365. Premeditation and deliberation are essential to constitute murder in the first degree: *People v. Williams*, 73 Cal. 531. The act should not only be willful, premeditated, malicious, and without legal justification, but it must have been committed with the formed intention to take life: *Commonwealth v. Murray*, 2 Ashm. 41; *Commonwealth v. Williams*, 2 Ashm. 69; *Kennedy v. Commonwealth*, 14 Bush, 340; a fixed design that the act shall result in

the death of the party assaulted: *Swan v. State*, 4 Humph. 136; *Riley v. State*, 9 Humph. 657; a fully formed and conscious design to kill, and with a weapon prepared for the purpose: *Commonwealth v. Drum*, 58 Pa. St. 1. Deliberation implies some degree of reflection: *Jones v. Commonwealth*, 75 Pa. St. 403. But there is no definite space of time fixed by law which must elapse between the formation of the intention to kill and the act of killing, to constitute it murder in the first degree; but the evidence must show a design to kill, formed in cool blood, and not hastily upon the occasion: *State v. Garraud*, 5 Or. 216. It is held that the formation of the intention and the act of killing may be as instantaneous as successive thoughts of the mind. If the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer, it is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing: *People v. Nichol*, 34 Cal. 211; *People v. Long*, 39 Cal. 694; *People v. Williams*, 43 Cal. 344; *People v. Cotta*, 49 Cal. 166; *State v. Ah Mook*, 12 Nev. 369; *McAdams v. State*, 25 Ark. 405.

The reflection and predetermination may take place even at the moment of committing the act, and, like any other fact, may be proved by circumstances which exclude every reasonable doubt: *Whitford v. Commonwealth*, 6 Rand. 722; *People v. Freck*, 48 Cal. 436; *State v. Ah Lee*, 8 Or. 214. Deliberation and premeditation and malice must be proved by the prosecution: *Goodall v. State*, 1 Or. 334; are not presumed from the mere fact of unlawful homicide; but they may be inferred from the circumstances surrounding the killing: *State v. Ah Lee*, 8 Or. 214. The question of the premeditation and deliberation of the defendant is one which it is peculiarly the province of the jury to determine: *People v. Valencia*, 43 Cal. 552; *People v. Martinez*, 66 Cal. 278. When no considerable provocation for the killing appears, malice is implied; and if the killing is with malice, it is unlawful: *People v. Knapp*, 71 Cal. 1; *People v. Hamblin*, 68 Cal. 101. Evidence of threats, of preparation of weapons, search for the victim, nature of the instrument used, the manner of using it, etc., is competent to prove the premeditation: See *Respublica v. Bob*, 4 Dall. 145; *Commonwealth v. Williams*, 2 Ashm. 69; *Birens v. State*, 11 Ark. 455; *Fields v. State*, 52 Ala. 348.

Evidence of concealment of weapons for the purpose of using them, though they were not in fact used, is admissible to show premeditation: *State v. Wintzingerode*, 9 Or. 153.

Where the killing was done intentionally, the use of a deadly weapon raises a presumption that it was done maliciously: *State v. Bertrand*, 3 Or. 61.

**Pardoning power of governor:** See § 1356, Code of Procedure.

*Placing obstructions, etc., upon railroad, whereby death ensues, is murder in first degree.*

§ 2. [787.] Any person or persons who shall willfully and maliciously displace any switch or rail, disturb, injure, or destroy any part



of a track or bridge, of any railroad, or place any obstruction thereon, with intent that any person or property passing over said railroad should thereby be injured, and human life shall thereby be destroyed, such person or persons so offending shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death. But this shall in no case prevent the exercise of the pardoning power of the governor, or authority to commute.

**"Willfully"** is equivalent to **"knowingly"**: *Wong v. Astoria*, 13 Or. 538. An act is **"willful"** when done with deliberation: *People v. Sheldon*, 68 Cal. 434. **Pardoning power of governor:** See § 1356, Code of Procedure.

*Murder in second degree defined.*

§ 3. [790.] Every person who shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree, and upon conviction thereof shall be imprisoned in the penitentiary for a term not less than ten nor more than twenty years, and kept at hard labor.

**Murder in the second degree.** — All murder not in the first degree is murder in the second degree: *People v. Sanchez*, 24 Cal. 17; *Singleton v. State*, 1 Tex. App. 501. The distinction between murder in the first and second degrees is, that in the former it must be committed either premeditatedly and maliciously or in the commission of or attempt to commit rape, arson, robbery, or burglary, etc.; while in the latter it is committed willfully and maliciously, but without deliberation: See *State v. Holme*, 54 Mo. 153.

*Survivor of fatal duel is guilty of murder in second degree.*

§ 4. [791.] If either party to a duel be killed, the survivor shall be deemed guilty of murder in the second degree.

*Same — Person inflicting mortal wound is guilty when.*

§ 5. [792.] If any person shall by previous appointment made within fight a duel without this state, and in so doing shall inflict a mortal wound upon any person, whereof the person so injured shall die, such person so offending shall be deemed guilty of murder in the second degree within any county in this state.

*Second at duel resulting in death is guilty of manslaughter.*

§ 6. [797.] Any person who shall be present at a duel as second, when either party thereto shall be killed, or a mortal wound inflicted, and whereof death shall ensue, shall be deemed guilty of manslaughter.

*Manslaughter defined.*

§ 7. Every person who shall unlawfully kill any human being without malice, express or implied, either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act, shall be deemed guilty of manslaughter. [March 2, 1891, § 2.]

**Manslaughter.** — The presence or absence of malice is the distinguishing feature between murder and manslaughter: *People v. Crowey*, 56 Cal. 36; *United States v. Outerbridge*, 5 Saw. 620. Neither malice nor deliberation is essential to unlawful killing: *Commonwealth v.*

*Webster*, 5 Cush. 295; 52 Am. Dec. 711. The unnecessary killing of another while resisting an attempt to commit a felony or do some other unlawful act, or after failure or abandonment of such attempt, is manslaughter: *Long v. State*, 52 Miss. 23. There must be in murder what is called "malice"; namely, either a purpose to kill, or else a purpose to do an act of violence which might reasonably be supposed would cause death, and which does cause death: *Commonwealth v. Sturtevant*, 117 Mass. 122; Wharton on Homicide, 742.

The law, in consideration of human weakness, makes the offense manslaughter when it is committed under the influence of passion caused by an insult or provocation sufficient to excite an irresistible passion in a reasonable person, — one of ordinary self-control. "If defendant was so far in possession of his mental faculties as to be capable of knowing that the act of killing was wrong, any partial defect of understanding which might cause him more readily to give way to passion than a man ordinarily reasonable cannot be considered for any purpose. To reduce the offense to manslaughter, the provocation must at least be such as would stir the resentment of a reasonable man": *People v. Hurtado*, 63 Cal. 288.

Whether a killing is murder or manslaughter does not depend upon the fact whether or not a dangerous weapon was used; and an instruction which makes the character of the crime depend, not upon the intention with which an act was done, but upon the nature of the instrument used, is error: *People v. Crowley*, 56 Cal. 36. But it is held that if the weapon or means used is one not likely to produce death, the killing is only manslaughter if no felonious purpose be shown: *Wellar v. People*, 30 Mich. 16; *Copeland v. State*, 7 Humph. 479. Where death results from a blow or kick not likely to produce death, it is manslaughter: *Wellar v. State*, 30 Mich. 16.

**Voluntary manslaughter.** — Voluntary manslaughter is a killing by design, whereas involuntary manslaughter consists of a killing without design or intent: *Bruner v. State*, 58 Ind. 159; *Brown v. State*, 28 Ga. 215. To constitute voluntary manslaughter, there must be a criminal intent, or negligence so gross as to imply it: *Hampton v. State*, 45 Ala. 82; as where death results from an unlawful act designed to effect another object: *State v. Turner, Wright*, 23. If the killing was done unintentionally during an affray, or intentionally in hot blood engendered, but without malice, it is manslaughter: *Patterson v. State*, 66 Ind. 190; *Ex parte Moore*, 30 Ind. 197. No words of reproach, however grievous, are sufficient provocation to reduce the offense of intentional homicide from murder to manslaughter: *People v. Murbach*, 64 Cal. 369; *People v. Tamplin*, 62 Cal. 472; *People v. Turley*, 50 Cal. 469; *People v. Butler*, 8 Cal. 435; *Commonwealth v. Webster*, 5 Cush. 295.

**Heat of passion.** — To constitute killing voluntary manslaughter, it must have been done in the heat of passion, upon adequate provocation, and these must concur: *State v. Hill*, 4 Dev. & B. 491. If sufficient time has elapsed for reason to resume its sway, the crime is not committed in the heat of passion: *Smith v. State*, 49 Ga. 482; and what is a sufficient time for the passions to cool is a question of law: *State v. Moore*, 69 N. C. 267; but whether there has been a cooling time is a question of fact: *McCann v. People*, 6 Park. Cr. 629; *Cates v. State*, 50 Ala. 166.

**Provocation.** — No provocation can justify or excuse an unlawful killing, but it may reduce it to manslaughter: *State v. Crozier*, 12 Nev. 300. The provocation must be great and sudden: *State v. Murphy*, 61 Me. 56. Generally no provocation short of a battery, or at least an assault, will extenuate killing to manslaughter: *State v. Barfield*, 8 Ired. 344; nor will moderate provocation given by a woman to a man of average strength, even though it be a blow: *Commonwealth v. Mosler*, 4 Pa. St. 268. The crime will not be extenuated by any trivial provocation which in point of law may amount to an assault, nor will it in every case where a blow is struck: *Commonwealth v. Mosler*, 4 Pa. St. 268. The assault must be of a character from which hot blood might ensue: *Nichols v. Commonwealth*, 11 Bush, 575. An unintentional and trivial assault is no palliation; as merely jostling against a person on a street: *State v. Toohy*, 2 Rice, 104. But jostling a person, if made with such apparent insolence as to provoke a quarrel, if hastily resented in hot blood, reduces the killing to manslaughter: *Felix v. State*, 18 Ala. 720. Striking with an ax without striking distance will not amount to a legal provocation: *State v. Barker*, 1 Jones, 267. If the provocation be so slight as to show an abandoned or malignant heart, it is murder: *Clarke v. State*, 35 Ga. 81. The doing of a legal act is no provocation such as will extenuate: *Hinton v. State*, 24 Tex. 454; nor is striking with a small cane in return for opprobrious words: *Thompson v. State*, 55 Ga. 47; nor a mere civil trespass: *Carrol v. State*, 23 Ala. 28.

**Involuntary manslaughter.** — Involuntary manslaughter is the accidental killing of a human being in the prosecution of some unlawful act not felonious, or in the improper performance of some lawful act: *State v. Benham*, 23 Iowa, 154. So accidental killing in the prosecution of some unlawful act is involuntary manslaughter, as accidentally killing an antagonist with a weapon under circumstances in which it is not lawful to use such a weapon in his defense: *State v. Benham*, 23 Iowa, 154; or contrary to intention, in the sudden heat of passion, contrary to expectation, and with a weapon not calculated to produce death: *Commonwealth v. McAfee*, 108 Mass. 458. A killing through negligence in a legal business may constitute manslaughter: *State v. Justus*, 11 Or. 179.

*Person assisting another to commit suicide is guilty of manslaughter.*

§ 8. [794.] Every person deliberately assisting another in the commission of self-murder shall be deemed guilty of manslaughter.



*One who overloads vessel, whereby death results, is guilty of manslaughter.*

§ 9. [795.] Any person navigating any boat or vessel for gain, who shall willfully or negligently receive so many passengers, or such a quantity of other lading, that by means thereof such boat or vessel shall sink or overset, and thereby any human being shall be drowned or otherwise killed, shall be deemed guilty of manslaughter.

*Officers of steamboats are guilty of manslaughter when.*

§ 10. [796.] If the captain or any other person having charge of any steamboat used for the conveyance of passengers, or if the engineer or other other person having charge of the boiler of such boat, or of any other apparatus for the generation of steam, shall, from ignorance or gross neglect, or for the purpose of excelling any other boat in speed, create, or allow to be created, such an undue quantity of steam as to burst or break the boiler or other apparatus in which it shall be generated, or any apparatus or machinery connected therewith, by which bursting or breaking any person shall be killed, every such captain, engineer, or other person shall be deemed guilty of manslaughter.

*Punishment for manslaughter.*

§ 11. [798.] Any person convicted of manslaughter shall be punished by imprisonment in the penitentiary not less than one year nor more than twenty years, and shall be fined in any sum not exceeding five thousand dollars.

*Malicious mayhem defined—Punishment for.*

§ 12. [803.] Every person who, on purpose, and of malice aforethought, shall unlawfully disable the tongue, put out an eye, cut or bite off the nose, ear, lip, or other member of any person, with intent to disfigure or disable such person, shall be deemed guilty of malicious mayhem, and upon conviction thereof shall be imprisoned in the penitentiary not more than fourteen years nor less than one year, and be fined in any sum not exceeding one thousand dollars.

**Mayhem.**—The ear is a "member" of a person's body, and biting it off is mayhem: *People v. Golden*, 62 Cal. 542. In *Tully v. People*, 67 N. Y. 18, it was held that in an indictment for mayhem a premeditated design to maim must be averred, and that the jury must find that there was such design before they could convict. The manner in which this design was evinced, however, and the circumstances establishing it, were held to be matters of evidence, to be proved on the trial, and not necessary to be averred. The issuable fact being whether the particular injury was deliberately and intentionally committed, where a maiming is proved to have been done, the

commission of the act with intent to maim is *prima facie* to be inferred: *State v. Girkin*, 1 Ired. 121; *State v. Simmons*, 3 Ala. 497. In New York it must appear that there was a lying in wait, or some other act, showing a premeditated design to do the act complained of: *Godfrey v. People*, 63 N. Y. 207, reversing 5 Hun, 369. Although a specific intent must be shown, the duration of this intent is not material: *Foster v. People*, 50 N. Y. 598; *Godfrey v. People*, 63 N. Y. 207; *Mollette v. State*, 49 Ala. 18; *Slattery v. State*, 41 Tex. 619.

An offense made punishable by this section may be denominated mayhem in the indictment: *State v. Vowels*, 4 Or. 324.



*Simple mayhem defined—Punishment for.*

§ 13. [804.] Every person who shall violently and unlawfully, but without premeditation, deprive another of the use of any bodily member, or who shall unlawfully and willfully, but without premeditation, disable the tongue or eye, or bite the nose, ear, or lip of another, shall be deemed guilty of simple mayhem, and on conviction thereof, shall be imprisoned in the county jail not more than one year nor less than one month, and be fined in any sum not exceeding two thousand dollars, or fined only.

*Kidnaping defined—Punishment for.*

§ 14. [817.] Every person who shall steal and take, or forcibly and unlawfully arrest, any person, and convey such person to parts without the state of Washington, or aid or abet therein, or who shall forcibly and unlawfully take or assist, or aid or abet, in forcibly and unlawfully taking or arresting any person, with intent to take such person to parts without said state, without having first established a claim upon the services of such person, according to the laws of this state or of the United States, shall be deemed guilty of kidnaping, and upon conviction thereof shall be imprisoned in the penitentiary not more than fourteen nor less than one year, and be fined not more than five thousand dollars nor less than one hundred dollars.

**Kidnaping**, at the common law, is seizing a person, and carrying him to a place where he is out of the protection of the law: 1 Wharton's *Crim. Law*, 8th ed., sec. 590. As defined by Blackstone, it is the forcible abduction or stealing away of a man, woman, or child from their own country, and sending them into another: 4 *Bla. Com.* 219. It is considered an aggravated species of false imprisonment: *Click v. State*, 3

*Tex.* 282. The requisites of an indictment charging kidnaping are, — 1. An averment of an assault; 2. The carrying away or transporting of the party injured from his own state or country into another, unlawfully, and against his will: *Click v. State*, 3 *Tex.* 282; see *People v. Chu Quong*, 15 *Cal.* 332; see also 1 *Archbold's Crim. Pl. & Pr.* 987.

*Punishment for kidnaping child.*

§ 15. [818.] If any person maliciously, forcibly, or fraudulently lead, take, decoy, or entice away any child under the age of twelve years, with the intent to detain or conceal such child from its parent, guardian, or other person having the lawful charge of such child, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment.

**Kidnaping of child.** — The intent to detain and conceal is the gist of the offense under this section; and it is unnecessary that the abduction should be accompanied with any removal into another county, state, or territory, or a design to remove the party beyond the limits of the state: *People v. Chu Quong*, 15 *Cal.* 332. It is not necessary that any actual violence or force should be used, nor is a transportation to a foreign country necessary to

complete the offense: *State v. Rollins*, 8 *N. H.* 550; *Moody v. People*, 20 *Ill.* 315; see *Redfield v. State*, 24 *Tex.* 133. One may be prosecuted by one indictment or information, under the above section, for the crime of attempting to take and entice away two children under the age of twelve years, with intent, etc. It would not charge two offenses, because a person may, by a single act, endeavor to accomplish two or more criminal results: *People v. Milne*, 60 *Cal.* 71.

*Place of trial for offense of kidnaping — Consent as defense.*

§ 16. [819.] Every offense mentioned in sections fourteen or fif-

teen of this code may be tried either in the county in which the same may have been committed, or in any county in or to which the person so seized, taken, inveigled, kidnaped, or sold, or whose services shall be sold or transferred shall have been taken, confined, held, carried, or brought; and upon the trial of any such offense, the consent thereto of the person so taken, inveigled, kidnaped, or confined shall not be a defense, unless it shall be made satisfactorily to appear to the jury that such consent was not obtained by fraud, nor extorted by duress or by threats.

*Definition and penalty of libel.*

§ 17. A libel is the defamation of a person made public by any words, printing, writing, sign, picture, representation, or effigy tending to provoke him to wrath, or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or any defamation, made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives or friends. Every person who makes, composes, or dictates a libel, or procures the same to be done, or who publishes or willfully circulates such libel, or in any way knowingly and willfully aids or assists in making, publishing, or circulating the same, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment. [March 2, 1891, § 3.]

*Publication of libel.*

§ 18. [1234.] The delivering, selling, reading, or otherwise communicating a libel, or causing the same to be delivered, sold, read, or otherwise communicated, to one or more persons, or to the party libeled, shall be deemed a publication thereof.

Indictment or information for libel, sufficiency of: See § 1249, Code of Procedure.

*Assault and battery defined — Punishment for.*

§ 19. [808.] Assault and battery is the unlawful beating of another; and a person duly convicted thereof shall be fined in any sum not exceeding one thousand dollars, or imprisoned in the county jail not exceeding one year.

**Assault and battery.** — In some of the code states assault and battery are two separate and distinct offenses. In this state assault is a separate offense from "assault and battery": See next succeeding section. Every battery includes an assault, but assault does not include battery: *People v. Helbing*, 61 Cal. 620. An assault and battery consists in the unlawful and unjustifiable use of force and violence upon the person of another, however

slight. If justifiable, it is not an assault and battery: *Commonwealth v. McKie*, 61 Am. Dec. 410, 412; *Kirkland v. State*, 43 Ind. 146; *Jornigan v. State*, 6 Tex. App. 465; *United States v. Ortega*, 4 Wash. C. C. 531. Whether the act in any particular case is an assault and battery, or a gentle imposition of hands, or a proper application of force, depends upon the question whether there was justifiable cause: *Commonwealth v. McKie*, 61 Am. Dec. 410, 412.

*Assault defined, and how punished.*

§ 20. [805.] An assault is an attempt in a rude, insolent, and



angry manner unlawfully to touch, strike, beat, or wound another person, coupled with a present ability to carry such attempt into execution, and every person convicted thereof shall be fined in any sum not exceeding five hundred dollars, to which may be added imprisonment in the county jail not exceeding six months.

**Assault.** — An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another: *United States v. Hand*, 2 Wash. C. C. 435. It is an attempt to commit a battery: 1 Wharton's Crim. Law, 8th ed., sec. 603. To constitute an assault, there must be an intentional attempt by violence to do an injury to the person of another. It must be intentional. If there is no present purpose to do an injury, there is no assault. The present ability to carry the party's intention into effect is not, however, in all cases necessary. It will be sufficient if the aggressor, by his conduct, lead another to suppose that he will do what he apparently attempts to do. There must also be an unlawful attempt: *People v. Yslas*, 27 Cal. 630. A purpose not accompanied by an effort to carry into immediate execution falls short of an assault. The mere use of words can never amount to an assault. But rushing towards another with menacing gestures, and with an intent to strike, is an assault, though the accused is prevented from striking before he comes near enough to do so: *State v. Davis*, 1 Ired. 125; *People v. Yslas*, 27 Cal. 630. But mere threatening gestures, unaccompanied by such intent, although sufficient to cause a person to believe that he was about to be struck, do not amount to an assault.

Thus when the defendant shook his whip at the prosecutor, saying at the same time, "If you were not an old man I would knock you down," held, no assault, unless the jury should be satisfied that there was a present purpose to strike: *State v. Crow*, 1 Ired. 375; see also *Commonwealth v. Eyre*, 1 Serg. & R. 347;

*United States v. Hand*, 2 Wash. 435. Threatening another with a weapon, to compel him to submit to a demand, intending to strike if he refuses, but not to strike if he submits, is an assault, although the other party may submit to the demand: *State v. Morgan*, 3 Ired. 186; *People v. McMakin*, 8 Cal. 547. Holding a pistol which purports to be loaded so near another person as would endanger life if it were fired, although the pistol is not in fact loaded, is an assault: *State v. Smith*, 2 Humph. 457; *Rex v. Parfait*, 1 Leach, 4th ed., 19; 1 East P. C. 416; *Rex v. Thomas*, 1 Leach, 4th ed., 330; 1 East P. C. 417. If the party suffering the violence has consented to it, there is no assault. Thus, although a child of tender years cannot legally consent to a rape upon her, yet she may consent to an attempt to commit it; and such an attempt, if committed with her consent, is not an assault: *Regina v. Cockburn*, 3 Cox C. C. 543; *Regina v. Read*, 3 Cox C. C. 266; 1 Denio, 377; *Regina v. Mehegan*, 7 Cox C. C. 145. Mere failure to resist is not enough: *Regina v. McGarvan*, 6 Cox C. C. 64. So where a medical man had criminal connection with a girl fourteen years of age, she consenting from a bona fide belief that the defendant was treating her medically, as he represented he was doing, he was held properly convicted of an assault: *Regina v. Case*, 4 Cox C. C. 220. The administering of poison is also an assault. Also the malicious application of injurious drugs: *Regina v. Case*, 1 Wharton's Crim. Law, 8th ed., sec. 610; *Commonwealth v. Stratton*, 114 Mass. 303; but see *Garnet v. State*, 1 Tex. App. 605.

*Provoking assault, etc., is misdemeanor — Punishment for — Jurisdiction.*

§ 21. Every person who shall, by word, sign, or gestures, willfully provoke or attempt to provoke another person to commit an assault and battery or other breach of the peace shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding twenty-five dollars, and shall stand committed until such fine and costs are paid. Justices of the peace shall have exclusive original jurisdiction of prosecutions under this act within their respective counties. [January 9, 1886, § 1. In effect immediately.]

*Punishment for assault with intent to commit felony.*

§ 22. [806.] An assault with an intent to commit murder, rape, the infamous crime against nature, mayhem, robbery, or grand larceny shall subject the offender to imprisonment in the penitentiary for a term of not less than one year nor more than fourteen years.

**Assault with intent to commit murder.** must be specifically averred and satisfactorily proved: *State v. Neal*, 37 Me. 468; *Smith v.*



*State*, 52 Ga. 88; *Johnson v. State*, 35 Ala. 363; *Morgan v. State*, 13 Sines & M. 242; *State v. Johnson*, 9 Nev. 175; *People v. Yslas*, 27 Cal. 630; *People v. Murat*, 45 Cal. 281; *People v. Swenson*, 49 Cal. 388; *People v. Fine*, 53 Cal. 264. It is incumbent upon the prosecution to prove the intent; and if it appear that the assault was made under such circumstances as would, had death ensued therefrom, have mitigated the offense from murder to manslaughter, such intent is not made out: *Wright v. State*, 9 Yerg. 342; *Collier v. State*, 39 Ga. 31; *Morman v. State*, 24 Miss. 54; *State v. White*, 41 Iowa, 316; *Vandermark v. People*, 47 Ill. 122. The indictment or information must charge assault with intent to kill, and should specify the weapon used, if any: *State v. Doty*, 5 Or. 491. A person cannot be convicted of this offense unless he would have been guilty of murder in the first or second degree had death resulted from the assault: 1 Wharton's Crim. Law, 8th ed., sec. 641; *State v. Neal*, 37 Me. 468; *State v. White*, 41 Iowa, 316; *Meredith v. State*, 60 Ala. 441. Premeditation and malice aforethought are also necessary ingredients in this offense, and must be averred and proved: *People v. Urias*, 12 Cal. 325.

Within this offense is included the minor offense of a simple assault, and in some cases, depending upon whether the assault with intent to commit murder is alleged to have been with a deadly weapon, the offense of an assault with a deadly weapon to do bodily harm: *People v. Davidson*, 5 Cal. 134; *People v. Vanard*, 6 Cal. 562; *People v. English*, 30 Cal. 214; *Ex parte Ah Cha*, 40 Cal. 426; *Ex parte Max*, 44 Cal. 579; *People v. Fine*, 53 Cal. 263. If the indictment or information charging this offense avers that the defendant committed the assault with the intent to murder, it is sufficient: *People v. Swenson*, 49 Cal. 388. But if upon the trial the evidence fails to show an intent to murder, the defendant can only be convicted of a simple assault, and a verdict in such case that the defendant is guilty of an assault to do bodily harm means that he is guilty of a simple assault only: *People v. Vanard*, 6 Cal. 562; *People v. English*, 30 Cal. 214; *Ex parte Ah Cha*, 40 Cal. 426; *Ex parte Max*, 44 Cal. 579. So an indictment or information which charges an assault with intent to do bodily harm charges a simple assault only: *People v. Martin*, 47 Cal. 112. But if the indictment or information avers that the assault was committed with a deadly weapon with intent to murder, then the defendant may be convicted of either an assault with intent to murder, an assault with a deadly weapon to do bodily harm, or a simple assault: *People v. Congleton*, 44 Cal. 92; *People v. Murat*, 45 Cal. 281; *People v. Lightner*, 49 Cal. 226; see *State v. Robey*, 8 Nev. 312. An assault upon the wrong person by mistake does not excuse the defendant: *People v. Torres*, 38 Cal. 141. Mere threats, antecedently made, amount to no excuse for a deadly

assault when the party assailed has made no demonstration of a hostile or equivocal character: *People v. Wright*, 45 Cal. 260. In *People v. Fine*, 53 Cal. 264, an instruction to the jury that if they found the defendant guilty they must convict him of the offense charged in the indictment, was held erroneous, the defendant having been indicted for an assault with intent to murder. See generally, as to what evidence is admissible on the trial of an indictment or information for this offense, *People v. Shea*, 8 Cal. 538; *People v. Roach*, 17 Cal. 297; *People v. Yslas*, 27 Cal. 630. As to proper instructions, see *People v. English*, 30 Cal. 214; *People v. Hobson*, 17 Cal. 424.

**Assault with intent to commit rape, etc.** — The intent to commit rape or the other offenses mentioned in this section is the essence of this crime: *People v. Murat*, 45 Cal. 283; *People v. Woolly*, 48 Cal. 80. The question of intent is a question of fact; and if evidence is introduced tending to prove the intent as alleged, the verdict will not be set aside on the ground that the evidence is insufficient to sustain the verdict: *People v. Estrada*, 53 Cal. 600. An indictment or information alleging an assault with intent to commit an act of sexual intercourse by force and violence, and against the will of the woman, is a sufficient charge of an assault with intent to commit rape, without alleging that the force and violence was against her resistance: *People v. Brown*, 47 Cal. 447. It need not be alleged that the person assaulted was not the wife of the defendant: *People v. Estrada*, 53 Cal. 600. The language of the statute need not be followed in charging this offense; words conveying the same meaning may be employed: *People v. Girr*, 53 Cal. 629. An indictment or information which charges the defendant with feloniously assaulting a female, by throwing her on her back, and attempting to have sexual intercourse with her, with intent to outrage her person, does not charge an assault with intent to commit rape: *People v. O'Neil*, 48 Cal. 257. A person who stands by when an attempt is made by others to commit a rape, but who does no act to aid, assist, or abet its commission, is not guilty of this offense: *People v. Woodward*, 45 Cal. 223. Declarations of the defendant of his misconduct with other females are not admissible upon the trial of an indictment charging this offense: *People v. Bowen*, 49 Cal. 654. An indictment or information charging the crime of rape and an assault with an intent to commit such offense is not demurrable on the ground that it charges two offenses: *People v. Tyler*, 35 Cal. 35.

**Assault with intent to commit robbery.** the infamous crime against nature, or other offenses mentioned in the above section, are governed by the rules laid down in the above note, as far as concerns intent and proof thereof: See *People v. Cull*, 60 Cal. 640; *People v. Williams*, 59 Cal. 397.

### *Punishment for malignant assault to do bodily harm.*

§ 23. [807.] An assault with a deadly weapon, instrument, or other thing, with an intent to inflict upon the person of another a bodily injury, where no considerable provocation appears, or where the cir-

cumstances of the assault show a willful, malignant, and abandoned heart, shall subject the offender to imprisonment in the penitentiary not exceeding two years, or to a fine not exceeding five thousand dollars, or to both such fine and imprisonment.

**Assault with deadly weapon.** — As this section reads, it is evident that the "intent to inflict upon the person of another a bodily injury," etc., must be alleged in the indictment or information; but it is sufficient to aver the assault to have been made "with a deadly weapon." The weapon by name does not, in such case, become a necessary ingredient of the crime, but the nature of the weapon, as being deadly or otherwise, is alone important; and it is essential to aver it in some appropriate way to have been deadly in its character: *People v. Congleton*, 44 Cal. 92; *People v. Pope*, 66 Cal. 366. It is not sufficient to charge that the assault was made with a pistol. A pistol may or may not be a deadly weapon: *People v. Jacobs*, 29 Cal. 579. The weapon with which the assault is committed should be alleged and found, and whether it is made with a deadly weapon is of the substance of this offense, and distinguishes it from an ordinary assault: *People v. Davidson*, 5 Cal. 134; *People v. Vanard*, 6 Cal. 562; *People v. English*, 30 Cal. 214; *Ex parte Ah Cha*, 40 Cal. 426; *Ex parte Max*, 44 Cal. 579. An information charging "an assault by means likely to produce great bodily injury, to wit, with a brickbat weighing about five pounds," states an offense within the jurisdiction of the superior court: *People v. Fahy*, 64 Cal. 342. Whether a pick-handle is a deadly weapon, see *People v. Fuqua*, 58 Cal. 245.

A verdict, however, which finds the defendant guilty of an assault to commit great bodily injury, without stating it to have been with a deadly weapon, imports nothing more than that the defendant is guilty of a simple assault: *Ex parte Ah Cha*, 40 Cal. 426; *People v. Murat*,

45 Cal. 281; *Ex parte Max*, 44 Cal. 579. Upon such a verdict, a defendant cannot be confined in the state prison, the crime of which he has been convicted being simply a misdemeanor: See § 20, *supra*. A person convicted of this offense has no right of appeal to the supreme court, if the judgment direct that he be confined in the county jail: *People v. Aubrey*, 53 Cal. 427; *People v. Cornell*, 16 Cal. 187.

**Deadly weapon defined.** — A deadly weapon is one likely to produce death or great bodily injury. A knife may be such a weapon: *People v. Franklin*, 70 Cal. 641. Whether the weapon used in an assault would have produced death or great bodily injury is a question for the jury: *People v. McAdden*, 65 Cal. 445; see *People v. Leyba*, 74 Cal. 407. But it is error for the court to refuse to instruct the jury upon the meaning of the words "deadly weapon": *People v. Fuqua*, 58 Cal. 245. An instruction that a deadly weapon "is any weapon or instrument by which death may be produced, or would be likely to be produced when being used in the manner in which it may appear it was used in the affray." The jury are the judges as to whether the weapon was or was not a deadly weapon," — is correct: *People v. Rodrigo*, 69 Cal. 601. One who attempts to commit a violent injury upon the person of another by means of the explosion of gunpowder is guilty of an assault with a deadly weapon, although he was not present when the explosion occurred: *People v. Pope*, 66 Cal. 366.

**Assault with deadly weapon, indictment for:** See notes to § 1244, Code of Procedure.

### *Obstructing railroad, whereby life is endangered, how punished.*

§ 24. [788.] If any person or persons shall willfully and maliciously place any obstruction on the track of any railroad in this state, or remove any rail therefrom, or in any other way injure such railroad, or do any other thing thereto, whereby the life of any person is or may be endangered, he or they shall be punished by confinement in the state penitentiary for life, or for any term not less than two years.

**Obstructing railroad.** — Proof that defendant had prepared a dynamite bomb to place on a railroad track, and was on his way with the bomb to a previously appointed rendezvous with his confederate, whence the two intended

to proceed to the track, and place the bomb thereon, but was prevented by the presence of officers, clearly establishes an attempt to place the bomb upon the track: *People v. Stites*, 75 Cal. 570.

### *Obstructing railroad, where injury, but not death, results, how punished.*

§ 25. Any person who shall willfully and maliciously displace any switch or rail, or disturb, injure, or destroy any part of a track or bridge, of any railroad, or place any obstruction thereon, with intent



that any person or property passing over said railroad shall thereby be injured, and thereby endangering and not destroying human life, or thereby causing injury or destruction of property, upon conviction thereof shall be punished by imprisonment in the penitentiary for a term of not less than one nor more than ten years, and shall be kept at hard labor. [March 2, 1891, § 4.]

*Punishment for administering poison with intent to kill.*

§ 26. [801.] Every person who shall administer, or procure to be administered, any poison to any other human being, with intent to kill the person to whom the same shall be administered, if death do not ensue, upon conviction thereof shall be imprisoned in the penitentiary not more than twenty years nor less than two years.

**Administering poison.** — A poison is defined by Wharton and Stillé's Medical Jurisprudence, section 493, as "a substance having an inherent deleterious property, which renders it, when taken into the system, capable of destroying life." A definition stated in 2 Beck's Medical Jurisprudence, with approval, is as follows: "A poison is any substance which, when applied to the body externally, or in any way introduced into the system, without acting mechanically, but by its own inherent qualities, is capable of destroying life."

The purpose of the statute is to provide a punishment for attempt to kill, by the means therein mentioned; and in order to bring a

case within the statute, it must be proved that the substance or liquid which was administered was capable of destroying life. The intent to kill cannot be inferred from the act of administering a substance which has not the capacity of destroying life: *People v. Van Decker*, 53 Cal. 147.

In *People v. Cuddihy*, 54 Cal. 53, an indictment which recited that the defendant was accused of the crime of "assault with intent to commit murder," and then proceeded to state facts showing that the defendant had administered poison with intent to kill, etc., was held sufficient to bring the case within the provisions of this section.

*Punishment for poisoning food or drink with intent to injure.*

§ 27. [802.] Every person who shall mingle poison with any food, drink, or medicine, with intent to injure any human being, or who shall poison any spring, well, or reservoir of water, with such intent, shall, upon conviction thereof, be imprisoned in the penitentiary not more than fourteen years nor less than one year.

*Punishment for rape.*

§ 28. [812.] If any person ravish and carnally know any female of the age of twelve years or more, by force and against her will, or carnally know and abuse any female child under the age of twelve years, he shall be punished by imprisonment in the penitentiary for life or any term of years.

**Rape:** See, generally, the note to *Smith v. State*, 80 Am. Dec. 361. This offense is defined by Blackstone to be the carnal knowledge of a woman by force and against her will: 4 Bla. Com. 210. Wharton defines it to be the act of carnal knowledge of a woman without her conscious permission, such permission not being extorted by force or fear of immediate bodily harm: 1 Wharton's Crim. Law, 8th ed., sec. 550. Under the above section, to constitute rape upon a female over the age of twelve years, force must be shown. But it is held in many cases that this is not necessary in those cases in which acquiescence is caused by fraud or

stupefaction. An indictment or information should allege, however, that the offense was "forcibly" committed, and in the cases just mentioned this allegation is considered proved by proof of penetration: *Commonwealth v. Fogarty*, 8 Gray, 489; *State v. Johnson*, 67 N. C. 55; 1 Wharton's Crim. Law, 8th ed., sec. 551. Force, or the intent to use force, in all cases where acquiescence has not been obtained by fraud or stupefaction, is essential to the offense, and must be averred and proved: 1 Wharton's Crim. Law, 8th ed., sec. 550; *Taylor v. State*, 50 Ga. 79; *State v. Hagerman*, 47 Iowa, 151; *McNair v. State*, 53 Ala. 453; *Dunson v. State*, 29



Ark. 117; *Bradley v. State*, 32 Ark. 704; *Smith v. State*, 12 Ohio St. 466; *State v. Erickson*, 45 Wis. 86; *People v. Brown*, 47 Cal. 447; *People v. Royal*, 53 Cal. 62. See § 29, *infra*. Resistance on the part of the woman must also be established; but it is not necessary to show that she used all the resistance in her power, if her resistance was *bona fide*, and "was the utmost, according to her lights, that she could offer": 1 Wharton's Crim. Law, 8th ed., sec. 557; *Commonwealth v. McDonald*, 110 Mass. 406; *Jenkins v. State*, 1 Tex. App. 346; *State v. Dohring*, 59 N. Y. 374; *Mills v. State*, 52 Ind. 187. Consent, however reluctant, if free, negatives rape: 1 Wharton's Crim. Law, 8th ed., sec. 557; *Anschicks v. State*, 6 Tex. App. 524; *Commonwealth v. McDonald*, 110 Mass. 405; *Anderson v. State*, 41 Wis. 430; *People v. Brown*, 47 Cal. 447. A conviction of an assault with intent to commit rape upon a girl under twelve years of age may be had without showing her want of consent to the assault: *People v. Gordon*, 70 Cal. 467. A girl under twelve years of age is presumed incapable of consenting to an act of sexual intercourse, or to an assault with intent to commit it: *Id.* On the trial of an indictment for this offense, it is necessary to prove, — 1. Penetration. Proof of emission is not necessary: 1 Wharton's Crim. Law, 8th ed., sec. 554. There must be specific proof of some penetration, though such proof may be inferred from circumstances aside from the statement of the party injured: *People v. Mayes*, 66 Cal. 597; *Commonwealth v. Beale*, 2 Wharton's & Stillé's Medical Jurisprudence, sec. 245; *State v. Tarr*, 28 Iowa, 397; *Brauer v. State*, 25 Wis. 413. And 2. That it was done by force and against the will of the woman. This element of force, however, as above stated, is not necessary in those cases where the crime is committed by fraud or stupefaction.

*Fraud.* — It is not rape where a medical practitioner represents to a patient that coition is necessary for the treatment of her case, and she consents to connection with him, through a belief in his representations; for there is a consent to the act, though fraudulently obtained: *Don Moran v. People*, 25 Mich. 356; *Walter v. People*, 50 Barb. 144; see also *Rex v. Stanton*, 1 Car. & K. 415; *Regina v. Flattery*, 13 Cox C. C. 388; *Pomeroy v. People*, 94 Ind. 96; 48 Am. Rep. 146. But where connection is obtained by a physician under pretense of making a professional examination of her person, or of performing a surgical operation, there is no consent, and a conviction of rape may be had: *Pomeroy v. State*, 94 Ind. 96; 48 Am. Rep. 146; *Regina v. Flattery*, 13 Cox C. C. 388; L. R. 2 Q. B. 410; *Rex v. Case*, 4 Cox C. C. 220. In such case, there is in the wrongful act itself all the force which the law demands as an element of the crime: *Pomeroy v. State*, *supra*. But the ignorance and innocence of the victim must be plainly established: *Walter v. People*, 50 Barb. 144; and if the woman consent in the belief that an illegal marriage is legal, upon the fraudulent assertion of the pretended husband, the latter will not be guilty of rape: *State v. Murphy*, 6 Ala. 765; 41 Am. Dec. 79; *Bloodworth v. State*, 6 Baxt. 616. The criterion is, whether or not the woman consented, not to something else, such as medical treatment, but to the act of coition. A con-

sent to coition, though fraudulently obtained, is, notwithstanding the fraud, a consent, with the presence of which there can be no rape: *State v. Riggs*, 1 Houst. 120; *Bloodworth v. State*, 6 Baxt. 614; *State v. Burgdorff*, 53 Mo. 65; *Clark v. State*, 30 Tex. 448; *Nair v. State*, 53 Ala. 453; see *Rex v. Williams*, 8 Car. & P. 286; *Rex v. Jackson*, Russ. & R. C. C. 487; *Regina v. Barrow*, L. R. 1 C. C. 156; *Commonwealth v. Fields*, 4 Leigh, 648; *Pomeroy v. State*, 94 Ind. 96; 48 Am. Rep. 146; *Stephen v. State*, 11 Ga. 225; *Pleasant v. State*, 3 Ark. 360.

*Acquiescence of married woman under belief that defendant is her husband.* — It is maintained by many authorities that where a woman admits the defendant to sexual connection under the belief that he is her husband, the act does not amount to rape: *Rex v. Jackson*, Russ. & R. C. C. 487; *Regina v. Saunders*, 8 Car. & P. 265; *Regina v. Williams*, 8 Car. & P. 286; *Regina v. Clarke*, Dears. C. C. 397; 29 Eng. L. & Eq. 542; *Regina v. Barrow*, L. R. 1 C. C. 156; *Regina v. Francis*, 13 U. C. Q. B. 116; *Rex v. Sweeney*, 8 Cox C. C. 223; *Wyatt v. State*, 2 Swan, 394; *Lewis v. State*, 30 Ala. 54; 68 Am. Dec. 113; *State v. Brooks*, 76 N. C. 1. The contrary has been held in *People v. Metcalf*, 1 Wheel. C. C. 378; *Anonymous*, 1 Wheel. C. C. 381; *State v. Shepard*, 7 Conn. 54. And where she is asleep at the time, and therefore gives no consent, the offense may be rape: *Regina v. Young*, 14 Cox C. C. 114; *Regina v. Mayers*, 12 Cox C. C. 311. But even when she submits under belief that the man is her husband, the same reasoning may apply as in the case of consent obtained by fraud. Where the woman consents to medical treatment, and not sexual connection, the offense is rape. So when she consents to marital intercourse, and not to illegitimate sexual intercourse, such acquiescence should hardly be regarded as consent, though to constitute rape the defendant must have intended, if necessary, to consummate his crime by force, or at least by deceiving the woman: See 1 Wharton's Crim. Law, sec. 561; *Rex v. Dee*, 31 Alb. L. J. 43.

*Unconsciousness of female.* — Where the prisoner gave the prosecutrix liquor with the intention of exciting her and then having sexual connection with her, and consummated the connection while she was in a state of insensibility, the act was rape: *Regina v. Camplin*, 1 Den. C. C. 89; 1 Car. & K. 746; see § 29, *infra*. And where the prosecutrix was unconscious from intoxication, though not made so by the defendant, he was guilty of rape: *Commonwealth v. Burke*, 105 Mass. 376; see *State v. Stoyell*, 54 Me. 24; *Commonwealth v. Bakeman*, 13 Mass. 577; *Regina v. Fletcher*, 8 Cox C. C. 131; Bell C. C. 63, 71. In New York the contrary is held, though the decision rests upon the ground that the statute makes a specific offense of carnal knowledge of an intoxicated woman: *People v. Quin*, 50 Barb. 128; see § 29, *infra*. When the connection is had with a woman while she is under the influence of ether or chloroform, a question of medical jurisprudence is involved: 3 Wharton and Stillé's Medical Jurisprudence, 4th ed., sec. 597. If the woman's will is affected by the anæsthetic, so that the connection is had without her consent, though she may be more or less conscious, the act will be rape: *Id.* Whether it is to be

regarded as possible that a connection should be accomplished during the unconsciousness of natural sleep, without arousing the female, is said to be an open question in medical jurisprudence: See Beck's Medical Jurisprudence, 7th ed., 117; Taylor's Medical Jurisprudence, 5th ed., 654; Wharton and Stillé's Medical Jurisprudence, 336, secs. 440, 441; Montgomery on Pregnancy, 2d ed., 361.

Mr. Wharton, in the late edition (8th) of his work on criminal law, states the law to be now settled "that an unconscious submission during sleep is rape": *Regina v. Mayers*, 12 Cox C. C. 311; 2 Wharton and Stillé's Medical Jurisprudence, secs. 246, 264, 275; see *Regina v. Lock*, 27 L. T., N. S., 661.

*Intent to use force*, should fraud or stupefaction fail, is essential to the offense: *Rex v. Case*, 1 Den. C. C. 580; *Rex v. Lloyd*, 7 Car. & P. 318; *Rex v. Stanton*, 1 Car. & K. 415; *Rex v. Wright*, 4 Fost. & F. 967; *McNair v. State*, 53 Ala. 453; *Dawson v. State*, 29 Ark. 116; *Bradley v. State*, 32 Ark. 704; *Taylor v. State*, 50 Ga. 79; *State v. Hagerman*, 47 Iowa, 151; *Com. v. Merrill*, 14 Gray, 415; *State v. Erickson*, 45 Wis. 86; *Hull v. State*, 22 Wis. 580.

*Consent after penetration no defense.* — Consent given after the assault, and before penetration, is a good defense to the charge of rape: *Regina v. Hallet*, 9 Car. & P. 748; but after the offense has been completed by penetration, no submission or consent of the woman will avail the defendant: *Whittaker v. State*, 50 Wis. 518; *Brown v. People*, 36 Mich. 203; *Com. v. McDonald*, 110 Mass. 405; *Regina v. Paige*, 2 Cox C. C. 133; 1 Wharton's Crim. Law, sec. 562 a; 2 Bishop's Crim. Law, sec. 1122. And consent after the act is completed is *a fortiori* no defense: *Id.* It is no defense that the woman subsequently agreed to receive compensation for the injury: *State v. Hammond*, 77 Mo. 157.

*Female under age of consent.* — The law presumes a female of tender years incapable of consenting to sexual intercourse, and a man who has connection with such a female, although she may have in fact consented thereto, is guilty of rape: 1 Wharton's Crim. Law, 8th ed., sec. 558; *Dawson v. State*, 29 Ark. 120; *Stephens v. State*, 11 Ga. 225; *People v. McDonald*, 9 Mich. 150; *Hays v. People*, 1 Hill, 351; *State v. Farmer*, 4 Ired. 224; *Anschicks v. State*, 6 Tex. App. 524; *People v. Gordon*, 70 Cal. 467. It is no excuse that the person accused believed the girl to be over the age of consent, or that she told him that she was: *Lawrence v. Com.*, 30 Gratt. 845. He takes the risk, and if she is under that age, he is guilty: *Id.*; *People v. Gordon*, 70 Cal. 467.

*Female unsound in mind.* — Sexual intercourse with a woman mentally incapable of giving consent is rape: *Regina v. Fletcher*, 8 Cox C. C. 131; although she was over the age

of consent, and offered no resistance: *Quera v. Ryan*, 2 Cox C. C. 115; *State v. Tarr*, 28 Iowa, 397; *Stephen v. State*, 11 Ga. 227; see *State v. Crow*, 10 West. L. J. 501; see § 29, *infra*.

*Prior unchastity of woman is no defense.* — The fact that the woman was a common prostitute, or the defendant's mistress, is no defense; and the reputation of the prosecutrix for unchastity is no justification or excuse of the offense, though evidence of this character is admissible to impeach her testimony as to the want of consent: 1 Hale P. C. 629; Archbold's Crim. Proc., by Jervis, 453; *Rex v. Barker*, 3 Car. & P. 589; *Wilson v. State*, 17 Tex. App. 525; *Higgins v. People*, 1 Hun, 307; *Pratt v. State*, 19 Ohio St. 277; *Plenau v. State*, 3 Ark. 360; 15 Ark. 624; *Wright v. State*, 4 Humph. 194; *People v. Benson*, 6 Cal. 221; 65 Am. Dec. 506; and see the note to *Smith v. State*, 80 Am. Dec. 368.

*Proof of rape.* — The consummation of the offense may be shown by circumstances and surroundings: *People v. Mayes*, 66 Cal. 597. A conviction may be had upon the uncorroborated testimony of the prosecutrix: *Id.* And evidence is admissible to show a search for and flight of the defendant: *Id.* Evidence is admissible that the prosecutrix made complaint of the injury while it was recent: *People v. Snyder*, 75 Cal. 323; *People v. Mayes*, 66 Cal. 597. But the prosecutrix cannot give evidence of the particulars of a complaint made by her shortly after the assault: *People v. Tierney*, 67 Cal. 54; *People v. Mayes*, 66 Cal. 597. The reason why the prosecutrix did not make an immediate complaint against the defendant may be shown for the purpose of rebutting any unfavorable inference that might otherwise be drawn from her silence: *People v. Mayes*, 66 Cal. 597.

*Indictment or information for rape:* See Code of Procedure, § 1244. An allegation in an information or indictment for rape that the act was committed by force and violence, and against the will and consent of the female, is equivalent to a statement that she resisted, but that her resistance was overcome by violence, or that she was prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution; and under such an allegation, evidence that she resisted, or was prevented from resisting, is admissible: *People v. Pacheco*, 70 Cal. 473. And under information which alleged that the defendant committed the offense "by force and violence," and against the will of the prosecutrix, and did "feloniously ravish" her, evidence is admissible that the offense was committed by means of an intoxicating or narcotic substance, administered to her by the defendant: *People v. Snyder*, 75 Cal. 323; see § 29, *infra*.

### *Punishment for rape by administering drugs, etc.*

§ 29. [814.] If any person unlawfully have carnal knowledge of any female by administering to her any substance or by any other means producing such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, or have such carnal knowledge of an idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual resistance, he shall, upon



conviction, be punished as provided in section twenty-eight of this code.

**Rape by administering drugs, etc.:** See notes to § 28, *supra*.

### *Punishment of feticide.*

§ 30. [820.] Every person who shall administer to any woman pregnant with a quick child any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, shall, in case the death of such child or of such mother be thereby produced, on conviction thereof, be imprisoned in the penitentiary not more than twenty years nor less than one year.

**Administering drugs, etc., with intent to destroy child.** — Causing the death of the mother by such act was murder at the common law, but statutes have taken this offense out of the class of crimes designated as murder, and made it a felony of lesser grade: See extended note to *State v. Moore*, 95 Am. Dec. 784. The offense is not here designated by any particular legal term, but an indictment or information under the above section is, according to the general rules of code pleading, sufficient if the acts constituting the offense as defined by the statute are set forth, though there is an erroneous appellation given therein to the offense, or none at all: *People v. Phipps*, 39 Cal. 326; *Com. v. Jackson*, 15 Gray, 187; *People v. Cronin*, 34 Cal. 191; *People v. Dulton*, 58 Cal. 226. And the language of the statute may be followed: *People v. White*, 34 Cal. 183; *People v. Shuber*, 32 Cal. 36; *People v. Potter*, 34 Cal. 114. An indictment which charges the defendant with forcing and thrusting a certain instrument, the

name of which is unknown to the jury, up into the womb and body of a pregnant woman with intent to cause a miscarriage, and that by means of the forcing and thrusting said instrument into the body and womb of the woman she died, sufficiently describes the instrument, and the cause and manner of the death, and is good: *Com. v. Jackson*, 15 Gray, 187, cited in note to *State v. Moore*, 95 Am. Dec. 785.

**For purpose of punishing destruction of child,** the law recognizes it as a living being only after it quickens or stirs in the womb: *State v. Cooper*, 51 Am. Dec. 248. The expressions "quick with child" and "with quick child" are synonymous. *State v. Cooper*, 51 Am. Dec. 248.

**Intent to procure abortion bailable offense.** — Where the woman dies from the effect of the intended abortion, and the person attempting to procure it is held for murder, he is entitled to bail: *People v. Wolff*, 57 Cal. 94.

### *Punishment for dueling, or encouraging the same.*

§ 31. [799.] Every person who shall engage in a duel with any deadly weapon, although no homicide ensue, or shall challenge another to fight a duel, or shall send or deliver any written or verbal message purporting or intending to be such challenge, although no duel ensue, shall be imprisoned, on conviction thereof, in the penitentiary not more than ten years nor less than one year.

• *Same — Punishment for sending or accepting challenge, or aiding in duel.*

§ 32. [800.] Every person who shall accept such challenge, or who shall knowingly carry or deliver any such challenge or message, whether a duel ensue or not, and every person who shall be present at the fighting of a duel, with deadly weapons, as an aid or second, or who shall advise, encourage, or promote such duel, shall, on conviction thereof, be imprisoned in the penitentiary not more than five years nor less than six months.



*Punishment for attempting to procure miscarriage.*

§ 33. [821]. Every person who shall administer to any pregnant woman whom he supposes to be pregnant any medicine, drug, or substance whatever, or shall use or employ any instrument or other means thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall, on conviction thereof, be imprisoned in the penitentiary not more than five years, nor less than one year, or be imprisoned in the county jail not more than twelve months nor less than one month, and be fined in any sum not exceeding one thousand dollars.

**Administering drugs with intent to procure miscarriage.** — Offense of administering drug to a pregnant woman with intent to produce a miscarriage, and that of administering it with intent to kill the child, under the next preceding section, are distinct offenses: *Lohman v. People*, 1 N. Y. 379; 49 Am. Dec. 340. Administering any substance, or using any instrument or means, with intent to procure miscarriage, completes the offense under the above section, although the means employed are inadequate to produce the effect

intended. The criminal intent is the important consideration, and neither the name, quality, or quantity of the drug or other substance administered, nor the name of the instrument used with such intent, need be alleged in the indictment or information, or proved on the trial: See note to *Abrams v. Foshee*, 66 Am. Dec. 82-91. Nor is it necessary, under this section, to allege or prove an intent to kill the child, as would be necessary under § 30, above; *Abrams v. Foshee*, 66 Am. Dec. 86.

*Enticing away female for purpose of prostitution.*

§ 34. [815.] If any person take or entice away any unmarried female under the age of fifteen years from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution, he shall, upon conviction, be punished with imprisonment in the penitentiary for not more than three years, or by a fine of not more than one thousand dollars, and imprisonment in the county jail not more than one year.

**"Takes away" a female.** — Neither the language nor the intent of the statute requires that the taking should be by force, either actual or constructive; but both are accomplished if it is accompanied by improper solicitations or inducements: *People v. Marshall*, 59 Cal. 386. The girl need not be under the immediate control of her father, for the purpose of this section; if while out under employment, she is taken away and placed in a house of prostitution, she is, in contemplation of law, taken from her father: *People v. Cook*, 61 Cal. 478. For a case of insufficient taking from the mother, see *People v. Murray*, 3 West Coast Rep. 525. The kind and extent of seductive arts which will satisfy the law in such case do not depend upon any absolute rule. If the inducements held out do as a matter of fact entice such a female into a house of ill-fame or assignation, or elsewhere, for the purpose of prostitution, the offense is complete: *Slocum v. People*, 90 Ill. 274. The gist of the offense is the taking away of the child for the purpose of prostitution, against the will of the person having lawful charge of her, and though the consent of such person is obtained by fraud, the offense is complete: *Regina v. Mankleton*, 6 Cox C. C. 143; *Regina v. Frazer*, 8 Cox C. C. 446; *Regina v. Hopkins*, Car. & M. 254; *State v.*

*Ruhl*, 8 Iowa, 447. The consent of the child is no avail to the prisoner, if she is under the age mentioned in the statute, notwithstanding that he bona fide believed, and had reasonable ground for believing, that she was over that age: *Regina v. Prince*, 1 Am. Crim. Rep. 1; *Regina v. Olifier*, 10 Cox C. C. 402; *Regina v. Mycock*, 12 Cox C. C. 28; *Regina v. Booth*, 12 Cox C. C. 231. The enticing away must be for the purpose of prostitution, and not merely for the purpose of having illicit intercourse with her, by the man who entices her away. There must be an intent to reduce the female to a condition of common prostitution: *People v. Roderigas*, 49 Cal. 9; *Commonwealth v. Cook*, 12 Met. 93; *Carpenter's Case*, 8 Barb. 603; *State v. Stoyell*, 54 Me. 24; *Oshorn v. State*, 52 Ind. 526. Thus where a young woman, who lived with her parents, was induced by a man to leave home and meet him for a few hours, and have illicit intercourse with him, within a few rods of her home, after which she returned home, the offense was held not made out, because there was no proof of an intent to reduce her to a condition of common prostitution: *Slocum v. People*, 90 Ill. 274; see *People v. Roderigas*, 49 Cal. 9, and cases last cited above.

**"Purpose of prostitution."** — It is not necessary that there should be express testi-

mony to the fact that the taking was for the purpose of prostitution. Acts are the surest indications of one's purpose: *People v. Marshall*, 59 Cal. 386.

**"Other person having the legal charge of her person."**—The following meaning was given to these words by the supreme court of Iowa, in construing a somewhat similar statute: "They do not mean, in our opinion, that such person shall have all the power and authority over the child possessed by the parent or legally appointed guardian. Nor do they mean a person who has the temporary charge, or a charge for a particular purpose, as a school-mistress or governess. If otherwise made out, the crime would be complete, if the taking

away was without the consent of the person, who, with the permission of the parents, if living, was intrusted with the care, custody, charge, or control of the child as an actual member of the family. If she was temporarily at a relative's house, and he should consent, and the parent not, this would not excuse the person charged. . . . If the parents are dead, and no guardian has been appointed, those with whom she resided as a member of the family, and who had her wholly under their care and protection, would have the 'legal charge of her person,' within the meaning of the statute": *State v. Ruhl*, 8 Iowa, 447, 452. See Bishop on Statutory Crimes, sec. 633, and cases there cited.

*Punishment for seduction — Subsequent marriage bars prosecution.*

§ 35. [816.] If any person seduce and debauch any unmarried woman of previously chaste character, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year. If before judgment upon an indictment the defendant marry the woman thus seduced, it is a bar to any further prosecution for the offense.

**Seduction.** — Previous chaste character means actual personal virtue as distinguished from a good reputation, and therefore a single act of illicit connection may be shown: *Lyons v. State*, 52 Ind. 427; 1 Am. Crim. Rep. 28; *Kenyon v. People*, 26 N. Y. 203; note to *Andre v. State*, 68 Am. Dec. 715. Seduction as a criminal offense is of statutory origin, and is not punishable at the common law. Under

most of the statutes, "previous chaste character" in the person alleged to have been seduced is necessary, and to be averred in the indictment or information as a qualification of the prosecutrix: See extended note to *State v. Carron*, 87 Am. Dec. 405-411. On seduction as a civil wrong, see note to *Weaver v. Bachert*, 44 Am. Dec. 162-170.

*Punishment for forcing woman to marry or to be defiled.*

§ 36. [813.] If any person take any woman unlawfully and against her will, and by force, menace, or duress compel her to marry him or any other person, or to be defiled, he shall be fined not exceeding one thousand dollars, and imprisoned in the penitentiary not exceeding ten years.

*Punishment for exhibiting deadly weapons in a manner threatening, etc.*

§ 37. [810.] Every person who shall, in a rude, angry, or threatening manner, in a crowd of two or more persons, exhibit any pistol, bowie-knife, or other dangerous weapon, shall, on conviction thereof, be imprisoned in the county jail not exceeding one year, and be fined in any sum not exceeding five hundred dollars.

*Blackmail, how punished.*

§ 38. [822.] If any person, either verbally or by any written or printed communication, shall maliciously threaten any injury to the person or property of another, with intent thereby to extort money or any pecuniary advantage whatever, or to control the person so threatened to do any act against his will, he shall, upon conviction thereof



be imprisoned in the county jail not more than one year nor less than one month, or be fined in any sum not exceeding five hundred dollars nor less than one hundred dollars.

**Threatening letters.** — The person threatened must be averred and proved: *Rex v. Dunkley*, 1 Moody C. C. 90; and so must the fact of sending: *Regina v. Jones*, 2 Cox C. C. 434; *Rex v. Paddle*, Russ. & R. C. C. 484. The sending, however, may be inferred from the proof of other facts. In *Rex v. Waystiff*, Russ. & R. C. C. 398, it was held that the dropping of a letter in a man's way, in order that he might pick it up, was a sending of it. So the fastening of a threatening letter on a gate in a public highway is some evidence to go to a jury to prove a sending: *Regina v. Williams*, 1 Cox C. C. 16; see *Regina v. Grimwade*, 1 Cox C. C. 67; 2 East P. C. 1120. It must also appear that threats were intended: 2 Wharton's Crim. Law, 8th ed., sec. 1664. A letter that is ambiguous may be explained by parol proof of extraneous facts as well as by declarations of the writer: *Id.*, sec. 1665. The meaning of the letter, if ambiguous, must be determined by the jury, though whether a crime is threatened by a letter that is not ambiguous is for

the court: *Id.*; *Rex v. Tucker*, 1 Moody C. C. 134; *Regina v. Hendy*, 4 Cox C. C. 243; *Regina v. Menage*, 3 Fost. & F. 310; *Regina v. Coghlan*, 4 Fost. & F. 316; *Regina v. Braynell*, 4 Cox C. C. 402; *State v. Hollyway*, 41 Iowa, 200; *Longley v. State*, 43 Tex. 490. It is not necessary that the matter set forth in the letter should be libelous, to constitute the offense: *Regina v. Coghlan*, 4 Fost. & F. 316. The intent to extort may be implied from the circumstances, and no express demand of money is necessary. But if it appears that the object of the letter is to compel the payment of accounts honestly believed to be due, there is no evidence of an intent to extort: *Regina v. Coghlan*, 4 Fost. & F. 316.

**Property.** — Right to appeal is property: *People v. Cadman*, 57 Cal. 562.

**Venue** may be laid in the place of the reception of the letter: 1 Wharton's Crim. Law, 8th ed., sec. 288; 2 *Id.*, secs. 1206, 1666; *Rex v. Gerwood*, 2 East P. C. 1120; *Rex v. Essex*, 2 East P. C. 1125; *People v. Griffin*, 2 Barb. 427.

### *Punishment for horsewhipping, etc.*

§ 39. [809.] Every person who shall assault and beat another with a cowhide or whip, having with him at the time a pistol or other deadly weapon, shall, on conviction thereof, be imprisoned in the county jail not more than one year nor less than three months, and be fined in any sum not exceeding one thousand dollars.

## CHAPTER II.

### OF CRIMES AGAINST PROPERTY.

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*Arson defined — Murder where death results — Punishment for.*

§ 40. Every person who shall willfully and maliciously set fire to the dwelling-house, tent, cabin, or any structure, no matter of what material constructed, used and occupied as a place of abode by any person or persons, any barn, stable, outhouse, ship, steamboat, or other vessel, or any water-craft, mill, milk-house, banking-house, distillery, manufactory, mechanics' or artificers' shop, storehouse-building, or room occupied as a shop or an office for professional business, or printing-office, of another, any public bridge, court-house, jail, market-house, seminary, or college, edifice or building thereto belonging, or other public buildings, of the value of five dollars, or any stock of grain, hay, or straw of another, of the value of five dollars, shall be deemed guilty of arson, and upon conviction thereof shall be imprisoned in the penitentiary not more than ten years nor less than one year, or in the county jail not more than six months nor less

than one month, and be fined in any sum not exceeding one thousand dollars, and should the death of any person ensue therefrom, known to be occupying or present on said premises at the time such premises are willfully and maliciously set fire to, the offender, on conviction thereof, shall be deemed guilty of murder in the first degree. [January 20, 1886, § 1. In effect immediately.]

**Arson** consists in the willful, malicious, and voluntary burning of the house or outhouse of another. This definition has been somewhat enlarged by the above section. Malice is of the essence of the crime, both by the common law and by statute: See *Mary v. State*, 81 Am. Dec. 65-76. An allegation in the indictment or information that the accused set fire to or burned a dwelling-house belonging to or the property of a certain person, naming him, is a sufficient allegation of ownership, as the possessor thereof, for the purposes of the statute, is the owner, and the presumption flowing from such allegation is, that the party named is in possession: *Woodford v. People*, 62 N. Y. 117; 20 Am. Rep. 464. As to sufficiency of indictment, see also notes to § 1244, Code of

**Procedure.** An indictment or information making it an aggravated crime to burn a building in which a person is present or staying must charge that there was such being in the house at the time of the burning, and the words of the statute in this respect must be set out in full; but the name of the person in the house at the time that the burning takes place need not be stated: See *Woodford v. People*, 62 N. Y. 117; 20 Am. Rep. 464; note to *Mary v. State*, 81 Am. Dec. 65-76. An indictment or information for arson which charges as a single act the burning of several houses is not bad for duplicity, as it charges but one offense: *Woodford v. People*, 62 N. Y. 117; 20 Am. Rep. 464.

*Punishment for setting fire to grain, wood, lumber, etc.*

§ 41. [824.] Every person who shall willfully and maliciously set fire to any pile or parcel of boards, timber, piles, or other lumber, cord-wood, ricks, stacks, or shocks of grain, hay, or other vegetable products, or vegetable products severed from the soil not in ricks, stacks, or shocks, or any standing grass or grain, or other cultivated vegetable product of the soil, shall, upon conviction thereof, be imprisoned in the county jail not more than one year nor less than one month, and be fined in any sum not exceeding five hundred dollars.

*Punishment for setting fire to one's own building, whereby another's is burned. — If death ensues, it is murder in second degree.*

§ 42. [825.] Every person who shall willfully and maliciously set fire to the dwelling-house or any building owned by himself, whereby the dwelling-house or building of another shall be burnt or injured by fire, shall, on conviction thereof, be imprisoned in the penitentiary not more than ten years nor less than one year, or be imprisoned in the county jail not more than six years nor less than six months, and fined in any sum not exceeding one thousand dollars; and should the life of any person be thereby lost, such offender shall be deemed guilty of murder in the second degree, and be imprisoned in the penitentiary during life.

**Communicated injury to other property.** — It is not arson at the common law for one to destroy his own house by fire; but one may be found guilty of arson, under the above section, if by burning his own house the

dwelling of another is thereby burned. And this was so at common law: See note to *Mary v. State*, 81 Am. Dec. 70. As to pleading the facts under this section, the same rules apply as are stated in the notes to § 40, *ante*.

*Arson as to one's own unoccupied dwelling-house — Punishment for.*

§ 43. Every person who shall unlawfully and maliciously set fire



to the unoccupied dwelling-house owned by himself or by any other person, whereby such unoccupied dwelling-house shall be burned or injured by fire, shall be deemed guilty of arson, and on conviction thereof shall be imprisoned in the penitentiary not more than ten years nor less than one year, or in the county jail not more than six months nor less than one month, and be fined in any sum not exceeding one thousand dollars. [February 2, 1888, § 1. In effect immediately.]

*Married woman may be guilty of arson when.*

§ 44. A married woman who shall commit the crime of arson may be convicted thereof, and punished therefor, though the property set fire to may belong partly or wholly to her husband. [Mar. 2, 1891, § 5.]

*Robbery defined, and how punished.*

§ 45. [829.] Every person who shall forcibly and feloniously take from the person of another, or from his immediate presence, any article of value, by violence or putting in fear, shall be deemed guilty of robbery, and upon conviction thereof shall be punished with imprisonment in the penitentiary for any length of time not more than twenty years nor less than one year.

**Robbery:** See notes to § 1244, Code of Procedure, and note to *State v. McCune*, 70 Am. Dec. 178-191. It is not necessary that the property should belong to the person from whose possession it was forcibly taken. It is requisite, however, that it should belong to some other person than the defendant, for the owner of property is not guilty of robbery in taking it from the possession of the possessor: *People v. Vice*, 21 Cal. 344; *People v. Shepardson*, 48 Cal. 189. The taking must be from the person, or in the presence of the party robbed: *United States v. Jones*, 3 Wash. 209; *Rex v. Grey*, 2 East P. C. 708; *Commonwealth v. Snelling*, 4 Binn. 379; *Rex v. Hamilton*, 8 Car. & P. 49; and against his will: *Long v. State*, 12 Ga. 293. See application of the requisite taking in *People v. Clough*, 59 Cal. 438. So where a thief puts a man in fear, and then drives away his cattle, the offense is complete: 1 Hale P. C. 533. Also, where a man flying from a robber drops his hat, which the robber steals: 1 Hale P. C. 533; 1 Wharton's Crim. Law, 9th ed., sec. 847. The goods must appear to have been taken *animo furandi*: *Murphy v. People*, 3 Hun, 114; *Matthews v. State*, 4 Ohio St. 539; *State v. Hollyway*, 41 Iowa, 200; *State v. Curtis*, 71 N. C. 56; *Long v. State*, 12 Ga. 293. But where a creditor assaulted his debtor, and compelled him to give him a check in part payment, and then again assaulted him in order to force him to give him money in payment of the debt, it was held that, there being no felonious intent, the defendant could not be convicted of robbery: *Regina v. Hemming*, 4 Fost. & F. 50. So if a party, under a bona fide impression that property is his own, obtain it by menaces, he is not guilty of robbery: *Rex v. Hall*, 3 Car. & P.

409; *Brown v. State*, 28 Ark. 126; *Hammond v. State*, 3 Cold. 129; *United States v. Durkee*, 1 McAll. 196; *Commonwealth v. Holland*, 1 Duvall, 182; see *People v. Vice*, 21 Cal. 344. There must be an actual taking and carrying away: 1 Hale P. C. 533; *Farrell's Case*, 1 Leach, 4th ed., 322, note. In the latter case the defendant stopped the prosecutor as he was carrying a feather-bed on his shoulders, and told him to lay it down or he would shoot him. The prosecutor laid the bed on the ground, and the defendant took it, and while in the act of removing it was apprehended. The court held the offense was not complete, and discharged the defendant. In *Lapier's Case*, 1 Leach, 4th ed., 320, the defendant snatched out a lady's ear-ring, and succeeding in separating it from the ear, and it was afterwards found in her hair, the offense was held complete: See *Rex v. Mason*, Russ. & R. C. C. 419. If "force" is used, "fear" is not an essential ingredient of the crime: *McDaniel v. State*, 8 Smedes & M. 401; *Commonwealth v. Snelling*, 4 Binn. 379; *State v. McCune*, 5 R. I. 60; 1 Wharton's Crim. Law, 8th ed., sec. 850; *State v. Gorham*, 55 N. H. 152; *Commonwealth v. Humphries*, 7 Mass. 242; *State v. Cowan*, 7 Ired. 239; *State v. Burke*, 73 N. C. 83; *Bonsall v. State*, 35 Ind. 460; *State v. Howerton*, 58 Mo. 581. In *State v. Broderick*, 59 Mo. 318, it appeared that defendant, coming unexpectedly upon the prosecutor, had snatched his watch-chain with such violence as to tear it away from the watch, and from the button-hole; the offense was held complete. Where the indictment avers fear, fear must be proved: *Glass v. Commonwealth*, 6 Bush, 436. It is not necessary that the fear should be of robbery. Fear of bodily hurt is enough: *Commonwealth v. Snelling*, 4 Binn. 379.



Any threat calculated to produce terror is sufficient: *Long v. State*, 12 Ga. 293; *Rex v. Reane*, 2 East P. C. 734. Thus if a man take another's child, and threaten to throw it into the river or otherwise injure it unless the other give him money, this is robbery: *Id.* So if a man part with his money in order to save his house from being fired, the offense is complete: *Rex v. Donnelly*, 2 East P. C. 718. See *Rex v. Winkworth*, 4 Car. & P. 444. To extort money from a person under threat of charging him with an unnatural crime has been held to be robbery: *People v. McDaniels*, 1 Park. Cr. 199; 1 Wharton's Crim. Law, 8th ed., sec. 852, and

cases there cited. Upon an indictment charging a person as principal in a robbery, he cannot be convicted as an accessory after the fact: *People v. Gassaway*, 28 Cal. 404. See generally, as to what evidence is admissible upon the trial of an indictment for robbery, *People v. Jones*, 32 Cal. 80; *People v. McCrea*, 32 Cal. 98; *People v. Hoy Yen*, 34 Cal. 176. In *People v. Pool*, 27 Cal. 572, the court characterized the crime of robbery as an outrage, in instructing the jury, and it was held that the defendant was not prejudiced thereby. In *People v. Jones*, 33 Cal. 58, robbery was held to include larceny.

### *Burglary defined—How punished.*

§ 46. Every person who shall unlawfully enter in the night-time, or shall unlawfully break and enter in the daytime, any dwelling-house, or outhouse thereunto adjoining, and occupied therewith, or any office, shop, store, warehouse, malt-house, still-house, mill, factory, bank, church, school-house, railroad car, barn, stable, ship, steamboat, watercraft, or any building in which any goods, merchandise, or valuable things are kept for use, sale, or deposit, within the body of any county, with intent to commit a misdemeanor or felony, shall be deemed guilty of burglary, and upon conviction thereof shall be imprisoned in the penitentiary for any period not more than fourteen years. [January 31, 1888, § 1. In effect immediately.]

**Burglary.**—The entering of a building with intent to commit a misdemeanor, or some felony, is all that is made essential to the crime. The entry and intent being found, the crime would be complete, even though it should turn out, contrary to the calculations of the burglar, that the building was empty: *People v. Shaber*, 32 Cal. 36. Where defendant was indicted, and, upon sufficient evidence, found guilty of burglary, in having entered a house with intent to commit petit larceny, it was held immaterial that he might also have had the further intent to have sexual intercourse with a woman who was in the house: *People v. Soto*, 53 Cal. 415. A larceny, though committed at the same time, is not necessarily included in a burglary, as manslaughter is in murder. The offense of burglary is complete without any larceny being committed. Upon an indictment for burglary, defendant cannot be found guilty of larceny: *People v. Garnett*, 29 Cal. 622. Where defendant proposed to another to enter a house and steal some money concealed there, and the other, for the purpose of entrapping defendant, appeared to assent, but went and informed the sheriff, and thereafter, by advice of the sheriff and district attorney, did enter the house and take the money, the defendant keeping watch on the outside, and the money obtained was then divided between the two, and thereupon the sheriff immediately arrested defendant, it was held that since the person who entered the building and took the money had no intention of stealing it,

but intended solely to entrap defendant into the apparent commission of a crime, no burglary was committed, there being no felonious intent in entering the house or taking the money: *People v. Collins*, 53 Cal. 185.

In *People v. Ah Ping*, 27 Cal. 489, the court held that the mere fact that one person is with another who enters a dwelling-house and steals therefrom, and sees him steal without interference, does not render him guilty of the crime of burglary: See *People v. Kennedy*, 55 Cal. 201.

**Indictment for:** See notes to section 1244, Code of Procedure. Charging the crime in the language of the statute is sufficient: *People v. Lewis*, 61 Cal. 366. But in this offense it is much safer, if not absolutely necessary, to designate the particular misdemeanor or felony, to commit which the defendant entered. And a setting forth of the facts will avoid all questions of uncertainty: *People v. Nelson*, 58 Cal. 104. It is sufficient to charge the ownership of the room to be in him who rents and occupies it as a lodger, though another have supervision and general control of the whole house: *People v. St. Clair*, 38 Cal. 137. Where the indictment describes a particular house as the one entered, the prosecution cannot prove that defendant entered a different one: *People v. Barnes*, 48 Cal. 551.

The hour of the night at which a burglary is committed is not of the essence of the crime, and it need not be averred in the indictment or information: *People v. Burgess*, 35 Cal. 115.

### *Presumption as to intent, and rebuttal of, in cases of burglary.*

§ 47. [828.] Every person who shall be guilty of any such unlaw-

ful entry, or unlawful breaking and entry, as described in the next preceding section, shall be deemed to have made such entry, or breaking or entry, with intent to commit a misdemeanor or a felony, unless such entry, or breaking and entry, shall be explained by testimony satisfactory to the jury trying the case to have been made for some purpose without criminal intent.

*Grand larceny defined — Punishment of.*

§ 48. [830.] Every person who shall feloniously steal, take and carry, lead or drive away the personal goods or property of another, of the value of thirty dollars or more, shall be deemed guilty of grand larceny, and upon conviction thereof shall be imprisoned in the penitentiary not more than fourteen years nor less than one year.

**Larceny defined:** See a general discussion of the subject of larceny in a note to *State v. Homes*, 57 Am. Dec. 271-286. Asportation and intent to steal are necessary elements in the offense of larceny: *People v. Murphy*, 47 Cal. 103; *People v. Stone*, 16 Cal. 369; *Scott v. Harbor*, 18 Cal. 704; *People v. Smith*, 15 Cal. 408. The crime consists in the felonious and fraudulent taking of property with intent to deprive the owner thereof, even though the defendant did not intend to convert the property to his own use: *People v. Juarez*, 28 Cal. 380. Larceny of different articles at one time from the same person cannot be carved into distinct offenses, and but one indictment can be sustained: *State v. McCormack*, 8 Or. 236. The crime is not committed unless the accused acted feloniously; and if the court, in defining larceny, omit the word "felonious," it will be error: *People v. Cheong Foon Ark*, 61 Cal. 527. A man may steal his own property, if, by taking it, his intent be to charge a bailee with the property: *People v. Thompson*, 34 Cal. 671; *People v. Stone*, 16 Cal. 369. Where the bailee of property obtains possession of it from the owner with the intent to steal it, and carries out that intent, he is guilty of larceny: *People v. Smith*, 23 Cal. 280; see *People v. Poggi*, 19 Cal. 600. The felonious intent at the time of the taking is the essence of the crime: *People v. Jersey*, 18 Cal. 337; *People v. Raschke*, 73 Cal. 384; though there are cases holding that it is larceny if the intent is afterward formed and acted upon: See *People v. Pico*, 62 Cal. 50; compare *People v. Salorse*, 62 Cal. 139; *People v. Eastman*, 77 Cal. 171. Money collected by a sheriff for taxes is the property of the county in the hands of the sheriff, and he may be guilty of larceny by converting the same to his own use: *State v. Dale*, 8 Or. 229. One who receives money from another, to which he knows he is not entitled, and which he knows has been paid to him by mistake, and conceals such overpayment, appropriating the money to his own use, with intent to defraud the owner thereof, is guilty of larceny: *State v. Ducker*, 8 Or. 394.

**Jurisdiction.** — When property stolen in one county has been brought into another, the jurisdiction of the offense is in either county: See §§ 1193-1195, Code of Procedure; *People v. Mellon*, 40 Cal. 648; *State v. Brown*, 8 Nev.

208; *People v. Valenzuela*, 6 Pac. C. L. J. 561; *State v. Johnson*, 2 Or. 115.

**Indictment:** See notes to § 1244, Code of Procedure. An indictment for larceny which charges that defendant "did feloniously, willfully, and unlawfully, and with force and arms, steal, take and carry, lead and drive away," etc., contains a sufficient statement of the intent with which the taking was done: *People v. Brown*, 27 Cal. 500. An information charging defendant with stealing "a certain hog," the property of one A. L., was held sufficient, a particular description of the hog not being necessary: *People v. Stanford*, 64 Cal. 27, citing *People v. Salazar*, 6 Pac. C. L. J. 569; see § 1241, Code of Procedure.

**Larceny and embezzlement — Distinction.** — The chief distinction between larceny and embezzlement is, that in the case of embezzlement the guilty party has possession of the property at the time of the commission of the offense, while in the case of larceny the taking of the property constitutes one of the elements of the offense: *People v. Belden*, 37 Cal. 51; *People v. Abbott*, 53 Cal. 284; *People v. Jersey*, 18 Cal. 337; *People v. Smith*, 23 Cal. 280; *People v. Bogart*, 36 Cal. 245; *People v. Dalton*, 15 Wend. 581; *People v. Salorse*, 62 Cal. 139.

**Evidence.** — The possession of stolen property, although a circumstance to be considered in determining the guilt of defendant, is not alone sufficient to convict: *People v. Beaver*, 49 Cal. 57; *People v. Getty*, 49 Cal. 581; *People v. Gill*, 45 Cal. 285; *People v. Gassaway*, 23 Cal. 51; *People v. Antonio*, 27 Cal. 404; *People v. Ah Ki*, 20 Cal. 177; *People v. Chambers*, 18 Cal. 382; *People v. Kelly*, 28 Cal. 423. A confession, voluntarily made, is admissible in evidence, even though on a prior occasion there had been given a promise of favor, not acted upon, and which had been made to induce the accused to confess: *People v. Jim Ti*, 32 Cal. 60. An attempt to escape is also a circumstance which the jury may consider in determining the guilt or innocence of defendant: *People v. Strong*, 46 Cal. 302; and so is a concealment of the stolen property: *People v. Murphy*, 47 Cal. 103. Proof that the person alleged to be the owner of the stolen property had a special property, or that he held it to do some act upon it, or for the purpose of car-



riage, or in trust for the benefit of another, Me. 18; *Yates v. State*, 10 Yerg. 549; see *People* will support the allegation of ownership: *People v. Smallman*, 55 Cal. 185, for various questions of evidence and practice.

*Petit larceny defined—How punished.*

§ 49. [831.] Every person who shall feloniously steal, take and carry, lead or drive away the personal goods or property of another, under the value of thirty dollars, shall be deemed guilty of petit larceny, and upon conviction thereof shall be fined not less than twenty-five nor more than one hundred dollars, or be imprisoned in the county jail not more than one month, or by both fine and imprisonment, in the discretion of the court.

**Petit larceny.**—With the exception of fense as that of grand larceny: See notes to "value," the same principles govern this of- next preceding section.

*Larceny of partnership property.*

§ 49 a. If any person, being the copartner of another person or persons, shall fraudulently conceal or fail to account for any money or property belonging to the copartnership, with the fraudulent intent to convert the same to his individual use, such person shall be deemed guilty of the larceny of said money or property, and shall, if the amount so taken be of the value of thirty dollars or less, be fined in any sum not to exceed one hundred dollars, and shall be imprisoned in the county jail for a period of not to exceed thirty days; if the value of the copartnership property or money aforesaid exceed thirty dollars in value, then the person fraudulently concealing or failing to account for the same as aforesaid shall be deemed guilty of grand larceny, and shall be fined in any sum not exceeding five hundred dollars, and imprisoned in the penitentiary not less than one year nor more than two years. [January 28, 1867. In effect immediately.]

This section is not found in the Code of 1881, repealing provisions of the statute adopting but it does not appear to be embraced in the that code or other statute.

*Bonds, notes, etc., are property, and subjects of larceny.*

§ 50. [832.] Bonds, promissory notes, bills of exchange, or other bills, orders, drafts, checks, or certificates, or warrants for or concerning money, goods, or property due, or to become due, or to be delivered, and any deed or writing containing a conveyance of land, or any valuable contract in force, or receipt, release, or defeasance, writ, process, or public record, or any other instrument whatever, shall be considered personal goods, of which larceny may be committed.

**Larceny of notes, etc.**—Sufficient specifications in indictment or information for: See Code of Procedure, § 1253.

*Dogs are property—Stealing of, how punished.*

§ 51. [837.] All dogs in this state are hereby declared to be personal property, and shall be as much the subject of larceny as any



other kind of personal property, and every person stealing and taking away such dog shall be liable to prosecution and indictment as in other cases of larceny.

*Stealing horses, cattle, sheep, etc., or receiving or buying them to defraud owner — How punished.*

§ 52. [833.] If any person shall steal a horse, mare, gelding, foal or filly, ass or mule, or any one or more head of neat cattle, or any one or more head of sheep, of any value, or if any person shall receive or buy any horse, mare, gelding, foal or filly, ass or mule, or any one or more head of neat cattle, or any one or more head of sheep, that shall have been stolen, with intent, by such receiving or buying, to defraud the owner, or if any person shall conceal any person guilty of stealing any of said property, knowing him to be the person who stole the same, or if any person shall conceal any horse, mare, or gelding, foal or filly, ass or mule, or any one or more head of neat cattle, or any one or more head of sheep, knowing the same to have been stolen, any person so offending shall be deemed guilty of an offense against the laws of the state of Washington, and upon conviction thereof shall be imprisoned in the penitentiary and kept at hard labor not more than ten nor less than one year; or, in the discretion of the court, the offender may be imprisoned in the county jail not exceeding one year, or fined not exceeding one hundred dollars, or both.

**Stealing animals, or receiving stolen ones.** — For general principles of larceny relating to this offense and the sufficiency of the indictment or information, see notes to §§ 50 and 48, *ante*, and Code of Procedure, §§ 1241, 1255.

*One receiving money or property through false personation is guilty of larceny — How punished.*

§ 53. [834.] Every person who shall falsely represent or personate another, and in such assumed character shall receive any money or other property whatever, intended to be delivered to the party so personated, with intent to convert the same to his own use, shall be deemed guilty of larceny, and shall, on conviction thereof, be imprisoned in the penitentiary not more than fourteen years nor less than one year, or imprisoned in the county jail any length of time not exceeding one year.

**False pretenses:** See § 1253, Code of Procedure.

*Conversion of personal property is larceny when — How punished.*

§ 54. Every person who shall borrow, hire, or in any manner obtain the use of the goods, chattels, or personal property of any nature, kind, or condition whatsoever, of another, for any specific purpose, or for any specific time, and who shall at any time after the said purpose has been complied with, or the said time has expired, give away,

trade, barter, sell, convert, or secrete, with intent to convert to his own use, without the consent of the owner, or agent of said owner, any of the goods, chattels, or personal property of any nature, kind, or condition whatsoever, of another, which shall have come into his or her possession by virtue of such borrowing or hiring, or so obtaining the possession thereof, as aforesaid, he or she shall, upon conviction thereof, be adjudged guilty of larceny, and shall be punished in the same manner prescribed by law for the larceny of property of the kind and value of the goods, chattels, or personal property so given away, traded, bartered, sold, converted, or secreted with intent so to convert to his or her own use. [*February 2, 1888, § 1. In effect immediately.*]

*Larceny by embezzlement.*

§ 55. If any agent, clerk, officer, servant, or person to whom any money or other property shall be intrusted, with or without hire, shall fraudulently convert to his own use, or shall take and secrete the same with intent fraudulently to convert the same to his own use, or shall fail to account to the person so intrusting it to him, he shall be deemed guilty of larceny, and on conviction thereof shall be imprisoned in the penitentiary not more than ten years nor less than one year, or be imprisoned in the county jail for any length of time not exceeding one year. [*March 2, 1891, § 6.*]

**Embezzlement.** — Embezzlement is the proper name for the crime where an agent fraudulently converts the money of his employer: *State v. Sweet*, 2 Or. 127. The word "embezzlement" describes the offense charged, and it was not the intention of the legislature to abolish the name of embezzlement from the catalogue of crimes, but only to say that the crime of embezzlement should be equal in degree to larceny, and have the same penalty attached to its commission: *Id.*

In order to convict one as agent with having embezzled the property of his principal, four distinct propositions of fact are to be made out: 1. That he was such agent; 2. That he received the property of his principal; 3. That he received it in the course of his employment; and 4. That he converted it to his own use, with intent to steal: *Ex parte Hedley*, 31 Cal. 108; *Griffin v. State*, 4 Tex. App. 390. Money received by a clerk from collections on bills, intrusted to him to collect by his employer, is money intrusted to him: *Ex parte Ricord*, 11 Nev. 287. The disposal of collateral security by the holder before the debt is due, which it

secures, has been held not to be embezzlement: *Commonwealth v. Butterick*, 100 Mass. 1. Where one places his money in the hands of another, to be by him loaned at a stipulated rate of interest, relying upon the honesty of the one receiving it for its safe return, it is not embezzlement if the party fail to properly account for the money so received: *Kribs v. People*, 82 Ill. 425. A fraudulent conversion by one partner of property belonging to the firm, or by one of two joint owners of property, does not constitute this crime: *Napoleon v. State*, 3 Tex. App. 522; *State v. Kent*, 22 Minn. 41. Mere conversion, unless accompanied by a criminal intent, is not punishable: *State v. Reilly*, 4 Mo. App. 392. Shares of stock are the subject of embezzlement: *People v. Williams*, 60 Cal. 1.

As to the chief distinction between larceny and embezzlement, see notes to § 48, *ante*.

**Indictment or information for:** See § 1253, and notes to § 1244, Code of Procedure. It is fatally defective unless it charges that the "officer, agent, clerk," etc., was such for hire: *Terry v. State*, 24 Pac. Rep. 447 (Wash.).

**Larceny:** See notes to § 48, *ante*.

*Forgery of warehouse receipts — Embezzlement by bailee with or without hire is larceny — How punished.*

§ 56. If any warehouseman, miller, storage, forwarding, or commission merchant, or his or their servants, agents, or clerks, shall willfully and fraudulently make or alter any receipt or other written evidence of the delivery into the warehouse, mill, store, or other building belonging to him, them, or either of them, or his or their em-

ployers, of any grain, flour, pork, beef, or wool, or other goods, wares, or merchandise, which shall not have been so received or delivered into such mill, warehouse, store, or other building previous to the making and altering such receipt, or other written evidence thereof, he shall, upon conviction thereof, be imprisoned in the penitentiary not more than two years, nor less than six months, or imprisoned in the county jail for any length of time not exceeding one year, and fined in any sum not exceeding one thousand dollars. [*March 2, 1891, § 7.*]

*Embezzlement of public funds by officers is felony — Punishment.*

§ 57. If any state, county, township, city, town, village, or other officer elected or appointed under the constitution or laws of this state, court commissioner, or any officer of any court, or any clerk, agent, servant, or employee of any such officer, shall, in any manner not authorized by law, use any portion of the money intrusted to him for safe-keeping, in order to make a profit out of the same, or shall use the same for any purpose not authorized by law, he shall be deemed guilty of a felony, and on conviction thereof shall be imprisoned in the penitentiary not less than one nor more than ten years. [*December 20, 1889, § 1. In effect immediately.*]

*Pleading and evidence upon indictment, etc., for embezzlement of public funds.*

§ 58. In prosecutions for the offenses named in the next preceding section, it shall be sufficient to allege generally, in the information or indictment, that any such officer, court commissioner, clerk, agent, servant, or employee has made profit out of the public money in his possession or under his control, or has used the same for any purpose not authorized by law, to a certain value or amount, without specifying any further particulars in regard thereto, and on the trial evidence may be given of all the facts constituting the offense and defense thereto. [*December 20, 1889, § 2. In effect immediately.*]

*Malicious injury to animals. — How punished.*

§ 59. [838.] If any person maliciously kill, maim, or disfigure any horse, cattle, or other domestic beast of another, or maliciously administer poison to any such animal or animals, or expose any poisonous substance, with intent that the same should be taken by it or them, he shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding three hundred dollars.

**Willful or malicious offenses against property.** — According to the general rules of code pleading, the indictment or information will be sufficient if the acts constituting the offenses as defined by the various sections of this code are set forth either with or without a name given to the offense: *People v. Phipps*, 39 Cal. 326; *People v. Cronin*, 34 Cal. 191; *People v. Dalton*, 58 Cal. 226; and following the language of the statute will make a

good complaint: *People v. White*, 34 Cal. 183; *People v. Shaber*, 32 Cal. 36; *People v. Potter*, 34 Cal. 114.

**Defense.** — It is a good defense to show that the wounding or killing was done to protect the crop of the accused, and not from either ill-will towards the owner, or cruelty to the animal: *Wright v. State*, 30 Ga. 325; *Commonwealth v. Walden*, 3 Cush. 558; *State v. Pierce*, 7 Ala. 728.



*Putting marks or brands on cattle, etc., or altering same with intent to steal — How punished.*

§ 60. [839.] Every person who shall mark or brand, or alter or deface the mark or brand, of any horse, mare, colt, jack, jennet, mule, or any one or more head of neat cattle, or sheep, goat, hog, shoat, or pig, not his own property, but belonging to some other person, or cause the same to be done, with intent thereby to steal the same, or to prevent the identification thereof by the true owner, shall, on conviction thereof, be imprisoned in the penitentiary not more than five years nor less than one year, or be imprisoned in the county jail for any length of time not exceeding one year.

**Allegation of ownership** in indictment or information: See § 1255, Code of Procedure.

*Misdemeanor to cut off more than one half of ear of domestic animal — How punished.*

§ 61. [840.] It shall not be lawful for any person to cut off more than one half of the ear or ears of any domestic animal, such as an ox, cow, bull, calf, sheep, goat, or hog, and any person cutting off more than one half of the ear or ears of any such animals shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum less than twenty dollars.

*Taking up stray logs and timber is unlawful when.*

§ 62. It shall be unlawful for any person or persons to take up saw-logs, hewn or other timber of value, found adrift on any bay, harbor, or river in the counties of Snohomish, Whatcom, Skagit, or Island, in this state, that shall be marked with any mark or brand, without permission of the owner or agent thereof; *provided*, the person claiming such mark or brand shall have had a copy thereof recorded in the county wherein he resides. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction shall be fined in any sum not exceeding three hundred dollars, and stand committed until paid. [March 2, 1891, § 8.]

*Forgery defined — How punished.*

§ 63. [854.] Every person who shall falsely make, or assist to make, deface, destroy, alter, forge, or counterfeit, or cause to be falsely made, defaced, destroyed, altered, forged, or counterfeited, any record, deed, will, codicil, bond, writing obligatory, promissory note for money or property, receipt for property, power of attorney, certificate of a justice of the peace or other public officer, auditor's warrant, treasury note, county order, acceptance or indorsement of any bill of exchange, promissory note, draft, or order, or assignment of any bond, writing obligatory, or promissory note for money or property, or any other instrument in writing, or any brand prescribed by law on tobacco,

beef, bacon, or pork cask, lard keg or barrel, salt-barrel, or hay-bale, or any person who shall utter or publish as true any such instrument, knowing the same to be false, defaced, altered, forged, or counterfeited, with intent to defraud any person, body politic or corporate, shall be deemed guilty of forgery, and on conviction thereof shall be imprisoned in the penitentiary not more than fourteen years nor less than one year, and be fined in any sum not exceeding five thousand dollars.

**Forgery.** — It is not essential to the crime that the person in whose name the forged instrument purports to be made shall have legal capacity to make it: *State v. Eudes*, 68 Mo. 150. But an instrument having no validity upon its face is not a subject of forgery: *Abbott v. Rose*, 62 Me. 194. If the indictment merely sets out an instrument which is a nullity upon its face, without any averment showing it can be made to act injuriously or fraudulently, by reason of matter *aliunde*, no case is made: *People v. Tomlinson*, 35 Cal. 507. In the case of *Brown v. People*, 86 Ill. 239, it was held that, to authorize an indictment and conviction for forgery, the instrument alleged to have been forged must be such as if genuine would be effective, and that no indictment can be founded upon an instrument purporting to be a decree of divorce which on its face does not appear to be a copy of the record.

Intent being an element of the crime of forgery, evidence of the defendant's drunkenness and of its effect upon him are admissible: *People v. Blake*, 3 West Coast Rep. 38. If a note is uttered and published as true and genuine, with intent to defraud, the offense is made out, though no defrauding be actually accomplished: *State v. Lurch*, 12 Or. 99.

The alteration of a check already made is forgery: *People v. Brotherton*, 47 Cal. 388; *Wilson v. South Park Commissioners*, 70 Ill. 46. And it is no defense that the drawer of the forged check is a fictitious person, nor that he had no funds in the bank on which the check is drawn: *Thompson v. State*, 49 Ala. 16. If there are two persons of the same name, and one of them signs that name to notes, with the intention that the notes shall be used in trade as the notes of the other, it is forgery: *Barfield v. State*, 29 Ga. 127. Where defendant did not himself sign the name to the forged note, but procured an innocent person to sign the name by falsely representing that he had authority to do so from the person whose name was signed, he was adjudged guilty: *Gregory v. State*, 26 Ohio St. 510. Where one fraudulently executes and issues an instrument purporting on its face to be executed by him as agent of the principal therein named, he is not guilty of forgery, though he have no authority from the principal to execute the instrument: *Mann v. People*, 15 Hun, 155; see also *People v. Shotwell*, 27 Cal. 394; *People v. Frank*, 28 Cal. 507; *Fuller v. Ferguson*, 26 Cal. 546;

*Wright v. Carillo*, 22 Cal. 595; *People v. Ah Sam*, 41 Cal. 645; *People v. Ferris*, 56 Cal. 442; *People v. Cummings*, 57 Cal. 938. A note is not a forgery, but is genuine, where signed by one party under the direction and authority of the persons represented to be the makers: *State v. Lurch*, 12 Or. 99.

By the above section, the uttering or passing, as well as the making, etc., of a forged instrument, is declared a forgery: See *People v. Ah Woo*, 28 Cal. 205; *People v. Tomlinson*, 35 Cal. 503; *State v. Lane*, 80 N. C. 407; *State v. Snow*, 30 La. Ann. 401. The act of uttering the instrument, with knowledge of its fictitious character, and with intent to defraud, are the essential elements of the crime: *Dunn v. People*, 4 Col. 126. It is enough if it be offered as genuine, and it is not necessary that it should have been actually received as genuine by the party upon whom the fraud is attempted: *People v. Caton*, 25 Mich. 388. The bringing of a suit at law, as counsel, upon a forged note, and recovering judgment, and taking proceedings to enforce the judgment, knowing the note to be a forgery, amounts to uttering a forged note: *Chahoon v. Commonwealth*, 20 Gratt. 733.

Though one of the various acts mentioned in the law constitutes the crime, they all do no more than to charge one crime or offense: *People v. Frank*, 28 Cal. 513.

Upon a trial for uttering a forged writing, evidence is admissible to prove that the writing is different from that of the body of the instrument, even though defendant admits having signed the name, claiming to have had authorized to do so: *State v. Lurch*, 12 Or. 99; 1d. 104. The introduction of a receipt, purporting to extinguish a claim of sixty-five dollars, as evidence in support of an allegation in an indictment for forging a receipt extinguishing a claim of sixty dollars, is a fatal variance: *Shirley v. State*, 1 Or. 264.

In an indictment or information for forgery, it is not necessary to name any particular person as having been defrauded: See § 64, *infra*. The naming of such person confines the proof of defrauding to the person named: *State v. Lurch*, 12 Or. 104. If the forged or counterfeit order is in the Chinese language, to set it out in English in the indictment is good: *People v. Ah Woo*, 28 Cal. 208. As to sufficiency of indictment or information for forgery, see § 64, Pen. Code, § 1250, and notes to § 1244, Code Proc.

*Possession of counterfeiting tools with intent to use, etc. — How punished.*

§ 64. [855.] Every person who shall cast, stamp, engrave, make, or mend, or shall knowingly have in his possession, any mold, pattern, die, puncheon, engine, press, or other tool or instrument adapted



and designed for coining or making any counterfeit coin in the similitude of any gold or silver coin current by law or usage in this state, with intent to use the same, or cause or permit the same to be used or employed in coining or making any such false or counterfeit coin as aforesaid, shall, on conviction thereof, be imprisoned in the penitentiary not more than ten years nor less than one year, and be fined in any sum not exceeding five thousand dollars, and all such tools and instruments intended for such purposes aforesaid shall be destroyed.

**Possession of tools, etc., for counterfeiting.** — The state courts have power to punish this offense: *State v. Brown*, 2 Or. 221. It is not only necessary to prove the known possession by defendant of counterfeiting tools, but it must also be shown that such possession was with criminal intent: *People v. White*, 34 Cal. 183; see *People v. Farrell*, 30 Cal. 316.

*Intent to defraud — Allegation of, when sufficient — Variance.*

§ 65. In any case where the intent to defraud is necessary to constitute the offense of forgery or any other offense that may be prosecuted, it shall be sufficient to allege in the indictment or information an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded; and on the trial of such indictment it shall be deemed sufficient, and shall not be deemed a variance, if there appear to be an intent to defraud the United States, or any state, territory, county, city, town, or village, or any body corporate, or any public officer in his official capacity, or any copartnership, or member thereof, or any particular person; and persons of skill shall be competent witnesses to prove a forgery. [*March 2, 1891, § 9.*]

*Counterfeiting defined — How punished.*

§ 66. [857.] Any person who shall counterfeit any kind or species of gold-dust, gold bullion or bars, lumps, pieces, or nuggets of gold, or any description whatsoever of uncoined gold, currently passing in this state, or shall alter or put off any kind of uncoined gold mentioned in this section, for the purpose of defrauding any person or persons, body politic or corporate, or shall make any instrument for counterfeiting any kind of uncoined gold as aforesaid, knowing the purpose for which such instrument was made, or shall knowingly have in his possession and secretly keep any instrument for the purpose of counterfeiting any kind of uncoined gold as aforesaid, every such person so offending, or any person or persons aiding or abetting in or about said offense or offenses, shall be deemed guilty of counterfeiting, and upon conviction thereof shall be punished by imprisonment in the penitentiary for a term not less than one year nor more than fourteen years.

**Possession of implements for counterfeiting:** See notes to § 63, *ante*.

*Forcible entry and detainer defined — How punished.*

§ 67. [858.] Every person who shall violently take or keep possession of any house or close with menaces, force, and arms, and without



the authority of law, shall be deemed guilty of forcible entry or forcible detainer, as the case may be, and upon conviction thereof shall be fined in any sum not exceeding one thousand dollars.

*Buying or receiving stolen goods — Punishment for.*

§ 68. Every person who shall buy, receive, or aid in the concealment of stolen property, money, or goods, knowing the same to have been stolen, or who shall bring or aid in bringing into this state from any other state or territory of the United States, or from any foreign country, any such stolen property, money, or goods, knowing the same to have been stolen, shall, upon conviction thereof, be imprisoned in the penitentiary not more than four years nor less than one year, or be imprisoned in the county jail not more than two years nor less than one month, and shall be fined not exceeding five hundred dollars nor less than one hundred dollars. [March 26, 1890, § 1.]

**Receiving stolen goods** is a distinct and specific offense under the above section. Where the evidence proved that the defendant was not present in the county at the time of the theft, and did not participate in the larceny, but subsequently, with guilty knowledge that it was stolen, received the stolen property, and aided in disposing of it for the joint benefit of himself and the perpetrator of the larceny, it was held that he could not be convicted either of larceny or of being an accessory after the fact, his offense being that of receiving stolen goods, knowing them to have been stolen: *People v. Stakem*, 40 Cal. 599. This section is intended to provide for the punishment of the

receivers of stolen goods in cases where it might be impossible to identify with certainty the thieves, as in cases of professional receivers. An allegation in the indictment or information of the name of the thief is unnecessary: *People v. Avila*, 43 Cal. 196; see also *People v. Hawkins*, 34 Cal. 181; and an information for receiving stolen property need not allege the value of the property: *People v. Rice*, 73 Cal. 220; 14 Pac. Rep. 851. In a prosecution for such an offense, when the evidence shows that the crime was committed three months prior to the time as alleged in the indictment or information, the variance is immaterial: *People v. Rice*, 73 Cal. 220; 14 Pac. Rep. 851.

*Averments and proof in prosecution for receiving stolen property — Sufficiency of.*

§ 69. In any prosecution for the offense of buying, receiving, or aiding in the concealment of stolen property, money, or goods, known to have been stolen, or for bringing or aiding in bringing into this state any such property, money, or goods, known to have been stolen, it shall not be necessary to aver, nor on the trial thereof to prove, that the person who stole such property has been convicted, nor that the larceny of such property, nor that any conspiracy or agreement between the defendant and any other person or persons concerning the stealing, buying, receiving, concealing, or bringing of such stolen property, was committed or entered into within the jurisdiction of the court trying the case. [March 26, 1890, § 1.]

*Trespass upon inclosed lands is misdemeanor — How punished — Lawful fence.*

§ 70. If any person, other than an officer on lawful business, shall go or trespass upon any inclosed lands or premises not his own, and shall fail, neglect, or refuse to depart therefrom immediately, and remain away until permitted to return, upon the verbal or printed or

written notice of the owner or person in the lawful occupation of said lands or premises, such trespasser shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by fine not less than five nor more than fifty dollars, and shall be committed, in default of payment of the fine and costs imposed, to the jail of the county in which the offense is committed, one day for each two dollars of the said fine and costs; *provided*, that any and all lands and premises inclosed by a lawful fence shall be deemed and considered inclosed lands within the meaning of this section; *and provided further*, that any and all precipices, embankments, streams, lakes, or ponds, or other natural obstructions which equally secure them from trespass of any domestic animals, or shall be made so by artificial means, constituting any part of such inclosure, shall, for all purposes of this section, be deemed lawful fences. [March 15, 1890, § 1. In effect immediately.]

*Trespass upon uninclosed lands is misdemeanor when.*

§ 71. If any person, other than an officer on lawful business, shall trespass upon any uninclosed lands or premises not his own, by the erection of any house, tent, or by continuing to camp or live thereon, after receipt from the owner or person in the lawful occupation of said lands or premises of verbal, written, or printed notice to vacate such lands or premises, such trespasser shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in the next preceding section. [March 15, 1890, § 2. In effect immediately.]

*Notice to trespassers — Evidence of.*

§ 72. Printed or written notices having attached thereto, by authority, the name of the owner or person in lawful occupation of said lands and premises, and requiring all persons to forbear trespassing on said lands or premises, and to depart therefrom, posted in three conspicuous places on said lands or premises, shall be held and deemed to be sufficient *prima facie* evidence of notice, as mentioned in sections seventy and seventy-one. [March 15, 1890, § 12. In effect immediately.]

*Trespassing hunters.*

§ 73. Any owner or other legal occupant of any inclosed premises, used for meadow, pasture, cultivation, or other use, may post, at the usual place or places of entering upon the same, written or printed notices, forbidding persons to trespass upon said inclosed premises, for the purpose of hunting or pursuing game, without first obtaining the consent of the owner or legal occupant thereof; any person entering said lands for said purposes while said notices are so posted shall

be deemed guilty of a misdemeanor, and for every such offense shall be punished by a fine of ten dollars, one half of which shall be paid to the owner or legal occupant of such premises, and the other half into the school fund in the county in which the act of trespass is committed. For the carrying out of the provisions of this section, the owner or legal occupant of the premises may arrest the trespasser upon his premises, taken in the act, without a warrant, and take him before the nearest justice of the peace for trial, or may have a warrant issued as in other cases of misdemeanor; and any natural barrier, as a river, lake, or other obstruction to the passage of stock, shall, for the purposes of this act, constitute an inclosure. [*March 2, 1891, § 10.*]

*Willfully cutting trees, taking stone, etc., from lands of another — How punished.*

§ 74. If any person shall willfully cut down, destroy, or injure any standing or growing tree upon the lands of another, or shall willfully take or remove from any such lands any timber or wood previously cut or severed from the same, or shall willfully dig, take, quarry, or remove from any such lands any mineral, earth, or stone, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than one month nor more than one year, or by fine not less than fifty nor more than one thousand dollars. [*March 15, 1890, § 5. In effect immediately.*]

*Willful entry upon another's land to take fruit, vegetables, etc. — How punished.*

§ 75. If any person shall willfully enter upon the garden, orchard, or other improved land of another, or in his possession, with intent to cut, take, carry away, destroy, or injure the trees, grain, grass, hay, fruit or vegetable products there growing and being, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than one nor more than six months, or by fine not less than five nor more than fifty dollars. [*March 15, 1890, § 3. In effect immediately.*]

*Willful trespass on state lands — How punished.*

§ 76. If any person shall willfully cut down, destroy, or injure any tree standing or growing upon any lands of this state, whether known as school-lands or otherwise, or shall willfully take or remove from any such lands any timber or wood previously cut or severed from the same, or shall dig, quarry, take, or remove any mineral, earth, or stone from such lands, except as provided by law, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than one month nor more than one year, or by fine not less than fifty nor more than one thousand dollars. [*March 15, 1890, § 4. In effect immediately.*]



*Destroying or injuring trees in streets, etc.*

§ 77. Every person who shall cut down, girdle, destroy, or injure any tree, timber, or shrub on the street or highway in front of any person's house, village, town, or city lot, or on the commons or public grounds of any village, town, or city, or on the street or highway in front thereof, without lawful authority, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than fifty dollars, or by imprisonment in the county jail not more than twenty days, or by both such fine and imprisonment. [March 2, 1891, § 11.]

*Malicious injuries to freehold — How punished.*

§ 78. If any person shall maliciously or wantonly cut down, destroy, or injure any bush, shrub, fruit, or other tree not his own, standing or growing for fruit, ornament, or other useful purpose, or shall willfully break the glass in or deface any building not his own, or shall willfully break down or destroy any fence or hedge belonging to or inclosing land not his own, or shall willfully throw down, or open and leave down or open, any bars, gate, or fence, or hedge belonging to or inclosing land not his own, or shall maliciously or wantonly sever from the land of another any produce thereof, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than three months nor more than one year, or by fine not less than ten dollars nor more than five hundred dollars. [March 15, 1890, § 10. In effect immediately.]

*Robbing sluice-boxes, or entry upon mine with intent to commit felony — How punished.*

§ 79. Any person who shall break or rob in any manner, or who shall attempt to break or rob, any flume, rocker, quartz-mill, quartz vein or lode, bed-rock sluice, sluice-box, or mining claim not his own, or who shall trespass upon such mining claim with the intent to commit a felony, shall, upon conviction thereof, be punished by imprisonment in the penitentiary of this state not less than one nor more than five years, or by fine not less than one hundred dollars nor more than one thousand dollars, or by both such imprisonment and fine, as the court or judge thereof may direct. [March 15, 1890, § 6. In effect immediately.]

*Malicious injury to railroad structures.*

§ 80. Any person or persons who shall purposely and maliciously break down, destroy, or injure any fence, gate, sign-board, mile-post, car, or other useful structure upon the line of any railroad, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding two hundred dollars, or be imprisoned

in the county jail not exceeding one year, or by both fine and imprisonment. [*March 2, 1891, § 12.*]

*Maliciously setting grounds on fire — How punished.*

§ 81. If any person shall maliciously or wantonly set on fire any prairie or other grounds other than his own or those of which he is in the lawful possession, or shall willfully or negligently permit or suffer the fire to pass from his own grounds or premises to the injury of another, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than three months nor more than one year, or by fine not less than fifty nor more than five hundred dollars. [*March 15, 1890, § 9. In effect immediately.*]

*Maliciously kindling fire by which injury is communicated to another's property — How punished.]*

§ 82. If any person shall maliciously, with intent to injure any other person, by himself or any other person, kindle a fire on his own land or the land of another person, and by means of such fire the buildings, fences, crops, or other personal property or wooded timberlands of any other person shall be destroyed or injured, he shall, on conviction, be punished by a fine not less than twenty dollars nor more than one thousand dollars, or by imprisonment in the county jail not less than three months nor more than twelve months, according to the aggravation of the offense. [*March 2, 1891, § 13.*]

*Setting out fire in field or timber-land, etc. — How punished.*

§ 83. If any person shall, without malice, kindle a fire in any field, pasture, inclosure, forest, prairie, or timber-land, not his own, without the consent of the owner, and the same shall spread and do damage to any buildings, fences, crops, cord-wood, bark, or other personal property, not his own, or to any wood or timber land, not his own, he shall, on conviction, be punished by a fine of not less than ten nor more than five hundred dollars, and costs, according to the aggravation of the offense, and shall stand committed till the fine and costs are paid. [*March 2, 1891, § 14.*]

*Kindling fire on another's land while hunting or fishing — How punished.*

§ 84. Any person who shall enter upon the lands of another person for the purposes of hunting or fishing, and shall, by the use of fire-arms, or other means, kindle any fire thereon, shall be punished by a fine not less than ten nor more than five hundred dollars, if such fire be kindled without malice; and if such fire be kindled maliciously, and with intent to injure any other person, such offender shall be punished by a fine not less than twenty nor more than one thousand

dollars, or by imprisonment in the county jail not less than three months nor more than twelve months. [March 2, 1891, § 15.]

*To prevent destruction of forests by fire.*

§ 84 a. Any person or persons who shall willfully and deliberately set fire to any wooded county or forest belonging to this state or the United States, within this state, or to any place from which fire shall be communicated to any such wooded county or forest, or who shall accidentally set fire to any such wooded county or forest, or to any place from which fire shall be communicated to any such wooded county or forest, and shall not extinguish the same or use every effort to that end, or who shall build any fire for lawful purposes or otherwise in or near any such wooded county or forest, and through carelessness or neglect shall permit said fire to extend to and burn through such wooded county or forest, shall be deemed guilty of a misdemeanor, and on conviction before a court of competent jurisdiction shall be punishable by fine not exceeding one thousand dollars or imprisonment not exceeding one year, or by both such fine and imprisonment; *provided*, that nothing herein contained shall apply to any person who in good faith shall set a back fire to prevent the extension of a fire already burning. All fines collected under this act shall be paid into the county treasury for the benefit of the common-school fund of the county in which they are collected. [March 7, 1891, § 1.]

*Willful injury to bridge, dam, flume, reservoir — How punished.*

§ 85. Every person who shall willfully and maliciously cut, break, injure, or destroy any bridge, mill-dam, canal, flume, aqueduct, reservoir, or other structure erected to create hydraulic power, or to conduct water for mining or agricultural purposes, or to conduct water for the purpose of floating or carrying therein logs, timber, earth, or sand, or any embankment necessary to the same, or either of them, or shall willfully or maliciously make, or cause to be made, any aperture in such dam, canal, flume, aqueduct, reservoir, embankment, or structure, with intent to injure or destroy the same, shall, on conviction thereof, be fined in any sum not more than one thousand dollars, or be imprisoned in the penitentiary at hard labor not more than two years, or both such fine and imprisonment. [March 7, 1891, § 1.]

“Willfully” is equivalent to “knowingly”: *ful*” when done with deliberation: *People v. Wong v. Astoria*, 13 Or. 538. An act is “will- *Sheldon*, 68 Cal. 434.

*Malicious injury to boat, vessel, logs, lumber, etc.*

§ 86. [843.] If any person maliciously cut away, let loose, injure, or destroy any boom or raft of wood, logs, or lumber, or any boat or vessel fastened to any place, of which he is not the owner or legal possessor, he shall be punished by fine not exceeding five hundred dollars, and imprisonment in the county jail not more than one year,



and shall also forfeit to the use of the person so injured double the amount of damages by him thereby sustained, to be recovered in an action at law.

*Driving sheep upon another's land for pasture is misdemeanor — How punished.*

§ 87. Any person being the owner, or having in his possession, charge, or control, as herder, or otherwise, any sheep, who shall herd or drive such sheep upon the lands of another for the purpose of pasture, against the consent of the owner of such lands, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding three hundred dollars, or imprisonment in the county jail not exceeding thirty days, or both such fine and imprisonment, which fine, when collected, shall go into the county school fund of the county. [February 2, 1888, § 2. In effect immediately.]

*Destruction of dikes, dams, etc. — How punished.*

§ 88. It shall be unlawful to cut or damage, break or destroy, any dike or dam erected or maintained in this state for the protection of lands from overflow; and any person or persons so offending, upon conviction thereof, shall be fined any sum not exceeding three hundred dollars for each and every offense, which fine shall be paid over to the school fund of the county wherein the offense is committed. The person or persons so offending shall not, by the provisions of this section, nor by any judgment under this section, be exempted from any suit for damages brought by any person or persons injured by the cutting, breaking, damaging, or destroying of such dike or dam. [March 2, 1891, § 16.]

*Injury to improvements of settlers upon unsurveyed lands.*

§ 89. Any person or persons who shall willfully and maliciously disturb, or in any wise injure or destroy, the dwelling-house or other building, or any fence inclosing or being on the claim, of any settler upon the unsurveyed public lands in this state, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than fifty nor more than one hundred dollars for each and every offense, to which may be added imprisonment in the county jail not exceeding ninety days. [March 2, 1891, § 17.]

*Posting advertisements on public property.*

§ 90. Every person who willfully commits any trespass by either putting up, affixing, fastening, printing, or painting upon any property belonging to the state, or to any county, city, town, or village, or dedicated to the public, or upon any property of any person or corporation without license from the owner, any notice, advertisement, or designation of, or any name for any commodity, whether for sale or

otherwise, or any picture, sign, or device intended to call attention thereto, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than fifty dollars, or by imprisonment in the county jail not more than twenty days, or by both such fine and imprisonment; *provided*, that nothing contained in this section shall be construed to prohibit the posting of legal notices. [January 15, 1886, § 1. In effect immediately.]

The above is subdivision 5 of the act of January 15, 1886.

*Penalty for converting estrays.*

§ 91. [916.] If the taker up of estray property shall convert the same to his own use, before the title thereto shall vest in him according to law, or if he shall knowingly and willfully violate any of the provisions of the law regulating the taking up of estrays, such person so offending shall be fined in any sum not exceeding five hundred dollars, and not less than double the value of such estray property.

**Allegation of ownership** in indictment or information: See § 1255, Code of Procedure.

## CHAPTER III.

### OF CRIMES AGAINST THE PUBLIC PEACE

- § 92. Riot defined — How punished.
- § 93. Riot, dispersing of — Riotous conduct is misdemeanor — Punishment.
- § 94. Failure to disperse — How punished.
- § 95. Disturbing religious and other meetings — How punished.
- § 96. Injury to buildings, vessels, etc., by persons riotously assembled — How punished.
- § 97. Horse-racing on highway, or boisterous conduct, is misdemeanor — Punishment.
- § 98. Sunday riots, fighting, etc. — How punished — Jurisdiction.
- § 99. Persons engaged in prize-fighting are guilty of affray — How punished.
- § 100. Flourishing weapon is misdemeanor when — How punished — Jurisdiction.
- § 101. Reckless shooting is misdemeanor — How punished — Jurisdiction.

*Riot defined — How punished.*

§ 92. [859.] If three or more persons shall do an act in a violent and tumultuous manner, they shall be deemed guilty of riot, and upon conviction thereof shall be imprisoned in the county jail not exceeding one year, and be fined in any sum not exceeding five hundred dollars, or be fined only.

**Riot.** — At common law, no act amounted to a riot, rout, or unlawful assembly, unless three or more persons mutually engaged in it: 4 Bla. Com. 146; 1 Hawk. P. C., c. 65, sec. 1; 1 Russell on Crimes, 378. It is generally held not to make any difference whether the act intended to be done by the persons assembled be of itself lawful or unlawful; for if a body of men assemble together for the purpose of ob-

taining any particular end, and conduct themselves in a turbulent manner, either with acts of violence, or with threats and intimidations calculated to excite the terror of the people, this is of itself a riot, whether the end and object proposed be a just and legitimate one or not: 1 Russell on Crimes, 380; *Kiphart v. State*, 42 Ind. 273; *State v. Cole*, 2 McCord, 117.

*Riot, dispersing of — Riotous conduct is misdemeanor — Punishment.*

§ 93. If three or more persons shall be unlawfully, riotously, or

tumultuously assembled, any justice of the peace, sheriff, deputy sheriff, constable, or marshal of a city, or mayor or alderman thereof, shall go among the persons so assembled, or as near to them as possible, and shall command them in the name of the state of Washington immediately to disperse. If the persons so assembled do not immediately disperse, it shall be lawful for every such officer to command sufficient aid to seize, arrest, and secure in custody all such persons, and, if necessary, an armed force may be called out, and shall obey the orders of any two of the magistrates or officers mentioned in this section, and if any such persons shall be killed or wounded by reason of their resisting the persons endeavoring to disperse or seize them, the magistrates or officers shall be held guiltless; and if three or more persons shall be unlawfully, riotously, or tumultuously assembled at or near the residence of other persons, or where such other persons may be peaceably assembled, and disturb or annoy such persons by loud or unusual shouting, the discharging of fire-arms, or by creating any unusual noise which is calculated or intended to annoy or in any manner disturb the inmates of said residence or said persons so peaceably assembled, they shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined not less than twenty dollars nor more than two hundred dollars each, or be imprisoned in the county jail not less than twenty days nor more than one year, or both fined and imprisoned. [*December 23, 1885, § 1. In effect immediately.*]

*Failure to disperse — How punished.*

§ 94. [861.] All persons who shall have been commanded peaceably to disperse, who shall refuse so to disperse, or shall willfully obstruct or hinder such officer, who shall declare himself as such, from commanding them to disperse, shall on conviction be imprisoned in the county jail not more than one year, and be fined in any sum not exceeding two hundred dollars, or fined only.

*Disturbing religious and other meetings — How punished.*

§ 95. [862.] Every person who shall disturb any religious society, or any member thereof, when met or meeting together for public worship, or shall sell or give away any spirituous liquor at any booth, wagon, shed, or open place, or any boat, canoe, or other water-craft, or in any building temporarily erected for the purpose of selling therein such liquors, within one mile of any collection of a portion of the citizens of this state convened for the purpose of worship, or shall disturb any collection of people for any unlawful purpose, such person shall, on conviction thereof, be imprisoned in the county jail not exceeding one month, and be fined in any sum not exceeding two hundred dollars, or fined only.



*Injury to buildings, vessels, etc., by persons riotously assembled — How punished.*

§ 96. [863.] If any person or persons unlawfully or riotously assembled pull down, injure, or destroy, or begin to pull down, injure, or destroy, any dwelling-house or other building, or destroy, or attempt to injure or destroy, any boat or vessel, or perpetrate any premeditated injury on the person of another, not being a felony, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars, and imprisonment in the county jail not more than one year, and shall also be answerable to any person injured to the full amount of the damages by him sustained in an action at law.

*Horse-racing on highway or boisterous conduct is misdemeanor — Punishment.*

§ 97. Any persons who shall be guilty of racing horses or driving upon the public highway in a manner likely to endanger the persons or lives of others, or guilty of loud shouting, or the discharging of fire-arms, or any other demonstrations which are calculated or intended to frighten, intimidate, or in any manner disturb other persons, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days. [December 23, 1835, § 1. In effect immediately.]

*Sunday riots, fighting, etc. — How punished — Jurisdiction.*

§ 98. [865.] If any person be found on the first day of the week, commonly called Sunday, engaged in any riot, fighting, or offering to fight, horse-racing, or dancing, whereby any worshiping assembly or private family are disturbed, every person so offending shall on conviction be fined in the sum of not to exceed one hundred dollars, to be recovered before any justice of the peace in the county where such offense is committed, and shall be committed to the jail of said county until the said fine, together with the costs of prosecution, shall be paid.

*Persons engaged in prize-fighting are guilty of affray — How punished.*

§ 99. [866.] If two or more persons by agreement fight in any public place, the person so offending shall be deemed guilty of an affray, and upon conviction thereof shall be imprisoned in the county jail not more than six months, and be fined in any sum not exceeding three hundred dollars, or be fined only.

*Flourishing weapon is misdemeanor when — How punished — Jurisdiction.*

§ 100. Every person who shall, in a manner likely to cause terror

to the people passing, exhibit or flourish, in the streets of an incorporated city or unincorporated town, any dangerous weapon, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine in any sum not exceeding twenty-five dollars. Justices of the peace shall have exclusive original jurisdiction of all offenses arising under this section. [January 31, 1888, §§ 2, 3. In effect immediately.]

*Reckless shooting is misdemeanor—How punished — Jurisdiction.*

§ 101. Every person who shall in a reckless, careless, or negligent manner discharge, in the vicinity of an inhabited dwelling-house, or in the streets of an incorporated city or unincorporated town, any fire-arm, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days, or both such fine and imprisonment. Justices of the peace shall have exclusive original jurisdiction of all offenses arising under this section. [January 31, 1888, §§ 1, 3. In effect immediately.]

## CHAPTER IV.

### OF CRIMES AGAINST PUBLIC JUSTICE.

§ 102. Perjury defined.

§ 103. Term "oath" includes affirmation.

§ 104. Irregularity of oath administered is no defense to charge of perjury.

§ 105. Incompetency of testimony is no defense to charge of perjury.

§ 106. Ignorance of materiality of false statement is no defense to charge of perjury.

§ 107. Making of deposition or certificate is complete when.

§ 108. False statement, what constitutes.

§ 109. Penalty for perjury and subornation of perjury.

§ 110. Perjury cannot be predicated upon official oath when.

§ 111. Subornation of perjury.

§ 112. Attempt to suborn perjury — How punished.

§ 113. One requesting that himself or another be placed upon list of jurors is guilty of misdemeanor.

§ 114. Misdemeanor for officer to select requesting juror.

§ 115. Failure to appear as witness is misdemeanor.

§ 116. Perpetration of fraud in drawing of jurors — How punished.

§ 117. Compounding or concealing crime — How punished.

*Perjury defined.*

§ 102. [867.] Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury.

**Perjury.** — A false oath in the course of a trial, to constitute perjury, must be to something material to the issue: *People v. Perazzo*, 64 Cal. 106; and the evidence given must be prejudicial to some one; otherwise, however willful it may be, it will not be perjury: *People v. McDermott*, 8 Cal. 288; *Plath v. Braunsdorff*, 40 Wis. 107. But it need not be the fact directly in issue. If a person falsely and corruptly swears as to any material circumstance which has a legitimate tendency to prove or disprove a material fact, it is perjury: *Commonwealth v. Grant*, 116 Mass. 17. Where one swearing as to a material fact denies that he had made statements different from his testimony, a charge of perjury may be based upon such denial: *People v. Barry*, 63 Cal. 63. Where one willfully testifies upon a trial that he has not made certain statements concerning a matter material to the case, when in fact such statements were made by him on the trial of another case, he is guilty of perjury, though the statements made were immaterial in the first case: *State v. Mooney*, 65 Mo. 494. The offense is not confined to actions in courts. There are many instances where the laws authorize an oath to be administered when no suit is pending, and the willful taking of a false oath in such instances is perjury: *United States v. Volz*, 14 Blatchf. 15. The false statement must be willfully and corruptly made. Accidental and unintentional false swearing is not perjury: *Bell v. Senneff*, 83 Ill. 122; *Nelson v. State*, 32 Ark. 192; *United States v. Passmore*, 4 Dall. 378. If a witness state the truth to the writer of an affidavit, but the statement is written out erroneously, the witness is not guilty of perjury in swearing to such affidavit, if he did not know it contained the false statements: *Jesse v. State*, 20 Ga. 156.

A false oath will not constitute perjury unless the officer or tribunal administering the oath has legal and competent authority to do so; otherwise the person taking the oath cannot be convicted, however false the statement may be: *Van Dusen v. People*, 78 Ill. 645; *Biggerstaff v. Commonwealth*, 11 Bush, 169. In *Ex parte Carpenter*, 64 Cal. 267, Carpenter appeared before a notary with a deed signed by one Bouchard; the notary, not knowing Carpenter,

swore him, and he, testifying that he was Bouchard, certified to the acknowledgment. The court held this amounted to a probable cause for holding Carpenter for perjury.

**Indictments.** See notes to § 1244, Code of Procedure. — In all indictments for perjury or subornation of perjury, it is necessary to set forth the substance of the controversy or matter in respect to which the crime was committed, and that only: See § 1251, Code of Procedure: *State v. Witham*, 6 Or. 366. In an indictment for perjury alleged to have been committed by a witness in the trial of a civil action in the circuit court, it is sufficient to allege that the oath was taken in that court, without designating the officer by whom it was administered: *State v. Spencer*, 6 Or. 152. The manner of stating the act constituting the crime as set forth in § 1251, Code of Procedure, is sufficient: See *State v. Spencer*, 6 Or. 152. Upon an indictment for perjury, an affidavit of the defendant directly contradicting the one upon which the perjury is assigned is not sufficient evidence of the falsity of the latter: *United States v. Mayer*, 1 Deady, 127.

**Evidence.** — On the trial the prosecution may prove by oral evidence what the defendant swore to, in respect to which the charge of perjury is made: *People v. Curtis*, 50 Cal. 95; *Nelson v. State*, 32 Ark. 192. Though the reporter's notes are *prima facie* evidence of the testimony given, yet such notes are inadmissible where the testimony was taken through an interpreter: *People v. Lee Fat*, 54 Cal. 527. Evidence that defendant was intoxicated at the time of the happening of the transaction in reference to which he is charged with having testified falsely is proper, in order to determine whether he knowingly testified falsely: *Lytle v. State*, 31 Ohio St. 196. A record of acquittal of a charge of perjury has been held to be conclusive evidence that the matter testified to was true: *Bell v. Senneff*, 83 Ill. 122. In California perjury must be proved by the testimony of two witnesses, or one witness and corroborating circumstances: Cal. Code Civ. Proc., § 1968; see also *People v. Young*, 31 Cal. 583; *People v. Quinn*, 18 Cal. 122; *Ex parte McCarthy*, 29 Cal. 396; *People v. Green*, 54 Cal. 592.

*Term "oath" includes affirmation.*

§ 103. [868.] The term "oath," as used in the last section, includes an affirmation, and every other mode authorized by law of attesting the truth of that which is stated.

*Irregularity of oath administered is no defense to charge of perjury.*

§ 104. [869.] It is no defense to a prosecution for perjury that the oath was administered or taken in any irregular manner.

One who applies to a notary public to certify his acknowledgment of a deed, and, not being personally known to the notary, takes an oath before the notary that he is the person who

signed the deed, may be convicted of perjury, such oath being false: *Ex parte Carpenter*, 64 Cal. 267.

*Incompetency of testimony is no defense to charge of perjury.*

§ 105. [870.] It is no defense to a prosecution for perjury that the



accused was not competent to give the testimony, deposition, or certificate of which falsehood is alleged. It is sufficient that he did give such testimony or make such deposition or certificate.

*Ignorance of materiality of false statement is no defense to charge of perjury.*

§ 106. [871.] It is no defense to a prosecution for perjury that the accused did not know the materiality of the false statement made by him, or that it did not in fact affect the proceeding in or for which it was made. It is sufficient that it was material, and might have been used to affect such proceeding.

*Making of deposition or certificate is complete when.*

§ 107. [872.] The making of a deposition or certificate is deemed to be complete, within the provisions of this chapter, from the time when it is delivered by the accused to any other person, with the intent that it be uttered or published as true.

*False statement, what constitutes.*

§ 108. [873.] An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false.

*Penalty for perjury and subornation of perjury.*

§ 109. [874.] Every person convicted of the crime of perjury committed on the trial of or proceedings in a criminal action for a crime punishable with death or imprisonment for life shall be punished by imprisonment in the penitentiary not less than five nor more than twenty years; every person convicted of the crime of perjury committed in any proceeding in a court of justice, other than such criminal action, shall be punished by imprisonment in the penitentiary not less than three nor more than ten years; and every person convicted of the crime of perjury committed otherwise than in a proceeding before a court of justice, or convicted of the crime of subornation of perjury, however committed, shall be punished by imprisonment in the penitentiary not less than two nor more than five years.

*Perjury cannot be predicated upon official oath when.*

§ 110. [875.] So much of an oath of office as relates to the future performance of official duties is not such an oath as is intended by sections one hundred and two and one hundred and three of this code.

*Subornation of perjury defined—How punished.*

§ 111. [876.] Every person who willfully procures another person to commit perjury is guilty of subornation of perjury, and is punish-

able in the same manner as he would be if personally guilty of the perjury so procured.

**Subornation of perjury.** — To constitute the crime of subornation of perjury, the party charged must have procured the commission of the perjury by inciting, instigating, or persuading the guilty party to commit the crime. Accordingly, it has been decided that to call a witness knowing that he will testify falsely is not sufficient to constitute this crime: *Commonwealth v. Douglass*, 5 Met. 241; 2 Wharton's Crim. Law, 8th ed., sec. 1329.

**Indictment, sufficiency of.** — It is sufficient to charge the commission of the offense by general averment: See § 1251, Code of Procedure; and it is not necessary that the

particular fact which the defendant attempted to procure the witness to swear to should be specifically stated: *State v. Holding*, 1 McCord, 31; *Tremain* P. C. 169; see also *Elkin v. People*, 28 N. Y. 177.

**Attempt to suborn perjury** is not the generic name of any class of offenses; and if the information or indictment does not allege facts constituting a crime, it is demurrable: *People v. Thomas*, 63 Cal. 482.

**A civil action** will not lie for suborning a witness to swear falsely in a criminal prosecution against the plaintiff: *Taylor v. Bidwell*, 3 West Coast Rep. 479.

### *Attempt to suborn perjury — How punished.*

§ 112. [877.] If any person shall endeavor to procure or incite another to commit the crime of perjury, though no perjury be committed, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one nor more than three years.

### *One requesting that himself or another be placed upon list of jurors is guilty of misdemeanor.*

§ 113. Any person who shall ask or request any sheriff, constable, or other person or persons whose duty it may be under the law to select or summon any jury or juror to be selected or put upon the jury, or shall procure or offer to procure for himself or for another person, or place upon any jury, or shall seek to have himself or another placed upon the list of jurors, that is now required by law to be made, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding three hundred dollars. [January 27, 1888, § 1. In effect immediately.]

### *Misdemeanor for officer to select requesting juror.*

§ 114. Any sheriff, constable, or other person whose duty it may be under the law to select or summon a jury who shall select, summon, or place upon any jury any person whom he has been asked or requested to select or summon shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding three hundred dollars. [January 27, 1888, § 2. In effect immediately.]

### *Failure to appear as witness is misdemeanor.*

§ 115. [1261.] If any person who shall have been summoned as a witness on the part of the prosecution shall fail or refuse to attend at the time fixed for trial, without a reasonable excuse, the person so failing or neglecting shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding two

hundred dollars, or by imprisonment in the county jail not less than twenty-five days nor more than three months, or by both such fine and imprisonment, in the discretion of the court.

*Perpetration of fraud in drawing of jurors — How punished.*

§ 116. [922.] If any clerk of a superior court, or any other person, shall be guilty of any fraud, either by practicing on a jury-box previously to a draft, or in changing a juror, or any way in drawing of jurors, he shall, upon conviction thereof, be fined in any sum not exceeding five hundred dollars.

*Compounding or concealing crime — How punished.*

§ 117. [934.] If any person, having knowledge of the commission of any crime, shall take any money, gratuity, reward, or any engagement therefor, upon an agreement or understanding, express or implied, to compound or conceal such crime, or not to prosecute therefor, he shall, on conviction thereof, be imprisoned in the county jail for any length of time not exceeding one year, or be fined in any sum not exceeding one thousand dollars.

**Compounding crimes.** — To compound a crime is to agree not to prosecute it, when the party so agreeing knows it to have been committed: 2 Wharton's Crim. Law, 8th ed., sec. 1559; 4 Bla. Com. 124-136; *Jones v. Rice*, 18 Pick. 440.

Where a party received a note, signed by a person guilty of larceny, as a consideration for non-prosecution, the offense was held complete: *Commonwealth v. Pease*, 16 Mass. 91; see *Ex parte Butt*, 13 Cox C. C. 374. The mere retaking by the owner of stolen goods is no offense, unless there is an agreement not to prosecute the thief: 1 Chitty's Crim. Law, 4; 1 Hale P.

C. 619; 1 Hawk. P. C., c. 59, sec. 7; *Regina v. Stone*, 4 Carr. & P. 379; *Plumer v. Smith*, 5 N. H. 553.

On an indictment or information for compounding a felony, the record of the conviction is *prima facie* evidence of the felony, but not conclusive: *State v. Duhammel*, 2 Harr. (Del.) 532. It is not necessary, however, that the principal offender should have been convicted, to sustain the indictment or information: *People v. Buckland*, 13 Wend. 592.

**Compromising offenses:** See § 1292, Code of Procedure.



## CHAPTER V.

## OF CRIMES AGAINST PUBLIC POLICY.

- § 118. Maintaining nuisance — How punished.
- § 119. Malicious prosecution — How punished.
- § 120. Fraudulent voting — How punished.
- § 121. Unqualified person voting — How punished.
- § 122. Collusion of election officers — How punished.
- § 123. Officers attempting to influence voters — How punished.
- § 124. Punishment of officer for marking ballot, or attempting to find out its contents.
- § 125. Intimidating or bribing voter — How punished.
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- § 168. Sales of toy pistols, tobacco, etc., is misdemeanor — Punishment for.  
 § 169. Killing of sea-gulls is unlawful.  
 § 170. Killing of sea-gulls — How punished.  
 § 171. Jurisdiction of police justices and other magistrates.

*Maintaining nuisance — How punished.*

§ 118. [898.] Every person who shall erect or continue and maintain any public nuisance, to the injury of any part of the citizens of this state, shall, upon conviction thereof, be fined in any sum not exceeding one thousand dollars.

*Malicious prosecution — How punished.*

§ 119. [899.] If any person shall maliciously, without probable cause, attempt to cause an indictment to be found, or other prosecution for any crime or misdemeanor to be commenced, against any person, or if two or more persons shall conspire together for that purpose, the person so sought to be indicted or otherwise prosecuted being innocent, such person or persons so offending shall, on conviction thereof, be imprisoned in the county jail not exceeding six months, and be fined in any sum not exceeding one thousand dollars.

*Fraudulent voting — How punished.*

§ 120. [903.] If any elector shall vote, or attempt to vote, more than once at any election, or shall knowingly hand in two or more tickets together, or, having voted in one township, precinct, or county, shall afterwards, on the same day, vote, or attempt to vote, in another township, precinct, or county, such person shall be fined in any sum not exceeding fifty dollars, and be incapable of voting at any election or holding any office for two years thereafter.

**Voting twice.** — The act of voting more than once at the same election is not a crime, unless it is done knowingly, and with wrong intent: *People v. Harris*, 29 Cal. 678.

*Unqualified person voting — How punished.*

§ 121. [905.] If any person, knowing that he does not possess the legal qualifications of a voter, at any election authorized by law to be held in this state for any office whatever, shall vote at such election, such person so offending shall be fined not more than one hundred nor less than five dollars.

**Not entitled to vote.** — A minor cannot be convicted of illegal voting if he honestly believed that he was twenty-one years of age when he voted: *Carter v. State*, 55 Ala. 181; *Gordon v. State*, 52 Ala. 308. But ignorance of the law is no defense. Where a female voted under the belief that the constitution gave her the right, when in fact it did not, it was held no defense that she believed she had a right to vote, and voted in reliance on that belief: *United States v. Anthony*, 11 Blatchf. 200. If, however, one states the facts to the election judges, and they decide in favor of his right to vote, their decision would rebut the presumption of guilty knowledge on his part that he had no such right: *State v. Boyett*, 10 Ired. 336.

**Indictment for illegal voting.** — An indictment or information for illegal voting is sufficient after verdict when it charges the defendant with having willfully, knowingly, and unlawfully voted at a legally authorized election for representative of Congress, though it does not disclose the reason of defendant's disqualification: *State v. Bruce*, 5 Or. 68.

*Collusion of election officers — How punished.*

§ 122. [911.] If any inspector or judge of any such election shall knowingly permit any elector to cast a second vote at any such election, or shall knowingly permit any person not a qualified elector to vote at any such election, such inspector or judge of election, upon conviction thereof, shall be imprisoned in the county jail not more than thirty nor less than ten days, be fined in any sum not exceeding five hundred dollars, and be incapable of holding any office in this state for five years thereafter.

*Officers attempting to influence voters — How punished.*

§ 123. [904.] If any inspector, judge, or clerk of an election shall attempt to induce, by persuasion, menace, or reward, or promise thereof, any elector to vote for any person, such person so offending shall be fined in any sum not exceeding one hundred dollars.

*Punishment of officer for marking ballot or attempting to find out its contents.*

§ 124. [906.] If any judge, inspector, clerk, or any other officer of an election shall open or mark, by folding or otherwise, any ticket presented by such elector at such election, or attempt to find out the names thereon, or suffer the same to be done by any other person, before such ticket is deposited in the ballot-box, such person so offending shall be fined in any sum not exceeding one hundred dollars.

*Intimidating or bribing voter — How punished.*

§ 125. [909.] If any person shall use any threats, menaces, force, or any corrupt means, at or previous to any election held pursuant to the laws of this state, towards any elector, to hinder or deter such elector from voting at such election, or shall directly or indirectly offer any bribe or reward of any kind, to induce any elector to vote contrary to his inclinations, or shall, on the day of election, give any public treat, or authorize any person to do so, to obtain votes for any person, such person so offending shall be fined in any sum not exceeding five hundred dollars.

*Same — Making false assertions about candidates, etc. — How punished.*

§ 126. [3140.] No person shall in any way, directly or indirectly, by menace or other corrupt means or device [directly or indirectly], attempt to influence any person in giving or refusing to give his vote in any such election, or to deter or dissuade any person from giving his vote therein, or to disturb, hinder, persuade, threaten, or intimidate any person from giving his vote therein, nor shall any person at any such election, knowingly and willfully, make any false assertion or propagate any false report concerning any person who shall be a can-



didate thereat, which shall have a tendency to prevent his election, or with a view thereto, and if any person shall be guilty of any act forbidden or declared to be unlawful by this section, he shall be deemed and taken to be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine and imprisonment, or both, at the discretion of the court before which such conviction shall be had; *provided*, that in no case shall such fine exceed the sum of two hundred and fifty dollars, or such imprisonment the term of six months.

*Fraudulently attempting to cause elector to change his vote—How punished.*

§ 127. [902.] If any person shall fraudulently cause, or attempt to cause, any elector, at any election pursuant to law in this state, to vote for a person different from the one he intended to vote for, such person so offending shall be fined not more than one hundred nor less than ten dollars.

*Misleading illiterate voter as to name on ticket—How punished.*

§ 128. [3141.] If any person shall furnish any elector wishing to vote at any election held pursuant to law, who cannot read, with a ticket, such person informing or giving such elector to understand that it contains a name or names written or printed thereon different from the name or names which are written or printed thereon, such person shall, upon conviction thereof, be fined in any sum not less than fifty nor more than five hundred dollars.

*Procuring Indian to vote—How punished.*

§ 129. [910.] If any person shall induce, or attempt to induce, any Indian to vote or offer his vote at any such election, such person so offending, upon conviction thereof, shall be fined in any sum not exceeding five hundred dollars, to which may be added imprisonment in the county jail not to exceed three months; *provided*, that this section shall not be so construed as to include Indians who are citizens and entitled to vote under the amendments to the constitution of the United States and the laws of Congress.

*Non-feasance or malfeasance of officers as to elections—How punished.*

§ 130. [912.] Every person charged with the performance of any duty under the provisions of any law of this state relating to elections, who willfully neglects or refuses to perform such duty, or who, in the performance of such duty, or in his official capacity, knowingly or fraudulently acts in contravention or violation of any of the provisions of law relating to such duty, shall, on conviction thereof, be fined in any sum not exceeding one thousand dollars, to which punishment may be added imprisonment in the county jail for a term not exceeding one year.

*Sale of liquors on election day is unlawful.*

§ 131. Any person who shall barter, sell, give away, or in any manner dispose of any intoxicating liquors, on the day of any general or special election of state, county, or municipal officers within the state, district, county, or corporation in which said election is held, and before the polls have closed, shall, upon conviction thereof, be punished by a fine of not less than twenty-five dollars nor more than two hundred dollars, or by imprisonment in the county jail not less than ten nor more than thirty days, or both, in the discretion of the court. [March 2, 1891, § 18.]

*Violation of license laws — Penalty for.*

§ 132. [900.] Every person who shall, by himself or agent, transact any business, or do any act, without a license therefor, where such license is required by any law in this state, shall, on conviction thereof, be fined in any sum not exceeding five hundred dollars, and in all such cases, where the principal is prosecuted, his agent may be compelled to testify; and when the agent is prosecuted the principal may be compelled to testify.

*Sale of liquors without license is misdemeanor — Punishment for.*

§ 133. Any person who shall sell or dispose of any spirituous, malt, or other intoxicating liquors without having first obtained a license from the proper authorities shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding one thousand dollars, or imprisoned in the county jail not to exceed six months, or by both fine and imprisonment, for each offense. [February 2, 1888, § 4. In effect sixty days after passage.]

*Selling liquors to minor — How punished.*

§ 134. [939.] Every person who shall knowingly sell or give to a minor intoxicating or spirituous liquors, without the written permission of the parent or guardian of such minor, shall, on conviction thereof, be fined in any sum not exceeding five hundred dollars, or be imprisoned in the county jail for a term not exceeding three months, or both.

*Penalty for allowing minor to play cards.*

§ 135. If any person shall allow any minor to play at cards in his house, without the written permission of the parent or guardian, he shall be liable to the same penalties as for furnishing to such minor spirituous liquors. [March 2, 1891, § 19.]

*Minor over eighteen misrepresenting his age to procure liquors is guilty of misdemeanor — Punishment.*

§ 136. [940.] Any minor over the age of eighteen years and under

the age of twenty-one years, who shall represent to any person dealing in spirituous, malt, or fermented liquors that he is of lawful age, and by means of such misrepresentation procure from such dealer spirituous, malt, or fermented liquors, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding one hundred dollars nor less than twenty-five dollars, or imprisonment in the county jail any length of time not exceeding three months.

*Selling liquors to Indians is misdemeanor — Fine, and disposition of.*

§ 137. [942.] Any tavern-keeper, grocery-keeper, brewer, distillers, or person or persons, Indian or Indians, who shall sell, barter, give, or in manner dispose of any wines, spirituous liquors, ale, beer, porter, cider, or any other intoxicating beverage, to any Indian or Indians within this state, every such person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof by any court having competent jurisdiction to try the same, shall forfeit and pay to the use of the county in which the offense may have been committed a fine of not less than twenty-five dollars and not more than one hundred dollars for each and every offense; and in all prosecutions under this section, Indians shall be competent as witnesses.

*Selling of tobacco to children is misdemeanor — Punishment for.*

§ 138. Every person who shall sell, give, furnish, or cause to be furnished to any person under the age of sixteen years any cigarette, cigar, or tobacco in any form, without the written consent of the parents or guardian of the person of such minor, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten dollars nor more than fifty dollars. [November 26, 1883, § 2. In effect January 1, 1884.]

*Sale of lottery tickets — How punished.*

§ 139. [913.] Every person who shall sell any lottery tickets, or shares in any lottery, for the division of property to be determined by chance, or shall make or draw any lottery or scheme for a division of property not authorized by law, on conviction thereof shall be fined in any sum not exceeding five hundred dollars; *provided*, that nothing herein contained shall apply to any lottery for charitable purposes.

*Gambling is misdemeanor — How punished.*

§ 140. [1253.] Each and every person who shall deal, play, or carry on, or open, or cause to be opened, or who shall conduct, either as owner, proprietor, employee, whether for hire or not, any game of faro, monte, roulette, rouge-et-noir, lansquenette, rondo, vingt-un (or twenty-one), poker, draw-poker, brag, bluff, thaw, tan, or any banking or



other game played with cards, dice, or any other device, whether the same be played for money, checks, credits, or any other representative of value, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars, and shall be imprisoned in the county jail until such fine and costs are paid; *provided*, that such persons so convicted shall be imprisoned one day for every two dollars of such fine and costs; *and provided further*, that such imprisonment shall not exceed one year; *and still further provided*, that any one who shall carry on any chuck-a-luck, bunko, strap, sling, panel-house, or other swindling game shall be deemed guilty of a felony, and upon conviction shall be imprisoned in the penitentiary not exceeding five years for such offense.

**Gambling.** — A verdict of guilty as charged, upon an indictment for carrying on the swindling game of "twenty-one, or top-and-bottom dice," is insufficient to warrant a judgment of conviction for carrying on the swindling game of "top-and-bottom dice," and omitting any reference to "twenty-one": *Harland v. Territory*, 3 Wash. 131, 154. The articles used in carrying on and conducting the game are part of the *res gestæ*, and admissible in evidence in illustration of the game: *People v. Sam Lung*, 70 Cal. 515.

**Indictment or information for, sufficiency of:** See notes to § 1244, Code of Procedure, where the term "banking-game" is defined.

**One convicted under this section must pay the fine and costs** in money, or serve out the term of imprisonment imposed: *Ex parte Harrison*, 63 Cal. 299; see §§ 1274, 1280, 1283, Code of Procedure.

**Visiting gambling-houses.** — A city ordinance punishing the visiting of a gambling-house is not in conflict with the above section or with the constitution of the state, and will support a judgment of conviction: *Ex parte Chin Yan*, 60 Cal. 78.

**Indictment or information.** — As to sufficiency of indictment or information for gaming, see notes to § 1244, Code of Procedure.

### *Letting of premises for gaming or prostitution — How punished.*

§ 141. Every person who shall let or rent any room or building for a gaming-house or house of ill-fame, or for rent or hire shall permit to be dealt or carried on upon his premises any game prohibited by the last preceding section, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding one hundred dollars. [*March 2, 1891, § 20.*]

**A house of ill-fame** is defined to be a bawdy-house, — a house kept for the resort and convenience of lewd people of both sexes. The residence of an unchaste woman — a single pros-

titute — does not become a house of ill-fame because she may habitually admit one or many men to an illicit cohabitation with her: *State v. Evans*, 5 Ired. 603.

### *Cause of action for money lost at play.*

§ 142. [1255.] All persons losing money or anything of value at or on any of said games shall have a cause of action to recover from the dealer or player winning the same, or proprietor for whose benefit such game was played or dealt, or such money or things of value won, the amount of the money or the value of the thing so lost.

### *Lease, how may be terminated where premises are used for gambling.*

§ 143. [1257.] It shall be lawful for any person letting or renting any house, room, shop, or other building whatsoever, or any boat,

booth, garden, or other place, which shall, at any time, be used by the lessee or occupant thereof, or any other person with his knowledge or consent, for gambling purposes, upon discovery thereof, to avoid or terminate such lease or contract of occupancy, and to recover immediate possession of said boat, building, or other place above mentioned by an action at law for that purpose, to be brought before any justice of the peace of the county in which such use shall be permitted.

*Permitting gaming on premises is unlawful.*

§ 144. [1258.] Any person who shall suffer or permit any of the acts or things forbidden by or made punishable by this title, to be done or carried on in any house, room, or shop, or other building whatsoever, or any boat, booth, garden, or other place of which he is the owner, or in the possession of which he is entitled, under sections one hundred and forty and one hundred and forty-one, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars, and be imprisoned in the county jail until such fine is paid.

“This title” includes sections 1253-1262, 1891, which sections are the same as sections both inclusive, of the code of 1881, as amended 140-149, both inclusive, of this code. by sections 20 and 21 of the act of March 2,

*Duty of officers to inform and prosecute.*

§ 145. [1259.] It shall be the duty of each prosecuting attorney, sheriff, constable, city or town marshal, or public officer, to inform against and diligently prosecute any and all persons whom they shall have reasonable cause to believe guilty of a violation of the provisions of this title.

See note to § 144.

*Penalty for failure to inform and prosecute.*

§ 146. [1260.] Any person named in the preceding section, who shall refuse or willfully neglect to inform against and prosecute offenders against this act, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than fifty nor more than five hundred dollars, and the court before which such officer shall be tried shall declare the office, or appointment held by such officer, vacant for the balance of his term.

See note to § 144.

*Failure or refusal to attend as witness — How punished.*

§ 147. [1261.] If any person, who shall have been summoned as a witness on the part of the prosecution, shall fail or refuse to attend at the time fixed for trial, without a reasonable excuse, the person so failing or neglecting shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding two hun-

dred dollars, or by imprisonment in the county jail not less than twenty-five days nor more than three months, or by both such fine and imprisonment, in the discretion of the court.

*Note, etc., given on consideration of wager is void except as to bona fide holder without notice.*

§ 148. All notes, bills, bonds, mortgages, or other securities, or other conveyances, the consideration for which shall be money, or other things of value, won by playing at any unlawful game, shall be void and of no effect as between the parties to the same and all other persons, except holders in good faith without notice of the illegality of such contract or conveyance. [March 2, 1891, § 21.]

*Playing at game of chance for pastime is not gambling.*

§ 149. [1262.] No person shall be deemed guilty of gambling who shall play at any game of chance or skill for amusement or pastime only, and not for gain to himself or another.

*Penalty for gaming — Duty of prosecuting attorney.*

§ 150. Every white man, negro, half-breed Indian, kanaka, or Chinaman who shall play at any game of cards or any game of chance with any Indian, for fun, pleasure, luck, money, or anything of value whatever, or for anything whatever, and every white man, negro, half-breed Indian, kanaka, or Chinaman who shall run horses on a wager of any kind, or for pastime, with an Indian, shall be subject, on conviction thereof, for each and every offense, to a fine of not less than fifty dollars and not exceeding five hundred dollars, or to imprisonment not exceeding six months, or to both such fine and imprisonment; and it is hereby made the duty of any prosecuting attorney having knowledge of the violation of this section to prosecute the offender, and of every sheriff or constable having such knowledge to report the same to a justice of the peace in the county in which such offense was committed, or to the prosecuting attorney or grand jury for such county. [March 2, 1891, § 22.]

See § 140 as to gambling generally.

*Sale of poisonous drug, etc., to Indians and infants is unlawful.*

§ 151. [935.] It shall be unlawful for any druggist or other person to sell, give, or in any manner furnish to any Indian, minor, intoxicated person, or person of unsound mind, any poisonous drug or compound destructive of human or animal life.

*Every druggist shall keep register of persons purchasing poisonous drugs, etc.*

§ 152. [936.] Every druggist shall keep a book in which he shall register the name of any person purchasing or receiving from him any



such poisonous drug or compound, unless the same shall be furnished upon the prescription of a competent physician, together with the name of such drug or compound, and the time when it was furnished.

*Putting out poison without previous notice.*

§ 153. [937.] Every person who shall place any poison outside of his own building or out-buildings, for the destruction of noxious animals, or for any purpose whatever, shall give notice to all persons or families residing within one mile of the place where such poison is used, by posting notices in three of the most public places within one mile of where said poison is to be put out; but this notice shall not apply to such use of poison within the limits of an incorporate town.

*Penalties prescribed.*

§ 154. [938.] Every person violating any of the provisions of sections one hundred and fifty-one, one hundred and fifty-two, or one hundred and fifty-three of this code shall be fined in any sum not exceeding five hundred dollars, and may be imprisoned until the fine and costs are paid.

*Officers purchasing or discounting state or county orders — How punished.*

§ 155. [920.] If any auditor, treasurer, sheriff, assessor, or county commissioner shall purchase, exchange, or receive in payment, during his term of office, any state or county order or demand for less than the amount of such order or demand, he shall, on conviction thereof, be fined in any sum not exceeding one thousand dollars.

*Extortion by ferry-men, toll-gate keepers, etc. — How punished.*

§ 156. [923.] If any ferry-man, ferry-owner, ferry-keeper, or keeper of a toll-bridge or toll-gate, himself, or by any person in his employment, shall demand or receive any greater fees on account of ferriage or toll than is or may be fixed by law, or by the proper board doing county business, as the rates of ferriage or toll to be received by such person, upon conviction thereof he shall be fined in any sum not exceeding one hundred dollars, or be imprisoned in the county jail not exceeding one month.

*Joining parties in marriage unlawfully — How punished.*

§ 157. [924.] Any person authorized by the laws of this state to join parties in marriage, who shall knowingly join in marriage any parties contrary to the provisions of the law regulating marriages, shall, on conviction thereof, be fined in any sum not exceeding one thousand dollars.

*Failure to return certificate of marriage — How punished.*

§ 158. [925.] Any person having joined parties in marriage who

shall fail to return a certificate thereof within the time prescribed by law shall be fined in any sum not exceeding three hundred dollars.

*Person joining others in marriage without authority.*

§ 159. [926.] Every person who shall undertake to join parties in marriage, knowing that he is not authorized so to do, shall, upon conviction thereof, be imprisoned in the county jail not more than three months, or fined in any sum not exceeding five hundred dollars.

*Enticing seaman to desert is misdemeanor — How punished.*

§ 160. [1222.] If any person or persons shall entice any seaman to desert from any vessel belonging to any citizen or citizens of the United States, or any foreign country, while lying within the waters of this state, and on board of which said seaman shall have shipped for a term or voyage unexpired at the time of such enticement, such person or persons shall be deemed guilty of a misdemeanor, and on conviction by any court of competent jurisdiction, shall be sentenced for the first offense to imprisonment in the county jail not less than two months nor more than six months, or to a fine not less than fifty dollars nor more than five hundred dollars, and for each subsequent offense, to imprisonment not less than six months nor more than two years, or a fine of not less than five hundred dollars nor more than one thousand.

*Harboring or secreting seaman is misdemeanor — Punishment for.*

§ 161. [1223.] Any person or persons who shall harbor or secrete [a] seaman shipped as aforesaid, knowing him to be so shipped, and with a view to persuade or enable said seaman to desert, shall be deemed guilty of a misdemeanor, and punished as provided in section one hundred and sixty of this code.

*Importing pauper — When punishable, and how.*

§ 162. [932.] If any person knowingly bring within this state any pauper or poor person, with the intent of making him a charge on any county or counties therein, he shall be punished by fine not exceeding five hundred dollars, and stand charged with his support.

*Diseased horses, etc. — Disposition of — Importing or selling is misdemeanor — How punished.*

§ 163. [933.] If any person knowingly import or bring within this state any horse, mule, or ass affected by the disease known as nasal gleet, glanders, or button farcy, or suffer the same to run at large upon any common, highway, or uninclosed land, or use or tie the same in any public place, or off his own premises, or sell, trade, or offer for sale or trade any such horse, mule, or ass, knowing the same to be so diseased, he shall be deemed guilty of a misdemeanor,

and shall on conviction be punished by a fine of not less than fifty dollars nor more than five hundred dollars; and if any horse, mule, or ass, reasonably supposed to be diseased with nasal gleet, glanders, or button farcy, be found running at large without any known owner, it shall be lawful for the finder thereof to take such horse, mule, or ass so found, before some justice of the peace, who shall forthwith cause the same to be examined by some veterinary surgeon, or other person skilled in such diseases, and if, on examination, it is ascertained to be so diseased, it shall be lawful for such justice of the peace to order such diseased animal to be immediately destroyed and buried; and the necessary expense accruing under the provisions of this section shall be defrayed out of the county treasury.

*Cruelty to animals.*

§ 164. [930.] If any person torture, torment, deprive of necessary sustenance, cruelly beat, mutilate, cruelly kill or over-drive any animal, or cruelly drive or work the same when unfit for labor, or cruelly abandon the same, or carry or cause the same to be carried on any vehicle, or otherwise, in an unnecessarily cruel and inhuman manner, he shall be punished by imprisonment in the county jail not exceeding thirty days, or by fine not exceeding one hundred dollars.

*Fast driving over bridge.*

§ 165. [931.] Any person or persons riding or driving faster than a walk over any bridge located on any county or state road, composed of one or more spans, upon conviction thereof shall be fined in any sum not to exceed ten dollars nor less than five dollars, to be collected by any court having competent jurisdiction thereof, and all moneys so collected shall be paid into the county treasury and become a part of the school fund; *provided*, that this section shall apply only to bridges over thirty feet in length.

*Carrying concealed weapon is misdemeanor.*

§ 166. If any person shall carry upon his person any concealed weapon, consisting of either a revolver, pistol, or other fire-arms, or any knife (other than an ordinary pocket-knife), or any dirk or dagger, sling-shot, or metal knuckles, or any instrument by the use of which injury could be inflicted upon the person or property of any other person, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty dollars nor more than one hundred dollars, or imprisonment in the county jail not more than thirty days, or by both fine and imprisonment, in the discretion of the court; *provided*, that this section shall not apply to police-officers and other persons whose duty it is to execute process or warrants or make arrests. [January 20, 1886, § 1. In effect immediately.]



*Common barrator defined — How punished.*

§ 167. [901.] Every person who shall excite quarrels or lawsuits among the citizens of this state shall be deemed a common barrator, and upon conviction thereof shall be imprisoned in the county jail any length of time not exceeding six months, and be fined in any sum not exceeding five hundred dollars, or fined only.

**Common barratry.** — An indictment or information for this offense must charge the offender with being a common barrator. Such a person was indictable at common law as a nuisance: *Com. v. Mohn*, 52 Pa. St. 243; *State v. Chitty*, 1 Bail. 379. A person can only be convicted of this offense by the showing a number of distinct acts of misconduct: *Com. v. Davis*, 11 Pick. 434; *Com. v. Pray*, 13 Pick. 362; *Com. v. Tubbs*, 1 Cush. 2. It is not necessary, however, that the particular acts of misconduct should be set forth or specified in the indictment or information; but the defendant is entitled to a note, before the trial, of the particular acts of barratry which the prosecution intend to prove against him. A fail-

ure to furnish such note will be sufficient to justify the court in refusing to proceed with the trial of the indictment: *Com. v. Davis*, 11 Pick. 434; *Com. v. Pray*, 13 Pick. 362. The moving and exciting criminal prosecutions is barratry, the same as the exciting of civil suits: *State v. Chitty*, 1 Bail. 397. And it may be committed by moving and exciting the commencement of a just suit, if the motive is selfish or oppressive: *Id.* Whether three acts of barratry constituted the perpetrator a common barrator was at first unsettled in Massachusetts, but it was subsequently determined that they did: *Com. v. McCulloch*, 15 Mass. 226; *Com. v. Tubbs*, 1 Cush. 2; see *Voorhees v. Dorr*, 51 Barb. 580.

*Sales of toy pistols, tobacco, etc., to children is misdemeanor — Punishment for.*

§ 168. It shall be unlawful for any person or persons to sell or offer for sale any toy pistols within this state, and every person who shall sell, give, furnish, or cause to be furnished, to any person under the age of sixteen years, any pistol, toy pistol, or other pocket weapon in which explosives may be used, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than five nor more than twenty-five dollars. [November 26, 1883, § 1. In effect January, 1, 1884.]

*Killing of sea-gulls is unlawful.*

§ 169. It shall be unlawful for any person in this state, or upon or about any of the waters or shores of this state, to take, injure, or kill, or endeavor to take, injure, or kill, any sea-gull of any kind or species. [February 21, 1891, § 1.]

*Killing of sea-gulls — How punished.*

§ 170. Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by fine of not less than five nor more than twenty-five dollars, and in default of payment of the fine imposed shall be imprisoned in the county jail for the period of one day for each two dollars of the fine so imposed. [February 21, 1891, § 2.]

*Jurisdiction of police justices and other magistrates.*

§ 171. Police justices or other magistrates of incorporated cities or

towns, and justices of the peace (not excluding the jurisdiction of other courts), shall have jurisdiction over all proceedings under this act. [*February 21, 1891, § 3.*]

“This act” includes three sections only, to wit. sections 169, 170, and 171 of this code.

## CHAPTER VI.

### OF CRIMES BY AND AGAINST PUBLIC OFFICERS.

- § 172. Judicial officers receiving bribes — How punished.
- § 173. Executive or legislative officer receiving bribe — How punished.
- § 174. Bribing or attempting to bribe — How punished.
- § 175. Assisting prisoner to escape — How punished.
- § 176. Officer voluntarily suffering prisoner to escape — How punished.
- § 177. Officer refusing to receive prisoner, or negligently allowing one to escape — How punished.
- § 178. Penalty for jail-breaking.
- § 179. Resisting officer or execution of process — How punished.
- § 180. Refusal to assist officer — How punished.
- § 181. Corrupt failure of officer to serve process — How punished.
- § 182. Officer's willful inhumanity to prisoner — How punished.
- § 183. Official non-feasance and malfeasance — How punished.
- § 184. Failure to pay over moneys, etc. — How punished.
- § 185. Auditor issuing illegal warrant — How punished.
- § 186. Usurpation of authority defined — How punished.
- § 187. Performing official duties without having filed oath and bond — How punished.
- § 188. Extorting illegal fees — How punished.
- § 189. Duty of officers to make complaint of violations of law.
- § 190. Willful refusal to perform duty imposed by preceding section is misdemeanor — How punished.
- § 191. Conviction of officer operates to vacate office — How filled.

#### *Judicial officers receiving bribes — How punished.*

§ 172. [878.] If any judge, justice of the peace, juror, commissioner, auditor, referee, arbitrator, or person summoned as a juror, shall accept, receive, or agree for in any way any bribe, present, or reward to him offered for the purpose of obtaining or influencing his opinion, judgment, verdict, sentence, report, or award, in any matter or cause depending or to be tried before him alone, or before him with others, he shall, on conviction thereof, be imprisoned in the penitentiary not more than seven years nor less than one year, or be imprisoned in the county jail not more than one year nor less than one month, and be fined in any sum not exceeding one thousand dollars.

#### *Executive or legislative officer receiving bribe — How punished.*

§ 173. [879.] If any executive, judicial, or ministerial officer, or member of the legislative assembly, shall accept or receive in any way any bribe, present, or reward to him offered, for the purpose of inducing or influencing such officer to appoint any person to office,

to give any vote or to execute any of the powers in him vested, or perform any duty of him required with partiality or favor, or otherwise than is required by law, or in consideration that such officer has appointed any person to any office, or voted, or exercised any power in him vested, or performed any duty of him required with partiality or favor, or otherwise contrary to law, he shall, on conviction thereof, be imprisoned in the penitentiary not more than ten years nor less than one year, or in the county jail not more than one year nor less than three months, and be fined in any sum not exceeding five thousand dollars.

**Receiving bribes.** — In *People v. Markham*, 64 Cal. 157, a police-officer was charged in an information with receiving a bribe in consideration of his not arresting violators of the gambling law. After full deliberation, the court held the officer guilty of receiving a bribe, they saying: "We think when a police-officer receives money in consideration of his

promise that he will not arrest any one of a class of offenders against the criminal laws, he is guilty of receiving a bribe, because the case of one who has committed the offense and the consequent duty of the officer to arrest is 'a matter which may be brought before him in his official capacity.'"

*Bribing or attempting to bribe — How punished.*

§ 174. Every person who shall bribe or attempt to bribe or offer any present, bribe, or reward to any judge, justice of the peace, juror, commissioner, referee, auditor, arbitrator, or person summoned as a juror, or to any executive, judicial, or ministerial officer, or member of the legislature, for the purpose of influencing him in the exercise of any of the powers in him vested for the performance of any duty of him required, shall, on conviction thereof, be imprisoned in the county jail any length of time not exceeding one year, and fined in any sum not exceeding two thousand dollars, or fined only. [March 2, 1891, § 23.]

**An offer to bribe, as well as actual bribery, is an offense under this section; as where any person pays or offers to pay any money, emolument, or thing of value to a sheriff for the release of a prisoner in his custody: *O'Brien v. State*, 6 Tex. App. 665. The crime of offering to bribe an officer, whether in the executive, legislative, or judicial department of the government, by the offer of a reward or pecuniary consideration, is complete without the tender**

**or production of money: *People v. Ah Fook*, 62 Cal. 493; *Walsh v. People*, 65 Ill. 60. The gift, advantage, or emolument must be bestowed for the purpose of inducing the officer to do a particular act in violation of his duty, or as an inducement to favor or in some manner aid the person offering it, or some other person, in a manner forbidden by law: *Hutchinson v. State*, 36 Tex. 293.**

*Assisting prisoner to escape — How punished.*

§ 175. [881.] Every person who shall convey into any penitentiary, jail, or house of correction, or house of reformation, any disguise, or any instrument, tool, weapon, or other thing adapted to or useful in aiding any prisoner there lawfully committed or detained to make escape, or shall, by any means whatever, aid or assist any such prisoner in his endeavor to escape therefrom, whether such escape be attempted or effected, or not; and every person who shall aid or assist any prisoner in escaping, or in attempting to escape, from any officer or person who shall have the lawful custody of such prisoner, or who shall forci-



bly rescue any prisoner from lawful custody of such persons, shall, on conviction thereof, be imprisoned in the penitentiary not more than four years nor less than one year, or imprisoned in the county jail any length of time not exceeding one year, and be fined in any sum not exceeding five hundred dollars.

*Officer voluntarily suffering prisoner to escape — How punished.*

§ 176. [882.] If any jailer or other officer shall voluntarily suffer any prisoner in his custody, charged with or convicted of any criminal offense, to escape, he shall suffer, unless the prisoner so escaping be charged with or convicted of any capital offense, the like punishment and penalties as the prisoner so suffered to escape was sentenced to, or would be liable to suffer upon conviction for the crime or offense wherewith he stood charged; and if the prisoner was charged with or convicted of a capital offense, he shall be imprisoned in the penitentiary not more than twenty years nor less than five years.

*Officer refusing to receive prisoner, or negligently allowing one to escape — How punished.*

§ 177. [883.] If any jailer or other officer shall, through negligence, suffer any prisoner in his custody, upon conviction or upon any criminal charge, to escape, or shall willfully refuse to receive into his custody any prisoner lawfully committed thereto, on any criminal charge or conviction, or on any lawful process whatever, he shall, on conviction thereof, be imprisoned in the county jail not more than two years, and be fined not more than five hundred nor less than one hundred dollars, or fined only.

*Penalty for jail-breaking.*

§ 178. [884.] If any person confined in any county jail upon any conviction for a criminal offense break such jail and escape therefrom, he shall be imprisoned in such prison not exceeding one year, to commence from and after the expiration of the former sentence, and fined not exceeding three hundred dollars.

*Resisting officer or execution of process — How punished.*

§ 179. [885.] If any person knowingly and willfully resist or oppose any officer of this state, or any other person authorized by law, in serving or attempting to execute any legal writ, rule, order, or process whatsoever, or shall knowingly and willfully resist any such officer in the discharge of his duties without such writ, rule, order, or process, he shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars nor less than fifty dollars, or by both fine and imprisonment, at the discretion of the court.

**Resisting officers.** — In an indictment or information for resisting an officer, it must be distinctly charged that the person resisted was an officer, and was opposed while acting in such capacity, both of which facts must be proved at the trial: *McQuoid v. People*, 3 Gilm. 76. It must show that the warrant of arrest which the constable was trying to serve at the time he was resisted was issued by a justice having jurisdiction to issue the warrant, and that the offense was committed in the county: *People v. Craig*, 59 Cal. 370. The nature of the official duty, the manner of its execution, and the mode of the resistance should be set forth: *State v. Burt*, 25 Vt. 373. An indictment for assaulting and obstructing an officer in the discharge of his duties as such, averring that the defendant made an assault upon the officer, and while the latter was in the due and lawful execution of his office did "unlawfully, knowingly, and designedly hinder and oppose him," etc., was held to be sufficient to show that the defendant knew the person assaulted was an officer: *Commonwealth v. Kirby*, 2 Cush.

577. A mere allegation that the defendant "resisted" the officer is insufficient, being but a conclusion of law: *Lamberton v. State*, 11 Ohio, 282; but see *United States v. Butcheider*, 2 Gall. 15; *State v. Hooker*, 17 Vt. 658. To constitute the offense, it must appear that the process under which the officer is acting is legal: *Commonwealth v. Tobin*, 108 Mass. 426; *Commonwealth v. Newton*, 123 Mass. 420; *State v. Zeibert*, 40 Iowa, 169; *People v. Muldoon*, 2 Park. Cr. 13. The officer must be at the time engaged in executing his duties, and the defendant must be notified thereof; and unless there be notification or knowledge, the killing of the officer in resisting the arrest will not be murder: 1 Wharton's Crim. Law, 8th ed., sec. 648; *Yates v. People*, 32 N. Y. 509. If the defendant can prove that he was ignorant that the party resisted was an officer, this is a defense to the indictment: *People v. Muldoon*, 2 Park. Cr. 13; *Yates v. People*, 32 N. Y. 509; *State v. Belk*, 76 N. C. 10; *Johnson v. State*, 26 Tex. 117.

### *Refusal to assist officer — How punished.*

§ 180. [886.] If any person, being lawfully required by any sheriff, deputy sheriff, coroner, constable, or other officer, willfully neglect or refuse to assist him in the execution of his office in any criminal case, or in any case of escape or rescue, he shall be punished by imprisonment in the county jail not more than six months, or by fine not more than one hundred dollars.

**Citizens aiding officers in making arrests.** — It is the duty of every private citizen to aid and assist officers in the lawful discharge of their duties. It is as imperative upon him to render such assistance as it is the duty of an officer to preserve the peace. A citizen has no discretion whatever in the matter, and if he fails to assist an officer when required, he renders himself liable to punishment, the same as any other person who violates the law: *Res. v. Montgomery*, 1 Yeates, 419; *Comfort v. Commonwealth*, 5 Whart. 437; *Regina v. Brown*, 1 Car. & M. 314; 1 Wharton's Crim. Law, 8th ed., sec. 652 a; Wharton's Crim. Pl. & Pr., sec. 17, note. In *Regina v. Brown*, 1 Car. & M. 314,

it was held that in order to convict a person of refusing to assist an officer in quelling a riot, three things must be proved: 1. That the officer saw a breach of the peace committed; 2. That there was a reasonable necessity for calling on the defendant for his assistance; and 3. That when duly called upon to assist, the defendant, without any physical impossibility or lawful excuse, refused to do so. Whether the aid of the party called upon would have proved sufficient or useful is not the criterion; and it is no defense to a party that his aid would have done no good: See Wharton's Crim. Pl. & Pr., 8th ed., sec. 17.

### *Corrupt failure of officer to serve process — How punished.*

§ 181. [887.] If any officer authorized to serve process shall willfully and corruptly refuse to execute any lawful process to him directed, and requiring him to apprehend or confine any person charged with or convicted of any offense, or shall willfully and corruptly omit or delay to execute such process, whereby such person shall escape and go at large, he shall, on conviction thereof, be imprisoned in the county jail not more than one year, or be fined not exceeding three hundred nor less than fifty dollars.

### *Officer's willful inhumanity to prisoner — How punished.*

§ 182. [888.] If any sheriff, jailer, or other officer shall be guilty

of willful inhumanity or oppression to any prisoner under his care or custody, he shall, on conviction thereof, be imprisoned in the county jail not more than one year nor less than one day, and be fined in any sum not exceeding one thousand dollars.

**Officer, liability of, for assaulting person under color of authority.** — An officer in the service of criminal or other process is not justified in the use of excessive violence, unless necessary in order to properly discharge the duties imposed upon him. In arresting a person, or in the performance of any official act, great care should be taken to use only such force as may be necessary. A person, although a wrong-doer, is not compelled to submit to any unreasonable or unnecessary violence. Notwithstanding a person may have violated the law, he does not for that reason forfeit all right to self-protection, and may

protect himself from unreasonable or wanton violence committed or sought to be committed by his custodian: *People v. Gulick*, Hill & D. Supp. 229. But he can lawfully use no more force than is necessary and proper to prevent the trespass upon his rights: See *Harrison v. Hodyson*, 10 Barn. & C. 445; 1 Wharton's Crim. Law, 8th ed., secs. 648-650. The object of this section is to prevent officers from assaulting or beating persons, and in justification thereof asserting that it was done under the color of the authority imposed upon them by virtue of such office.

*Official non-feasance and malfeasance — How punished.*

§ 183. [889.] If any officer shall willfully fail to perform any duty within the time and in the manner prescribed by law, or shall do any act which he shall be specially prohibited from doing by law, he shall, on conviction thereof, be fined in any sum not exceeding one thousand dollars, to which may be added imprisonment in the county jail for any length of time not exceeding six months.

**Failure to perform duty, etc.** — As to misconduct in office, see notes to § 1244, Code  
sufficiency of indictment or information for of Procedure.

*Failure to pay over moneys, etc. — How punished.*

§ 184. [890.] If any officer or person required by law to collect, disburse, receive, or keep any public money shall willfully neglect or refuse to pay over such money at the time prescribed by law, or shall willfully refuse to pay any warrant lawfully drawn, or shall pay over a less valuable kind of money than that collected or received by him, or scrip or county or state orders in lieu of money so collected or received by him, in any sum whatever, he shall, on conviction thereof, be imprisoned in the county jail not exceeding one year nor less than one month, or be fined in any sum not exceeding five thousand dollars, or both.

*Auditor issuing illegal warrant — How punished.*

§ 185. [891.] If any auditor shall knowingly issue any warrant not authorized by law, he shall, on conviction thereof, be imprisoned in the county jail not exceeding one year, and be fined in any sum not exceeding one thousand dollars, or be fined only.

*Usurpation of authority defined — How punished.*

§ 186. [892.] Every person who shall officiate in any place of authority without being legally authorized shall be deemed guilty of



usurpation, and upon conviction thereof be fined in any sum not exceeding one thousand dollars.

*Performing official duties without having filed oath and bond—How punished.*

§ 187. [893.] If any person elected or appointed to an office, or his deputy, shall perform any of the duties of such office, without having taken an oath as prescribed by law, or before having given and filed the bond required of him, and in the manner prescribed by law, he shall, upon conviction thereof, be fined in any sum not exceeding one thousand dollars.

*Extorting illegal fees—How punished.*

§ 188. [894.] If any officer, whose fees are stated by law, shall corruptly exact or extort any greater fees for any services than by law are stated and allowed, or shall levy, demand, receive, or take under color of his office any bond, bill, or note, or other assurance or promise whatever, securing the payment of a greater sum of money for any service than he is by law authorized to demand or receive, he shall, on conviction thereof, be imprisoned in the county jail not exceeding one year, and be fined in any sum not exceeding one thousand dollars.

**Official extortion.**—If an officer exacts payment of his fee before it is due, it is extortion: *Commonwealth v. Bagley*, 7 Pick. 279. The taking of illegal fees by a public officer may often result from mistake, and where this is the case, and there is no corrupt motive, no extortion has been committed: 2 Wharton's *Crim. Law*, 8th ed., sec. 1576; *State ad. Cutter*, 36 N. J. L. 125.

**Indictment or information** should designate service or duty for which charge was made or money taken: *State v. Packard*, 4 Or. 157; *State v. Perham*, 4 Or. 188. It charges no offense under this section by alleging that the mayor of a city corruptly received from a city official a part of the latter's, which salary had been increased by the influence of defendant: *People v. Kalloch*, 60 Cal. 116.

*Duty of officers to make complaint of violations of law.*

§ 189. [895.] It shall be the duty of all county school superintendents and school directors to make complaint in all cases which shall come to their knowledge of a criminal violation of the laws relating to schools and education. It shall be the duty of road supervisors to make complaint in all cases which shall come to their knowledge of a criminal violation of the laws relating to roads and highways. It shall be the duty of all constables and sheriffs to make complaint of all violations of the criminal law which shall come to their knowledge within their respective jurisdictions.

*Willful refusal to perform duty imposed by preceding section is misdemeanor—How punished.*

§ 190. [896.] Any officer who shall willfully and knowingly violate or refuse to perform the duty imposed by the next preceding section of this code shall be guilty of a misdemeanor, and on conviction thereof be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for

not less than one month nor more than six months, or by fine and imprisonment, in the discretion of the court having jurisdiction thereof.

*Conviction of officer operates to vacate office—How filled.*

§ 191. [897.] A conviction of any officer, under the last preceding section, shall operate as a vacation of the office of the officer so convicted, and the office so vacated shall be filled in accordance with law.

## CHAPTER VII.

### OF CRIMES AGAINST PUBLIC DECENCY AND GOOD MORALS.

- § 192. Punishment for living in open and notorious adultery.
- § 193. Adultery defined — How punished.
- § 194. Bigamy defined — How punished.
- § 195. Exceptions to preceding section.
- § 196. Punishment of one who knowingly marries the husband or wife of a living person.
- § 197. Cases in which marriages are prohibited.
- § 198. Open or gross lewdness defined — Punishment of.
- § 199. Person keeping house of ill-fame is guilty of misdemeanor — How punished.
- § 200. Keeping house of ill-fame — Effect of lessee's conviction in terminating lease.
- § 201. Keeper of house of ill-fame may be required to give bond for good behavior.
- § 202. Keeper of house of ill-fame to pay costs, when put under bonds, or be committed.
- § 203. Participation in prize-fight, etc., is misdemeanor — Punishment.
- § 204. One who bets or holds money on prize-fight, etc., is guilty of misdemeanor — Punishment.
- § 205. Punishment for circulating demoralizing literature.
- § 206. Jury to determine whether matter is obscene or indecent.
- § 207. Duty of peace-officers as to prize-fighting, glove contests, etc.
- § 208. Violation of sepulcher, how punished.
- § 209. Willful injury to cemetery, or use of it for foreign purpose — How punished.
- § 210. Certain places not to be kept open on Sunday.

*Punishment for living in open and notorious adultery.*

§ 192. [943.] Every person who shall live in open and notorious adultery or fornication shall, upon conviction thereof, be imprisoned in the county jail not exceeding two years, or be fined in any sum not exceeding five hundred dollars, or fined only.

**Open adultery.** — The notoriety is as material in making out the offense made punishable by the above act as the fact of adultery committed: *People v. Gates*, 46 Cal. 52. This offense cannot be sustained by proof of a single act of illicit intercourse or a number of acts.

The living together must be open and notorious, as if the relation of husband and wife existed: *Searls v. People*, 13 Ill. 597; *Miner v. People*, 58 Ill. 59; *Richardson v. State*, 37 Tex. 346; *Smith v. State*, 39 Ala. 554.

*Adultery defined — How punished.*

§ 193. [944.] Every person who commits the crime of adultery shall be punished by imprisonment in the penitentiary not more than three years, or by fine not exceeding three hundred dollars, and imprisonment in the county jail not exceeding one year; and when the crime is committed between parties only one of whom is married, both are guilty of adultery, and shall be punished accordingly.

**Adultery.** — Adultery is the illicit intercourse of two persons, one of whom at least is married: *State v. Pearce*, 2 Blackf. 318; *Commonwealth v. Reardon*, 6 Cush. 78; *Helfrich v. Commonwealth*, 33 Pa. St. 68; it is sexual intercourse between one who is married and another who is not his or her husband or wife: *Id.*;

*Wood v. State*, 56 Ind. 253. Ignorance of law is no excuse: *State v. Goodenow*, 65 Me. 30. Ignorance that the other party is married is no defense: *Commonwealth v. Elirell*, 2 Met. 190. Nor is belief that married woman's husband is dead a defense: *Commonwealth v. Marsh*, 7 Met. 472.

*Bigamy defined — How punished.*

§ 194. [945.] If any person who has a former husband or wife living marry another person, or continue to cohabit with such second husband or wife in this state, he or she, except in the cases mentioned in the following section, is guilty of bigamy, and shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year.

**Bigamy.** — Bigamy consists of contracting marriage during continuance of a prior marriage: 2 Wharton's Crim. Law, 8th ed., sec. 1682. Ignorance is no defense: *Farmer v. People*, 77 Ill. 322; *State v. Goodenow*, 65 Me. 30. Guilt or innocence depends on the legality of the first marriage: *Breakey v. Breakey*, 2 U. C. Q. B. 353. Parties to a voidable marriage cannot marry again while the first marriage exists: *Shaffer v. State*, 20 Ohio, 1.

See *Hayes v. People*, 25 N. Y. 390, where the first marriage was performed by one who, though assuming to be a minister, was not such in fact. The first wife must be shown to have been alive at the time of the second marriage: Extended note to *State v. Johnson*, 93 Am. Dec. 256.

Indictment or information need not state at what place the defendant was first married: *People v. Giesea*, 61 Cal. 53.

*Exceptions to preceding section.*

§ 195. [946.] The provisions of the preceding section do not extend to any person whose husband or wife has continually remained beyond seas, or who has voluntarily withdrawn from the other and remained absent for the space of five years together, the party marrying again not knowing the other to be living within that time; nor to any person who has good reason to believe such husband or wife to be dead; nor to any person who has been legally divorced from the bonds of matrimony.

*Punishment of one who knowingly marries the husband or wife of a living person.*

§ 196. [947.] Every unmarried person who knowingly marries the husband or wife of another, when such husband or wife is guilty of bigamy thereby, shall be punished by imprisonment in the penitentiary not exceeding three years, or by fine not more than three hundred dollars, or imprisonment in the county jail not exceeding one year.

*Cases in which marriages are prohibited.*

§ 197. [949.] Marriages in the following cases are prohibited:—

1. When either party thereto has a wife or husband living at the time of such marriage;
2. When the parties thereto are nearer of kin to each other than



second cousins, whether of the whole or half blood, computing by the rules of the civil law.

3. It shall be unlawful for any man to marry his father's sister, mother's sister, father's widow, wife's mother, daughter, wife's daughter, son's widow, sister, son's daughter, daughter's daughter, son's son's widow, daughter's son's widow, brother's daughter, or sister's daughter; it shall be unlawful for any woman to marry her father's brother, mother's brother, mother's husband, husband's father, son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, brother's son, or sister's son; and if any person being within the degrees of consanguinity or affinity in which marriages are prohibited by this section carnally know each other, they shall be deemed guilty of incest, and shall be punished by imprisonment in the state penitentiary for a term not exceeding ten years and not less than one year.

**For table of degrees,** see 1 Bishop on Marriage and Divorce, sec. 318, and note.

*Open or gross lewdness defined — Punishment of.*

§ 198. [948.] If any man or woman, not being married to each other, lewdly and viciously associate and cohabit together, or if any man or woman, married or unmarried, is guilty of open or gross lewdness, or designedly make any open and indecent or obscene exposure of his or her person, or of the person of another, every such person shall be punished by imprisonment in the county jail not exceeding six months, or by fine not exceeding two hundred dollars.

*Person keeping house of ill-fame is guilty of misdemeanor — How punished.*

§ 199. [1210.] Every person who shall keep a house of ill-fame in this state, resorted to for the purposes of prostitution and lewdness, or who shall reside in such house for the purposes aforesaid, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment in a common jail for a term not exceeding six months, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment, at the discretion of the court. [January 23, 1863.]

**House of ill-fame, what is:** See note to § 140, *supra*.

*Keeping house of ill-fame — Effect of lessee's conviction in terminating lease.*

§ 200. [1211.] Whenever the lessee of any house shall be convicted of the offense of keeping such house of ill-fame as aforesaid, the lease or contract for letting such house shall, at the option of the lessor, become void, and such lessor shall thereupon have the like remedy to recover the possession of such house as is provided against a tenant holding over after the termination of his lease. [January 23, 1863.]

*Keeper of house of ill-fame may be required to give bond for good behavior.*

§ 201. [1212.] Every justice of the peace may, on the complaint of any citizen of the county, require sureties of the peace and good behavior from any person who shall be guilty of keeping or maintaining houses reputed to be houses of bawdry and ill-fame; and every person being so ordered to find sureties of the peace and good behavior, who shall neglect or refuse to comply with such order, may, by said justice, be committed to the common jail in the county where the offense was committed for a term not exceeding thirty days; and the bond required, as aforesaid, shall be filed with the county auditor of the county where the offense was committed, and from said order the accused shall have the right to appeal to the superior court in the county within which the offense was committed. [January 23, 1863.]

*Keeper of house of ill-fame to pay costs, when put under bonds, or be committed.*

§ 202. [1213.] When any person, prosecuted under the next preceding section, shall be required to procure sureties of the peace and good behavior, such person shall pay costs of prosecution; and on failure so to do, shall be imprisoned in the county jail, at the discretion of the court having cognizance thereof, until such costs be paid and satisfied. [January 23, 1863.] •

*Participation in prize-fight, etc., is misdemeanor—Punishment.*

§ 203. Any person who, within this state, engages in, instigates, aids, or encourages, or does any act to further, a contention or fight, with or without weapons, between two or more persons, or a fight commonly called a sparring match, in which the combatants are provided with gloves, or who sends or publishes a challenge or acceptance to a challenge for such a contention, prize-fight, sparring match, with or without gloves, or carries or delivers such a challenge or acceptance, or trains or assists any person or persons in training or preparing for such contention, prize-fight, or sparring match, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for a term of not less than thirty days nor more than one year, and by a fine of not less than fifty dollars nor more than one thousand dollars; *provided*, that nothing in this section shall be so construed as to interfere with members of private clubs sparring or fencing for exercise among themselves. [March 26, 1890, § 1.]

*One who bets or holds money on prize-fight, etc., is guilty of misdemeanor—Punishment.*

§ 204. Any person who bets, stakes, or wagers money or other

property upon the result of such a fight, encounter, or contention, or holds or undertakes to hold money or property so staked or wagered, to be delivered to or for the benefit of the winner thereof, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for a term not less than thirty days nor more than one year, or by a fine of not less than fifty dollars nor more than one thousand dollars, or by both fine and imprisonment, at the discretion of the court. [March 26, 1890, § 2.]

*Punishment for circulating demoralizing literature.*

§ 205. If any person shall import, print, publish, sell, lend, give away, distribute, or show, or have in his possession with intent to sell or give away, or to show or advertise, or otherwise offer for loan, gift, sale, or distribution, any obscene or indecent book, magazine, pamphlet, newspaper, story-paper, writing-paper, picture, engraving, drawing, or photograph, or if any person shall design, copy, draw, photograph, print, utter, publish, or otherwise prepare any of the articles mentioned in this section, or shall write or print, or cause to be written or printed, a notice of any kind, giving information, or shall give information stating when, where, and how, or of whom or by what means, any of the articles mentioned in this section could be purchased or obtained, or if any person sells, lends, gives away, or shows, or has in his possession with intent to sell or give away, or to show or advertise, or otherwise offers for loan, gift, sale, or distribution, to any minor child, any book, pamphlet, magazine, newspaper, or other printed paper devoted to the publication, or principally made up of, criminal news, police reports, or accounts of criminal deeds, or pictures and stories of deeds of bloodshed, lust, or crime, or if any person exhibits upon any street or highway, or in any other place within the view, or which may be within the view, of any minor child, any book, magazine, pamphlet, newspaper, writing-paper, picture, engraving, drawing, photograph, or other article coming within the description of the articles mentioned in this section, or any of them, or if any person, in any manner, hires, uses, or employs any minor child to sell or give away, or in any manner to distribute, or who, having the care, custody, or control of any minor child, permits such child to sell, give away, or in any other manner to distribute any book, magazine, pamphlet, newspaper, story-paper, writing-paper, picture, engraving, drawing, photograph, or other article or thing coming within the description of articles and matter mentioned in this section, or any of them, upon conviction thereof shall be punished by imprisonment in the penitentiary not exceeding three years, or by a fine not exceeding two thousand dollars; *provided, however, that if such obscene or indecent matter is circulated in any*



school or institution of learning, or in any charitable or reformatory institution, or in any jail or penitentiary, supported in whole or in part by public money or moneys raised by taxation, then the minimum of imprisonment shall not be less than thirty days, and in all such cases imprisonment shall follow conviction. [March 2, 1891, § 24.]

Indictment or information is sufficient if the fact of the lewdness or obscenity is stated generally: See § 1254, Code of Procedure.

*Jury to determine whether matter is obscene or indecent.*

§ 206. The jury in all prosecutions under the next preceding section shall be the sole and exclusive judges as to whether or not the matter circulated is obscene or indecent. [January 30, 1886, § 2. In effect immediately.]

*Duty of peace-officers as to prize-fighting, glove contests, etc.*

§ 207. It shall be the duty of every peace-officer in this state to see that sections two hundred and three and two hundred and four are faithfully enforced, and when any such officer has reason to believe these sections are being violated, or are about to be violated, it shall be his duty forthwith to arrest any person or persons violating the provisions thereof, with or without warrant, and take him or them before the nearest committing magistrate of the county, to be dealt with according to law, and such peace-officer may pursue and arrest any person or persons whom he has reason to believe have violated or are attempting to violate any of the provisions thereof, into any county in the state, and take such offenders into the county from whence they were pursued, before the proper magistrate. It shall be the duty of every judge on charging the grand jury to read these sections, and charge such grand jury to diligently inquire into any and all violations of the provisions of the same. [January 6, 1886, § 3. In effect immediately.]

*Violation of sepulcher — How punished.*

§ 208. [951.] If any person, not being lawfully authorized, shall willfully dig up, disinter, remove, or convey away any human body, or the remains thereof, or shall knowingly aid in such disinterment, removal, or conveying away, every such offender, and every person accessory thereto, either before or after the fact, shall, upon conviction thereof, be imprisoned in the county jail not exceeding one year, and be fined not exceeding one thousand dollars, or fined only.

**Violating sepulcher, etc.** — This section is a valid law, and from a sanitary point of view is founded upon the law of self-protection. The subject-matter is a proper one for local regulation, and a violation of the statute is a punishable offense: *In re Wong Yung Quy*, 6 Sav. 442; *Regina v. Sharpe*, 40 Eng. L. & Eq. 581. When a body has once been buried, no one has the right to remove it without the con-

sent of the owner of the grave, or leave of the proper ecclesiastical, municipal, or judicial authority: See extended note to *Wynkoop v. Wynkoop*, 82 Am. Dec. 514.

Indictment or information is sufficient which charges the crime of "violating sepulcher," committed as follows, stating the facts: *People v. Dalton*, 58 Cal. 226.

*Willful injury to cemetery, or use of it for foreign purpose — How punished.*

§ 209. [952.] Every person who shall willfully disfigure, injure, or remove any tombstone, monument, fence, tree, or shrubbery around or within any cemetery, or shall use such cemetery for another purpose than a burying-ground, he shall, upon conviction thereof, be imprisoned in the county jail not exceeding six months, and be fined in any sum not exceeding five hundred dollars, or shall be fined only.

*Certain places not to be kept open on Sunday.*

§ 210. Any person who shall keep open any play-house or theater, race-ground, cock-pit, or play at any game of chance for gain, or engage in any noisy amusements, or keep open any drinking or billiard saloon, or sell or dispose of any intoxicating liquors as a beverage, on the first day of the week, commonly called Sunday, shall, upon conviction thereof, be punished by a fine not less than thirty dollars nor more than two hundred and fifty dollars. All fines collected for violation of this section shall be paid into the common school fund. [March 2, 1891, § 25.]

**Sunday laws.** — The legislature may prohibit all persons from keeping open their places of business on Sunday. Such laws are constitutional: *Ex parte Andrews*, 18 Cal. 678; *Ex parte Bird*, 19 Cal. 130; extended note to *City Council v. Benjamin*, 49 Am. Dec. 616-623. A law which prohibits a certain class from carry-

ing on their business on Sunday is special and unconstitutional: *People v. Westerfield*, 55 Cal. 550. Sunday laws should be liberally construed with respect to the mischiefs to be remedied: *Smith v. Wilcox*, 24 N. Y. 353; 82 Am. Dec. 302.

## CHAPTER VIII.

### OF CRIMES AGAINST THE PUBLIC HEALTH.

- § 211. Business houses must close on Sunday.
- § 212. Public officers must prosecute violators of Sunday laws.
- § 213. Selling of diseased or unwholesome provisions — How punished.
- § 214. Selling of active poisons without label of true name in English.
- § 215. Intoxicated physician prescribing medicine to person's injury.
- § 216. Houses of resort for opium-smoking.
- § 217. Opium-smoking is misdemeanor — Punishment for.
- § 218. Evidence in opium-smoking cases.
- § 219. Health of female employees to be protected.
- § 220. Sale of unwholesome dairy products or food prohibited — Punishment for.

*Business houses must be closed on Sunday.*

§ 211. It shall be unlawful for any person or persons of this state to open on Sunday for the purpose of trade or sale of goods, wares, and merchandise, any shop, store, or building, or place of business whatever; *provided*, that this section shall apply to hotels only in so far as the sale of intoxicating liquors is concerned, and shall not apply to drug-stores, livery-stables, or undertakers. Any person or persons violating this section shall be guilty of a misdemeanor, and on con-

viction thereof shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars. [*March 2, 1891, § 26.*]

*Public officers must prosecute violators of Sunday laws.*

§ 212. It shall be the duty of any and all public officers of this state, knowing of any violation of this chapter, to make complaint, under oath, to the nearest justice of the peace of the county in which the offense was committed. Any public officer who shall refuse or willfully neglect to inform against and prosecute offenders against the last preceding section shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, and the court before which such officer shall be tried shall declare the office or appointment held by such officer vacant for the remainder of his term. [*March 2, 1891, § 27.*]

*Selling of diseased or unwholesome provisions — How punished.*

§ 213. [953.] Every person who shall knowingly sell any kind of diseased, corrupted, or unwholesome provisions, whether for meat or drink, without making the same fully known to the buyer, shall, on conviction thereof, be imprisoned in the county jail not more than one year, and be fined not exceeding one thousand dollars, or fined only.

**This offense is complete** if unwholesome provisions are knowingly sold as and for human food, the seller well knowing the same to be diseased, unwholesome, and unfit to be eaten; but if sold generally as merchandise, without any knowledge on the part of the seller that

they are to be used, it is not an offense, for they might be applied, so far as seller knows, for the purpose of manure or as food for wild animals: *People v. Parker*, 38 N. Y. 88; extended note to *Hunter v. State*, 73 Am. Dec. 173.

*Selling of active poisons without label.*

§ 214. [954.] Every apothecary, druggist, or other person who shall sell and deliver any arsenic, corrosive sublimate, prussic acid, strychnine, or other active poison, without having the word "poison," and the true name thereof in English, written or printed upon a label attached to the vial, box, or parcel containing the same, shall, on conviction thereof, be imprisoned in the county jail not more than six months, and be fined in any sum not exceeding one hundred dollars, or fined only.

*Intoxicated physician prescribing medicine.*

§ 215. [955.] If any physician or other person, while in a state of intoxication, shall prescribe any poison, drug, or other medicine to another person, to his injury, he shall, on conviction thereof, be imprisoned in the county jail for any length of time not exceeding one year, and fined not exceeding five hundred dollars, or fined only.

*Houses of resort for opium-smoking.*

§ 216. [2072.] Any person or persons who shall hereafter keep a



house, cellar, or any other place in which such person or persons, or any other person or persons, smoke or inhale opium, shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction shall be fined in any sum not exceeding one thousand dollars, or imprisonment not more than one year, or both, in the discretion of the court.

*Opium-smoking.*

§ 217. Any person or persons who shall smoke or inhale opium, or who shall visit such house, cellar, or other place for the purpose of smoking or inhaling opium, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall, for the first offense, be fined in any sum not exceeding one hundred dollars, or imprisonment not to exceed one month, or both, in the discretion of the court; and for any subsequent offense, such person or persons so offending shall be imprisoned not to exceed three months; *provided always*, that all opium, pipes, or other apparatus used for smoking or inhaling opium, that may be taken by any officer, the judge or justice of the peace trying the cause shall as additional penalty order the same to be destroyed by the officer so taking the same, immediately after the trial. [November 27, 1883, § 1. In effect immediately.]

**Opium-smoking, etc.** — The above section is constitutional: *Territory v. Ah Lim*, 24 Pac. Rep. 588 (Wash.).

*Evidence in opium-smoking cases.*

§ 218. [2074.] It shall not be necessary, in order to prove the guilt of any person or persons keeping such house or other place for smoking or inhaling opium, that any one should be found smoking or inhaling therein; but the finding of the pipes, opium, or other appliances used for the purpose of smoking or inhaling opium therein, shall be deemed sufficient evidence of the violation of sections two hundred and sixteen and two hundred and seventeen. Nor shall it be deemed necessary, in order to prove the guilt, or to convict any person or persons of smoking or inhaling opium, that they shall be found in the act of smoking or inhaling; but evidence that such person or persons were found in such house or other place, in possession of opium pipes or under the influence of opium, shall be deemed sufficient evidence for conviction.

Section numbers are substituted for the words "this act," which occur in the Code of 1881. The act contained only the three sections.

*Health of female employees to be protected.*

§ 219. It shall be the duty of every agent, proprietor, superintendent, or employer of female help in stores, offices, or schools, within the state of Washington, to provide for each and every such employee a chair, stool, or seat, upon which such female worker or workers shall

be allowed to rest when their duties will permit, or when such rest shall or does not interfere with a faithful discharge of their incumbent duties. A violation of any of the provisions of this section shall be deemed a misdemeanor, and upon conviction thereof by any court of competent jurisdiction shall subject the person offending to a fine of not less than ten dollars nor more than fifty dollars. [March 26, 1890, §§ 1, 2.]

*Sale of unwholesome dairy products or food prohibited.*

§ 220. No person or persons shall sell or exchange, or expose for sale or exchange, any unclean, unwholesome, or adulterated milk, nor any article of food manufactured therefrom, or of cream from the same. [If] any person shall violate any of the provisions of this section, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty dollars nor more than two hundred dollars, or by not less than one month nor more than three months imprisonment in the county jail, or by both such fine and imprisonment. [January 20, 1890, §§ 1, 3.]

## CHAPTER IX.

### OF CRIMES AGAINST PUBLIC CONVENIENCE.

- § 221. Obstructing public highways, injuring bridges, etc.
- § 222. Obstructing highway by driving stock.
- § 223. Injury to bridges, roads, telegraph wires, locks, etc.
- § 224. Mooring vessel or boom of logs to bridge.
- § 225. Mooring vessels to or injuring buoys or beacons.
- § 226. Obstructing navigation.
- § 227. Discharge of ballast, when punishable and how.
- § 228. Willful injury to monuments, railings, signs, etc.
- § 229. Willful or malicious injury to public property.
- § 230. Malicious injury to property of the United States.
- § 231. Obstruction of public ditches or drains — How punished.
- § 232. Failure of road supervisor to perform duty — How punished.
- § 233. Unlawful use of traction engines.

*Obstructing public highways, injuring bridges, etc.*

§ 221. [917.] Every person who shall in any manner obstruct any public highway, turnpike, plank road, or bridge, or injure any material used in the construction of such road or bridge, shall, on conviction thereof, be fined in any sum not exceeding five hundred dollars.

*Obstructing highway by driving stock.*

§ 222. Any person or persons who shall, by driving stock along or near public highways, and cause such highway to be obstructed with stones, earth, or other *débris*, and shall permit such obstruction to remain for more than twenty-four hours, shall be deemed guilty of a

misdemeanor, and upon conviction shall be fined in any sum not exceeding two hundred dollars. [*March 2, 1891, § 28.*]

*Injury to bridges, roads, telegraphs, etc.*

§ 223. If any person shall willfully break down, injure, or remove or destroy any free or toll bridge, railway, plank road, macadamized road, or any gate upon any such road, or any lock or embankment of any canal, or any telegraph post or wire, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than six months nor more than two years, or by fine not less than fifty nor more than one thousand dollars. [*March 2, 1891, § 29.*]

*Mooring vessel or boom of logs to bridge.*

§ 224. [928.] Every person who shall moor or chain any steamer, sloop, scow, or other vessel, or raft, or boom of logs to the piling, piers, abutments, or other supports of any bridge within this state, shall, on conviction thereof, be fined in any sum not exceeding three hundred dollars nor less than fifty dollars.

*Mooring vessels to or injuring buoys or beacons.*

§ 225. [1208, 1209.] Any person or persons who shall moor any vessel or vessels, of any kind or name whatever, or any boat, skiff, barge, scow, raft, or part of raft to any buoy or beacon placed in the navigable waters of this state, or in any bay, river, or arm of the sea bordering upon this state by authority of the United States light-house board, or shall in any manner hang on with any vessel, boat, skiff, barge, scow, raft, or part of a raft to any such buoy or beacon, or shall willfully remove, damage, or destroy any such buoy or beacon, or shall cut down, remove, damage, or destroy any beacon or beacons erected on land in this state by the authority of the said United States light-house board, shall, for every such offense, be deemed guilty of a misdemeanor, and upon conviction thereof before any court of competent jurisdiction shall be punished by a fine not less than one hundred nor more than two hundred dollars, or by imprisonment in the county jail not less than one or more than six months, or by both such fine and imprisonment, in the discretion of the court. One half of all fines under this section shall be paid by the court to the informer, and the other half shall be paid into the common school fund of the county in which the offense shall be committed.

*Obstructing navigation.*

§ 226. Every person who shall in any manner obstruct the navigable portion or channel of any bay, harbor, or river or stream within or bordering upon this state, navigable and generally used for the navigation of vessels, boats, or other water crafts, or for the floating down of logs, cord-wood, fencing posts, or rails, shall, on conviction



thereof, be fined in any sum not exceeding three hundred dollars; *provided*, that the placing of any mill-dam or boom across a stream used for floating saw-logs, cord-wood, fencing posts, or rails shall not be construed to be an obstruction to the navigation of such stream, if the same shall be so constructed as to allow the passage of boats, saw-logs, cord-wood, fencing posts, or rails without unreasonable delay. [January 17, 1888, § 1. *In effect immediately.*]

*Discharge of ballast in navigable waters.*

§ 227. Every master or mate, or other officer or other person, belonging to or in charge of any vessel, who shall discharge or cause to be discharged the ballast of such vessels into the navigable portions or channels of any of the inlets, bays, harbors, or rivers within or bordering on this state, where the water is less than twenty fathoms deep, shall, on conviction thereof, be fined in any sum not less than seventy-five dollars nor more than five hundred dollars; *provided*, that nothing in this section shall be so construed as to prevent any such person from discharging ballast from such vessel on the beach at or above ordinary high tide in all waters where the tide ebbs and flows, and that no ballast shall be discharged on any of the flats included within the boundary of any city or town site, or extension thereof. [March 2, 1891, § 30.]

*Willful injury to monuments, railings, etc.*

§ 228. If any person shall willfully break down, injure, remove, or destroy any monument erected or used for the purpose of designating the boundary of any town, tract, or parcel of land, or any tree marked for that purpose, or shall willfully break down, injure, remove, or destroy any mile-stone, board, or post, or any guide or finger-board, erected or placed upon any road or highway, or shall willfully alter or deface the inscription upon any such stone, post, or board, or shall willfully extinguish any lamp, or break, injure, destroy, or remove any lamp, lamp-post, sign or sign-post, or any railing or posts erected upon any street, highway, sidewalk, court, or passage, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than three months nor more than one year, or by fine not less than ten dollars nor more than five hundred dollars. [March 15, 1890, § 11. *In effect immediately.*]

“Willfully”: See note to § 85.

*Willful or malicious injury to public property.*

§ 229. Any person who shall willfully or maliciously cut, carve, otherwise deface, or injure any guide-board, bridge, building, column, monument, or structure, grounds or trees, belonging to the public, or any incorporated charitable, religious, or scientific institution, shall,

on conviction thereof, be fined in any sum not greater than five hundred dollars nor less than ten dollars. [*March 2, 1891, § 31.*]

**Indictment, etc.:** See note to § 58, *ante*. “Willfully” defined: See note to § 85, *ante*.

*Malicious injury to property of United States.*

§ 230. Any malicious, willful, reckless, or voluntary injury to or mutilation of the grounds, buildings, or other property of the United States within this state shall subject the offender or offenders to a fine not greater than five hundred dollars, nor less than twenty dollars, to which may be added, for an aggravated offense, imprisonment not exceeding six months in the county jail or work-house, to be prosecuted before any court of competent jurisdiction. [*March 2, 1891, § 32.*]

*Obstruction of public ditches or drains.*

§ 231. [846.] If any person place any obstruction in any of the public ditches or drains made for the purpose of draining any of the swamp-lands in this state, he shall, upon conviction, be compelled to remove such obstructions, and be fined not less than five dollars nor more than one hundred dollars, or be imprisoned in the county jail not more than thirty days, at the discretion of the court.

*Failure of road supervisor to perform duty.*

§ 232. [921.] If any supervisor of roads fail to keep the highways and bridges in his road district in as good repair as the available labor or other means of such district will enable him to do, or fail to discharge any other duty required of him by law, he shall, on conviction thereof, be fined in any sum not exceeding two hundred dollars, and upon prosecution for neglecting to keep a highway in good repair, it shall be sufficient to prove that such highway is commonly reputed as such.

*Unlawful use of traction engines.*

§ 233. Whenever any person in charge of and running any traction engine propelled by steam upon any county road or public highway, except in towns, cities, or villages, shall meet or come in close proximity to any person driving a team of horses, it shall be the duty of the person in charge of such engine to come to a full stop, and remain standing until the team has passed. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction shall be fined not less than ten nor more than fifty dollars. [*February 14, 1890, §§ 1, 2.*]

## CHAPTER X.

## OF MISREPRESENTATION, DECEPTION, FALSE PRETENSES, AND FRAUD.

- § 234. Obtaining money under false pretenses.
- § 235. Fraudulent collection of price of building materials, etc., is felony.
- § 236. Use of false weights and measures is misdemeanor.
- § 237. Failure to give full weight is misdemeanor.
- § 238. Use of false pretenses or artifices in selling mines is felony.
- § 239. Interference with samples for assay with intent to cheat is felony.
- § 240. Making false samples of ore with intent to cheat is felony.
- § 241. Felony — Punishment for.
- § 242. Sale and use of imitation and adulterated dairy products prohibited, unless marked, etc. — How punished.
- § 243. Misrepresentation of pedigree of animal.
- § 244. Misrepresenting pedigree, etc., in making sale of animals.
- § 245. Deception as to being incorporated bank is misdemeanor — Punishment for.
- § 246. Wearing G. A. R. button without right.

*Obtaining money under false pretenses.*

§ 234. [853.] If any person, with intent to defraud another, shall designedly, by color of any false token or writing, or any false pretense, obtain from any person any money, transfer, note, bond, or receipt, or thing of value, such person shall, upon conviction thereof, be imprisoned in the penitentiary not more than five years nor less than one year, or imprisoned in the county jail for any length of time not exceeding one year.

**False pretenses.** — The essence of this offense is that the false pretense should relate to a past event, or to a fact having a present existence, and not to something to happen in the future. And the prosecutor must believe the pretense to be true, and confiding in its truth, must part with his money or property: *State v. Evers*, 49 Mo. 542; *In re Snyder*, 17 Kan. 542; *Johnson v. State*, 41 Tex. 65; *Ryan v. State*, 45 Ga. 128. Both the inducement and the fraudulent purpose are facts to be proved, not presumed: *Scott v. People*, 62 Barb. 62. Upon trial of an indictment for obtaining money by false pretenses, where the charge is that the accused had obtained money by giving certain forged instruments, purporting to be promissory notes of third persons, as security,

representing them to be genuine, the accused may give evidence that the signatures upon the notes were written by himself under the direction and authority of the persons represented to be the makers. A note so signed is not a false writing, but genuine: *State v. Lurch*, 12 Or. 95. In the cases of *People v. Thomas*, 3 Hill, 169, and *State v. Hurst*, 11 W. Va. 54, it is said that to make false representations, whereby one is induced to pay his debt, is not punishable. See also *People v. Higbie*, 66 Barb. 131; *Tatum v. State*, 58 Ga. 408; *Cheek v. State*, 1 Cold. 172; *People v. Clough*, 17 Wend. 351.

**Sufficiency of indictment under this section:** See *People v. Jordan*, 4 West Coast Rep. 138.

*Fraudulent collection of price of building materials etc., is felony — Punishment.*

§ 235. Any person, firm, or corporation, contracting with another to supply labor or material for any purpose whatever, who shall fraudulently represent that the labor or material supplied has been paid for, and shall, upon such fraudulent representation, collect the price thereof, shall be deemed guilty of a felony, and upon conviction thereof shall be fined in any sum not exceeding one thousand dollars, or imprisonment in the penitentiary for any term not exceeding two years, or both. [February 27, 1890, § 1. In effect immediately.]



*Use of false weights or measures is misdemeanor.*

§ 236. Every person who uses any weight or measure, knowing it to be false, by which use another is defrauded or otherwise injured, is guilty of a misdemeanor. A false weight or measure is one which does not conform to the standard established by the laws of the United States. [March 2, 1891, § 33.]

*Failure to give full weight is misdemeanor.*

§ 237. In all sales of coal, hay, and other commodities usually sold by the ton or fractional part thereof, the seller must give to the purchaser full weight at the rate of two thousand pounds to the ton; and in all sales of articles which are sold in commerce or trade by avoirdupois weight, the seller must give to the purchaser full weight, at the rate of sixteen ounces to the pound. Any person violating this section is guilty of a misdemeanor. [February 4, 1886, § 2. In effect immediately.]

*Use of false pretenses or artifices in selling mines is felony.*

§ 238. Any person who shall, with intent to cheat, wrong, or defraud, place in or upon any mine or mineral claim any ores or specimens of ores not extracted therefrom, or exhibit any ore, or certificate of assay of ore, not extracted therefrom, for the purpose of selling any mine or mining claim, or interest therein, or who shall obtain any money or property by any such false pretenses or artifices, shall be deemed guilty of a felony. [February 27, 1890, § 1.]

*Interference with samples for assay with intent to cheat is felony.*

§ 239. Any person who shall interfere with, or in any manner change, samples of ores or bullion produced for sampling, or change or alter samples or packages of ores or bullion which have been purchased for assaying, or who shall change or alter any certificate of sampling or assaying, with intent to cheat, wrong, or defraud, shall be deemed guilty of a felony. [February 27, 1890, § 2.]

*Making false samples of ore with intent to cheat is felony.*

§ 240. Any person who shall, with intent to cheat, wrong, or defraud, make or publish a false sample of ore or bullion, or who shall make or publish or cause to be published a false assay of ore or bullion, shall be deemed guilty of a felony. [February 27, 1890, § 3.]

*Felony — Punishment for.*

§ 241. Any person violating any of the provisions of sections two hundred and thirty-eight, two hundred and thirty-nine, or two hundred and forty, of this code shall be deemed guilty of a felony, and upon conviction thereof shall be fined in any sum not less than fifty nor more than one thousand dollars, or by imprisonment in the pen-

itentiary for not less than one year nor more than five years, or by both such fine and imprisonment. [February 27, 1890, § 4.]

*Sale and use of imitation and adulterated dairy products prohibited unless marked, etc. — How punished.*

§ 242. No person or persons shall sell, supply, or offer for sale or exchange any oleaginous substance, or any compound of the same, purporting to be butter or cheese, or having the semblance of butter or cheese, other than that produced from wholesome and unadulterated milk or cream of the same, unless the said oleaginous substance, and the package containing the same, shall be marked so as to plainly indicate its true character and distinguish it from pure and genuine dairy products; and in any public dining or eating room where imitation dairy product or products are commonly or knowingly used as an article of food, the bill of fare used in such dining or eating room shall state the fact in the same-sized type as is used in printing the body of said bill of fare; or if no bill of fare is used, then in a conspicuous place of said dining or eating room, easily seen by any one entering said room, shall be posted a notice stating the name or names of such imitation dairy products; *provided*, that the addition of harmless coloring matter to any product manufactured from pure, unadulterated milk, or the cream thereof, shall [not] come within the provisions of this section; *provided further*, that milk drawn from cows within fifteen days before and five days after parturition shall be construed to be unclean, impure, and unwholesome. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty dollars nor more than two hundred dollars, or by not less than one month nor more than three months imprisonment in the county jail, or by both such fine and imprisonment. [March 2, 1891, § 34.]

*Misrepresentation of pedigree of animal.*

§ 243. Any person who is the owner, agent, or keeper, or in any way interested in the ownership or the keeping, of any stallion, bull, ram, or boar, that may be kept for the use of the general public for pay, and who shall knowingly and willfully misrepresent the pedigree or blood of any such stallion, bull, ram, or boar, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding one hundred dollars, and shall be liable for all damages that may be sustained by reason of such misrepresentation. [March 2, 1891, § 35.]

*Misrepresenting pedigree, etc., in making sale of animals.*

§ 244. Any person who shall sell any horse, horned cattle, hog, or sheep, and shall have knowingly and willfully misrepresented the

blood or pedigree of the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding fifty dollars, and shall also be liable for all damage sustained by reason of such sale by misrepresentation. [*February 2, 1888, § 2. In effect immediately.*]

*Deception as to being incorporated bank is misdemeanor—Punishment of.*

§ 245. Any person or persons now or hereafter engaged in the business of banking, who shall put up, or cause to be put up, or exhibit, any sign or advertisement, purporting thereby to be an incorporated bank, or shall do business under a corporate name when they are not such, shall, on conviction thereof, be adjudged guilty of a misdemeanor, and punished by a fine not exceeding two hundred dollars. [*March 2, 1891, § 36.*]

*Wearing G. A. R. badge without right.*

§ 246. Any person who shall willfully wear the badge or button of the Grand Army of the Republic, or who shall use or wear the same within this state, unless he shall be entitled to use or wear the same under the rules and regulations of the department of Washington and Alaska Grand Army of the Republic, shall be guilty of a misdemeanor, and upon conviction shall be punished by imprisonment for a term not to exceed thirty days in the county jail, or a fine not exceeding twenty dollars, or by both such fine and imprisonment. [*January 27, 1890, § 1.*]

## CHAPTER XI.

### OF UNLAWFUL DESTRUCTION OF GAME AND FISH.

- § 247. Deer-hunting with dogs is unlawful.
- § 248. Hunting deer, etc., for their hides and horns forbidden.
- § 249. Time for killing deer, etc., for sale.
- § 250. Penalty for violation.
- § 251. Game-warden and deputy.
- § 252. Disposition of fines.
- § 253. Fire-hunting prohibited.
- § 254. Elk, etc., not to be killed at certain seasons.
- § 255. Elk, etc., not to be chased with dogs at certain seasons.
- § 256. Time when water-fowl may be killed.
- § 257. When grouse, etc., may be killed.
- § 258. When quail may be killed.
- § 259. Trapping grouse and quail unlawful.
- § 260. Nests of game birds must not be robbed.
- § 261. Taking or killing of feathered game is unlawful when.
- § 262. Same — Kinds of game designated.
- § 263. Sale or possession of game unlawful when.
- § 264. Shipping game out of state for market is unlawful.
- § 265. Certain game not to be killed for five years.
- § 266. Disposition of moneys collected.
- § 267. Punishment for violation of certain sections.



- § 268. When trout may not be taken.
- § 269. Trout to be taken only with hook and line.
- § 270. Possession a misdemeanor and evidence of unlawful taking.
- § 271. Night-shooting forbidden.
- § 272. Floating blinds, etc., forbidden.
- § 273. Penalty for violation.
- § 274. Provisions for protection of food fishes.
- § 275. Taking of salmon near fish-rack.
- § 276. Taking salmon on Gray's Harbor is a misdemeanor when.
- § 277. Taking of salmon from Puget Sound is unlawful when.
- § 278. What Puget Sound includes.
- § 279. Nets, wheels, etc., when may not extend.
- § 280. Corrupting waters containing fish.
- § 281. Obstructing stream without leaving fishways.
- § 282. Casting sawdust, etc., into fish streams.
- § 283. Word "salmon" construed.
- § 284. Pound nets or traps used, to be numbered and lighted.
- § 284 a. Jurisdiction of justices of the peace.
- § 285. Taking fish for propagation is lawful.
- § 286. Person cannot take food fish for sale unless he is citizen, etc.
- § 287. Fact of citizenship and residence — How to be established.
- § 288. Punishment upon conviction of offense.
- § 289. Certificates, fee for issuing and recording.
- § 290. Persons excepted from operation of above sections.
- § 291. Taking lobsters within prohibited time.

*Deer-hunting with dogs is unlawful.*

§ 247. It shall be unlawful to hunt or chase deer with dogs.  
[February 6, 1890, § 1.]

Deer were included in section 244 as it stood in the act of February 2, 1888, which prohibited their being hunted with dogs at certain specified seasons. The above section, which is a later act, forbids it at all times.

*Hunting deer, etc., for their hides or horns forbidden.*

§ 248. It shall be unlawful to hunt deer, mule-deer, carribou, elk, mountain sheep or goats, for the purpose of securing their hides or horns. [February 6, 1890, § 2.]

*Time for killing deer, etc., for sale.*

§ 249. It shall be unlawful to hunt or kill for sale, or offer for sale, any deer, mule-deer, carribou, mountain sheep, goats, or elk after the first day of January or before the first day of December. [February 6, 1890, § 3.]

*Penalty for violation of preceding sections.*

§ 250. Any person or persons violating section two hundred and forty-seven, two hundred and forty-eight, or two hundred and forty-nine of this code shall be fined, in any court of competent jurisdiction, not less than fifty dollars nor more than two hundred dollars for each offense, and in case of non-payment of said fine, to be imprisoned in the county jail not to exceed thirty days. [February 6, 1890, § 4.]

Sections specified, instead of the words "this act," the sections named being the only penal sections of the act of February 6, 1890.

*Game-warden and deputy — Term of office and duties.*

§ 251. The governor of the state shall have the power to appoint a game-warden, who shall serve four years without pay, and he in turn shall, by the advice and consent of the governor, appoint a deputy game-warden in each county of the state, whose duties shall be to inquire into all violations and prosecute all violators of sections two hundred and forty-seven, two hundred and forty-eight, and two hundred and forty-nine of this code. [February 6, 1890, § 5.]

See note to § 250.

*Disposition of fines.*

§ 252. Upon the arrest and conviction of any person or persons violating any of the provisions of sections two hundred and forty-seven, two hundred and forty-eight, or two hundred and forty-nine of this code, one half of the fine shall be paid to the game-warden of the county, and the other half into the school fund of the county in which the offense may be committed. [February 6, 1890, § 6.]

See note to § 250.

*Fire-hunting prohibited.*

§ 253. Every person who shall fire-hunt for deer, moose, or elk, except within the bounds of his own inclosure or by the permission of the owner of any other inclosure, shall, upon conviction thereof, be fined twenty dollars for each and every offense, one half of said fine to go to the informer, and the other half into the common school fund of the county where such act is done. [March 2, 1891, § 37.]

*Elk, etc., not to be killed at certain seasons.*

§ 254. Every person who shall, within the state of Washington, between the first day of January and the fifteenth day of August, pursue, hunt, take, kill, or destroy any elk, moose, deer, fawn, mountain-sheep, or mountain-goat shall be deemed guilty of a misdemeanor. Every person who shall take, kill, or destroy any elk, moose, deer, fawn, mountain sheep or goat at any time, unless the carcass of such animal is used or preserved for food by the person slaying it, shall be deemed guilty of a misdemeanor. Every person who shall, between the first day of January and the fifteenth day of August, sell or offer for sale any hides or horns of any elk, moose, deer, fawn, mountain sheep or goat, shall be deemed guilty of a misdemeanor. [March 2, 1891, § 38.]

As to killing deer, etc., for sale, see § 249.

*Elk, etc., not to be chased with dogs at certain seasons.*

§ 255. Every person who shall, within the state of Washington, chase, pursue, drive, or hunt any elk or moose, with dog or dogs, at any time except during the months of October, November, and December, shall be guilty of a misdemeanor. [March 2, 1891, § 39.]

*Time when water-fowl may not be killed.*

§ 256. Every person who shall, within the state of Washington, between the first day of April and the fifteenth day of August of each year, take, kill, injure, or destroy any wild swan, mallard-duck, wood-duck, widgeon, teal, butter-ball, spoon-bill, blue-bill, red-head, gray duck, black duck, sprig-tail, or canvas-back duck shall be guilty of a misdemeanor. [February 2, 1888, § 3. In effect April 2, 1888.]

*When grouse, etc., may not be killed.*

§ 257. Every person who shall, within the state of Washington, between the first day of January and the first day of August of each year, take, kill, injure, or destroy any mountain-grouse, blue or dusky grouse, ruffed grouse, of [or] pheasant, pintail grouse, or prairie chicken, or sage-hen, shall be guilty of a misdemeanor. [February 2, 1888, § 4. In effect April 2, 1888.]

*When quail may not be killed.*

§ 258. Every person who shall, within the state of Washington, between the fifteenth day of January and the first day of October of each year, take, kill, injure, or destroy any California quail or bob-white, shall be guilty of a misdemeanor. [February 2, 1888, § 5. In effect April 2, 1888.]

*Trapping grouse and quail unlawful.*

§ 259. Every person who shall, within the state of Washington, at any time trap, net, or ensnare, or attempt to trap, net, or ensnare, any quail, prairie chicken, grouse, or pheasant, except for the purposes of propagation, shall be deemed guilty of a misdemeanor. [March 2, 1891, § 40.]

*Nests of game-birds must not be robbed.*

§ 260. Every person who shall, within the state of Washington, remove or destroy any egg or eggs from the nest of any mallard-duck, widgeon, wood-duck, teal, butter-ball, spoon-bill, gray duck, black duck, sprig-tail, blue-bill, red-head, or canvas-back duck, or prairie-chicken, blue or dusky grouse, mountain-grouse, ruffed grouse, or pheasant, sage-hen, quail, or partridge, or willfully molest or destroy the nest of any such fowls or birds, shall be guilty of a misdemeanor. [March 2, 1891, § 41.]

*Taking or killing of feathered game is unlawful when.*

§ 261. It shall be unlawful for any person in the state of Washington to kill, trap, or in any way take or kill, any feathered game for the market or sale in any month in the year except the month of December. [March 9, 1891, § 1.]

*Same — Kinds of game designated.*

§ 262. Such game shall be of the several kinds as follows: Swan,



geese, brants, sand-hill cranes, grouse, pheasants, partridges, prairie-chicken, snipe, and all the various and different kinds of ducks. [March 9, 1891, § 2.]

*Sale or possession of game unlawful when.*

§ 263. It shall be unlawful for any person or persons to sell or dispose of, except in the month of December, or have in their possession for the purpose of sale, any of the game mentioned in section two hundred and sixty-two, for money, or for any pay whatever. [March 9, 1891, § 3.]

*Shipping game out of state for market is unlawful.*

§ 264. It shall be unlawful to ship any kind or kinds of game out of this state for the market any month in the year. [March 9, 1891, § 4.]

*Certain game not to be killed for five years.*

§ 265. It shall be unlawful for any person or persons to kill, trap, or in any manner cause to be killed, quail and golden, silver, China, or Mongolian pheasants for the period of five years after this act becomes a law. [March 9, 1891, § 5.]

“This act” comprises §§ 261-267, both inclusive, of this code.

*Disposition of moneys collected.*

§ 266. All fines or moneys collected under this act be paid to the county treasurer and held in and made a sinking fund for a game commissioner. [March 9, 1891, § 6.]

See note to § 265.

*Punishment for violation of certain sections.*

§ 267. Any person violating any of the provisions of this act shall be guilty of a misdemeanor, and on conviction thereof shall be fined for each offense in a sum not less than ten dollars nor more than one hundred dollars. [March 9, 1891, § 7.]

See note to § 265.

*When trout may not be taken.*

§ 268. Every person who shall, within the state of Washington, during the months of November, December, January, February, March, and April of each year, take, catch, kill, or have in their possession any brook-trout, mountain-trout, bull-trout, or salmon-trout shall be guilty of a misdemeanor. Every person who shall take, catch, kill, or have in their possession any of the food fishes implanted in the creeks, rivers, lakes, or bays of the state of Washington, except for propagating the same, for a period of three years after the same shall have been implanted, shall be guilty of a misdemeanor.

March 6, 1891, § 1. This act, embracing this exist, and this act shall be in force from and  
and the next succeeding section, provides — after its approval": See Const., art. 2, § 31.  
§ 3 — "An emergency is hereby declared to

*Trout to be taken only with hook and line.*

§ 269. Every person who shall, within the state of Washington, take, catch, or destroy, with any seine, net, weir, trap, or other device, other than hook and line, any mountain-trout, brook-trout, bull-trout, or salmon-trout, in any of the waters of the state of Washington, shall be guilty of a misdemeanor. [March 6, 1891, § 2.]

See note to § 268.

*Possession a misdemeanor and evidence of unlawful taking.*

§ 270. Every person who shall, within the state of Washington, have in his possession any of the animals, fowls, birds, or fish mentioned in sections two hundred and fifty-four, two hundred and fifty-five, two hundred and fifty-six, two hundred and fifty-seven, two hundred and fifty-eight, or two hundred and sixty-eight of this code, at any time when by any of said sections it is made unlawful to take or kill the same, shall be guilty of a misdemeanor; and proof of the possession by any person of any of the aforesaid animals, fowls, birds, or fish, when it is unlawful to take or kill the same, shall be *prima facie* evidence that the animals, fowls, birds, or fish were unlawfully taken or killed by the person having possession of the same, within the county wherein the same may be found; *provided*, that nothing in this chapter shall prohibit any person from taming or keeping for the purpose of propagation or curiosity any of the animals, fowls, or birds mentioned therein. [March 2, 1891, § 43.]

*Night-shooting forbidden.*

§ 271. Every person who shall, within the state of Washington, take, kill, shoot at, or injure, or destroy any mallard-duck, widgeon, teal, butter-ball, spoon-bill, wood-duck, gray duck, black duck, blue-bill, red-head, sprig-tail, or canvas-back duck, at any season of the year, between the hours of eight o'clock, P. M., and five o'clock, A. M., shall be guilty of a misdemeanor. [March 2, 1891, § 44.]

*Floating blinds, etc., forbidden.*

§ 272. Every person who shall, within the state of Washington, use any sink-box, floating blind, rafts, sneak-boat, punt, or any other device for approaching any of the water-fowl mentioned in this chapter, while the same are resting on the waters of this state, shall be guilty of a misdemeanor; *provided*, that nothing in this chapter shall be construed to prevent the shooting of any of the water-fowl mentioned therein from shore-blinds, or over decoys, with any gun which is fired from the shoulder of the shooter. [March 2, 1891, § 45.]

*Penalty for violations.*

§ 273. Every person who shall, within the state of Washington, be convicted of a violation of any of the provisions of sections two hundred and fifty-four, two hundred and fifty-five, two hundred and fifty-six, two hundred and fifty-seven, two hundred and fifty-eight, two hundred and fifty-nine, two hundred and sixty, two hundred and sixty-eight, two hundred and sixty-nine, two hundred and seventy-one, or two hundred and seventy-two of this code, shall be punished by a fine of not less than ten dollars and not more than three hundred dollars, together with the costs of prosecution, or imprisonment in the county jail where the offense is committed not less than five days nor more than three months, or both such fine and imprisonment. One half of all moneys collected from such fines for a violation of any of the provisions of said sections shall be paid to the informer, and one half to the prosecuting attorney of the county in which the case is prosecuted. [*February 2, 1888, § 14. In effect April 2, 1888.*]

The words "this act" occur in the section as it stands in the session laws of 1887-88, instead of the specifications of the respective sections. The sections here specified constitute all the penal sections of the act except section 12. That section related solely to trespass by hunters upon the lands of others, and is omitted, as foreign to the title and void: Const., art. 2, sec. 19; *Harland v. Territory*, 3 Wash. 131. The title of the act is "an act for the protection of game and fish."

*Provisions for protection of food fishes.*

§ 274. It shall not be lawful to take or fish for salmon in the Columbia River or its tributaries, by any means whatever, in any year hereafter, between the first day of March and the tenth day of April, or between the tenth day of August and the tenth day of September, or in any of the rivers and bays of the state, or the Columbia River, during the weekly close time, that is to say, between the hours of six o'clock, P. M., on each and every Saturday, and six o'clock in the afternoon of the following Sunday; and any such person or persons fishing for or catching salmon in violation of this section, or catching salmon by leaving or having any fishing gear in the water in a condition to take fish, or purchasing salmon so unlawfully caught, or having in his or their possession any such salmon, shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined in a sum not less than fifty dollars nor more than two hundred and fifty dollars; and it shall be unlawful for any person or persons to receive or have in his possession, or to offer for sale or transportation, or to transport, during the close season in the spring, namely, from March first to April tenth, and from August tenth to September tenth, any of the following varieties or kinds of fresh fish: Chinook salmon, silver salmon, steel-head or blue-back; and any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and be fined in a sum not less than sixty dollars nor more



than two hundred and fifty dollars. [*March 3, 1891, § 1. In effect immediately.*]

This section was enacted as an amended reading of section 1 of the act of February 11, 1890. See note to next section.

*Taking of salmon near fish-rack.*

§ 275. It shall be unlawful to catch, kill, or in any manner destroy any salmon on or within one mile below any rack or other obstruction erected across any river or stream for the purpose of obtaining fish for propagation, and any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined in a sum of not less than fifty dollars nor more than two hundred and fifty dollars; and any and all appliances used in the violation of sections two hundred and seventy-four, two hundred and seventy-five, two hundred and seventy-six, two hundred and seventy-seven, two hundred and seventy-nine, two hundred and eighty, two hundred and eighty-one, or two hundred and eighty-two of this code, viz., boats, nets, traps, wheels, seines, or other appliances, shall be subject to execution for the payment of the fine herein imposed. [*February 11, 1890, § 2.*]

“**This act.**” — The penal sections of the act are substituted in the above section.

*Taking salmon on Gray's Harbor is misdemeanor when.*

§ 276. It shall not be lawful for any person or persons to take or fish for salmon on the waters of Shoalwater Bay and the rivers with their tributaries flowing into said bay, and also on the waters of Gray's Harbor and the rivers with their tributaries flowing into said Gray's Harbor, from the fifteenth day of November until the fifteenth day of December during any year hereafter; and any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined in a sum not less than fifty dollars nor more than two hundred and fifty dollars. [*February 11, 1890, § 3.*]

*Taking of salmon from Puget Sound is unlawful when.*

§ 277. It shall not be lawful for any person or persons to take or fish for salmon during the months of March, April, and May of each year on the waters of Puget Sound. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined in a sum of not less than fifty dollars nor more than two hundred and fifty dollars. [*February 11, 1890, § 4.*]

*What Puget Sound includes.*

§ 278. For the purpose of more clearly defining the provisions of section two hundred and seventy-seven of this code, all that portion of the tide-waters emptying into the Straits of Fuca, and the bays, inlets,

streams, and estuaries thereof, shall be known and designated in this chapter as Puget Sound. [*February 11, 1890, § 5.*]

Instead of section two hundred and seventy-seven, the section in the session laws reads "section four of this act."

*Nets, wheels, etc., when may not extend.*

§ 279. It shall not be lawful for any pound-net, set-net, trap, weir, wheel, or other fixed appliance for taking fish, to extend more than one half of the way across the breadth of any stream, channel, or slough of any waters mentioned in sections two hundred and seventy-four, two hundred and seventy-five, two hundred and seventy-six, two hundred and seventy-seven, or two hundred and seventy-eight of this code, at the time and place of such fishing, and any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined in a sum not less than fifty dollars nor more than two hundred and fifty dollars. [*February 11, 1890, § 6.*]

"**This act.**"—The sections are substituted for the words "this act." The sections specified are all the sections of the act in which any waters are mentioned.

*Corrupting waters containing fish.*

§ 280. It shall not be lawful to cast or pass, or allow to be cast or passed, into any waters of this state into which salmon or trout are wont to be, any lime, gas, cocolus indicus, or any other substance deleterious to fish, or to explode, or cause to be exploded, any powder, hercules powder, dynamite, nitro glycerine, or any other explosive substance, for the purpose of catching, killing, or destroying salmon or other food fish, and any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined in a sum not less than fifty dollars nor more than two hundred and fifty dollars. [*March 3, 1891, § 2. In effect immediately.*]

This section was enacted by the legislature as an amended reading of § 7 of the act of February 11, 1890.

*Obstructing stream without leaving fishways.*

§ 281. Any person or persons now owning or maintaining, or who shall hereafter construct or maintain, any dam or other obstruction across any stream in this state which any food fish are wont to ascend, without providing a suitable fishway or ladder for the fish to pass over such obstruction, shall be deemed guilty of a misdemeanor, and upon conviction thereof be punished by a fine of not less than one hundred dollars nor more than two hundred and fifty dollars, and said dam or obstruction may, in the discretion of the court, be abated as a nuisance. [*February 11, 1890, § 8.*]

*Casting sawdust, etc., into fish streams.*

§ 282. It shall not be lawful for the proprietor of any saw-mill in this state, or any employee therein, or any other person, to cast sawdust, planer shavings, or other lumber waste made by any lumber manufacturing concern, or suffer or permit such sawdust, shavings, or other lumber waste to be thrown or discharged in any manner, into the Columbia River and its tributaries, and all other streams and lakes in this state where fish resort to spawn, and any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than one hundred dollars nor more than two hundred and fifty dollars. [February 11, 1889, § 9.]

*Word "salmon" construed.*

§ 283. Whenever the term "salmon" is used in this act, it shall be construed to include chinook, steel-head, blue-back, silver-sides, and all other species of salmon. [February, 11, 1890, § 11.]

The act of February 11, 1890, as amended by which includes §§ 274-285, both inclusive, of the act of March 3, 1891, constitutes "this act," this code.

*Pound-nets or traps used, to be numbered and lighted.*

§ 284. Any person or persons owning, operating, or using any pound-net or trap shall cause to be painted in a conspicuous place on said pound-net or trap, while the same is in use, a number designated by the fish commissioner of this state, said number consisting of a black figure or figures not less than six inches in height painted on a white ground; and shall also conspicuously show at night-time, between sunset and sunrise, a bright white light; and any person or persons violating the provisions of this section shall be deemed guilty of a misdemeanor, and shall be fined in any sum not exceeding two hundred and fifty dollars. [March 3, 1891, § 3. In effect immediately.]

This section was enacted as an amended reading of § 12 of the act of February 11, 1890.

*Jurisdiction of justices of the peace.*

§ 284 a. Justices of the peace shall have concurrent jurisdiction with the superior court of all offenses mentioned in this act.

"This act" comprises §§ 274-285, inclusive, of this act.

*Taking fish for propagation is lawful.*

§ 285. Nothing in this act shall be construed so as to prevent the taking of fish at any time of year, and in any manner, for propagation. [February 11, 1890, § 15.]

As to what "this act" includes, see § 283, note.

*Person cannot take food fish for sale unless he is citizen, etc.*

§ 286. From and after the first day of January, 1892, it shall be unlawful for any person to fish for or take for sale or profit any salmon, sturgeon, or other food fish in any of the rivers or waters of this state, or over which it has concurrent jurisdiction in civil and criminal cases, unless such person be a citizen of the United States,



or has declared his intention to become such, one year prior thereto, and is and has been for six months immediately prior to the time he engages in such business an actual resident of the state. [*March 6, 1891, § 1.*]

*Fact of citizenship and residence, how to be established.*

§ 287. Any person desiring to fish for salmon, sturgeon, or other food fish in any such rivers or waters may go before any county clerk of any county of this state and furnish satisfactory evidence of his citizenship, or of the fact that he has declared his intentions to become such one year prior thereto, and file his own affidavit and the affidavit of two other persons, to the effect that he is and has been for six months prior thereto an actual *bona fide* resident of this state, and thereupon such recorder or clerk shall issue to him a certificate briefly reciting those facts, and thereafter in any prosecution against such person for a violation of the provisions of this act such certificate or duly authenticated copies of the record in the office of the clerk or recorder relative thereto shall be *prima facie* evidence of his citizenship and residence as in this act required. But in all prosecutions under this act the burden of proof shall be on the defendant to establish the facts of his citizenship and residence. [*March 6, 1891, § 2.*]

“This act” includes §§ 286-290, both inclusive, of this code.

*Punishment upon conviction of offense.*

§ 288. Any person violating any of the provisions of this act, upon conviction thereof before any justice of the peace, shall be fined not less than five nor less [more] than one hundred dollars. [*March 6, 1891, § 3.*]

See note to § 287.

*Certificates — Fee for issuing and record of.*

§ 289. For taking the affidavits and issuing the certificates herein provided for, the clerk shall collect from the party applying the sum of one dollar, to be paid into the county treasury; and he shall keep in his office a record of all certificates issued pursuant to this act. [*March 6, 1891, § 4.*]

See note to § 278.

*Persons excepted from operation of above sections.*

§ 290. Nothing in this act shall be construed to prevent citizens of any state having concurrent jurisdiction with this state over or upon any rivers or waters from fishing upon such rivers or waters; *provided*, that this act shall not apply to Indians. [*March 6, 1891, § 5.*]

See note to § 287.

*Taking lobsters within prohibited time.*

§ 291. It shall be unlawful to fish for, catch, buy, sell, or pos-

sess any lobsters within three years from the first of April, 1890, and any lobsters caught whilst fishing for other fish shall be forthwith liberated alive. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined in a sum not less than five dollars or more than twenty-five dollars. [*March 14, 1890, § 1.*]

## CHAPTER XII.

### OF CRIMES IN CONNECTION WITH THE OPERATION OF TELEGRAPHS.

- § 292. Divulging or altering telegram, penalty for.
- § 293. Penalty for sending false or forged telegram.
- § 294. Telegraph operator must not use information, etc.
- § 295. Neglect or refusal to transmit or deliver message is offense when.
- § 296. Unlawfully receiving or opening message intended for another person.
- § 297. Unlawful use of telegraphic information by third person.
- § 298. Bribing telegraph operator.
- § 299. Willful or malicious injury to line, apparatus, etc.
- § 300. Unlawful use of trade-mark belonging to telegraph company.

#### *Divulging or altering telegram, penalty for.*

§ 292. [2342.] If any officer, agent, operator, clerk, or employee of a telegraph company, or any other person, shall willfully divulge to any other person than the party from whom the same was received, or to whom the same is addressed, or his agent or attorney, any message received or sent, or intended to be sent, over any telegraph line, or the contents, substance, purport, effect, or meaning of such message, or any part thereof, or shall willfully alter any such message by adding thereto or omitting therefrom any word or words, figure or figures, so as to materially change the sense, purport, or meaning of such message, to the injury of the person sending or desiring to send the same, or to whom the same was directed, the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by fine not to exceed one thousand dollars, or imprisonment not to exceed one year, or by both such fine and imprisonment in the discretion of the court; *provided*, that when numerals or words of number occur in any message, the operator or clerk, sending or receiving, may express the same in words or figures, or in both words and figures, and such fact shall not be deemed an alteration of the message, nor in any manner affecting its genuineness, force, or validity.

#### *Penalty for sending false or forged telegram.*

§ 293. [2343.] If any agent, operator, or employee in any telegraph office, or any other person, shall knowingly or willfully send by telegraph to any person or persons any false or forged message, purporting to be from such telegraph office, or from any other person,

or shall willfully deliver, or cause to be delivered, to any person any such message, falsely purporting to have been received by telegraph; or if any person or persons shall furnish or conspire to furnish, or cause to be furnished, to any such agent, operator, or employee, to be so sent by telegraph, or to be so delivered, any such message, knowing the same to be false or forged, with the intent to deceive, injure, or defraud any individual, partnership, or corporation, or the public, — the person or persons so offending shall be deemed guilty of a misdemeanor, and shall be punished by fine not to exceed one thousand dollars, or imprisonment not to exceed one year, or by both such fine and imprisonment, in the discretion of the court.

*Telegraph operator must not use information, etc.*

§ 294. [2344.] If any agent, operator, or employee in any telegraph office shall in any way use or appropriate any information derived by him from any private message or messages passing through his hands and addressed to any other person or persons, or in any other manner acquired by him by reason of his trust as such agent, operator, or employee, or shall trade or speculate upon any such information so obtained, or in any manner turn, or attempt to turn, the same to his own account, profit, or advantage, the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by fine not to exceed one thousand dollars, or imprisonment not to exceed one year, or by both such fine and imprisonment, in the discretion of the court; and shall also be liable in treble damages to the party aggrieved, for all loss or injury sustained by reason of such wrongful act.

*Neglect or refusal to transmit or deliver message is offense when.*

§ 295. [2345.] If any agent, operator, or employee in any telegraph office shall unreasonably and willfully refuse or neglect to send any message received at such office for transmission, or shall unreasonably and willfully postpone the same out of its order, or shall unreasonably and willfully refuse or neglect to deliver any message received by telegraph, the person so offending shall be deemed guilty of a misdemeanor, and may be punished by fine not to exceed five hundred dollars, or imprisonment not to exceed six months, or by both such fine and imprisonment, in the discretion of the court; *provided*, that nothing herein contained shall be so construed to require any message to be received, transmitted, or delivered unless the charges thereon shall have been paid or tendered, nor to require the sending, receiving, or delivery of any message counseling, aiding, abetting, or encouraging treason against the government of the United States, or other resistance to lawful authority, or any message calculated to further any fraudulent plan or purpose, or to instigate or encourage the perpetra-



tion of any unlawful act, or to facilitate the escape of any criminal or person accused of crime.

*Unlawfully receiving or opening message intended for another person.*

§ 296. [2346.] If any person not connected with any telegraph office shall, without the authority or consent of the person or persons to whom the same may be directed, willfully and unlawfully open any sealed envelope inclosing a telegraphic message and addressed to any other person or persons, with the purpose of learning the contents of such message, or shall fraudulently represent any other person or persons, and thereby procure to be delivered to himself any telegraphic message addressed to such other person or persons, with the intent to use, destroy, or detain the same from the person or persons entitled to receive such message, the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by fine not to exceed one thousand dollars, or imprisonment not to exceed one year, or by both such fine and imprisonment, in the discretion of the court; and shall, moreover, be liable in treble damages to the party injured, for all loss and damages sustained by reason of such wrongful act.

In the code of 1881, this section has the words "to himself." The original act — approved January 24, 1866 — is the same as here printed.

*Unlawful use of telegraphic information by third person.*

§ 297. [2347.] If any person, not connected with any telegraph company, shall, by means of any machine, instrument, or contrivance, or in any other manner, willfully and fraudulently read or attempt to read any message, or to learn the contents thereof, whilst the same is being sent over any telegraph line, or shall willfully or fraudulently or clandestinely learn, or attempt to learn, the contents or meaning of any message while the same is in any telegraph office, or is being received thereat, or sent therefrom, or shall use or attempt to use, or communicate to others, any information so obtained by any person, the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by fine not to exceed one thousand dollars, or imprisonment not to exceed one year, or by both such fine and imprisonment, in the discretion of the court.

*Bribing telegraph operator.*

§ 298. [2348.] If any person shall, by the payment or promise of any bribe, inducement, or reward, procure or attempt to procure any telegraph agent, operator, or employee to disclose any private message, or the contents, purport, substance, or meaning thereof, or shall offer to any such agent, operator, or employee any bribe, compensation, or reward, for the disclosure of any private information received by him, by reason of his trust as such agent, operator, or employee, or shall use or attempt to use any such information so obtained, the

person so offending shall be deemed guilty of a misdemeanor, and shall be punished by fine not to exceed one thousand dollars, or imprisonment not to exceed one year, or by both such fine and imprisonment, in the discretion of the court.

*Willful or malicious injury to line, apparatus, etc.*

§ 299. [2349.] If any person shall willfully or maliciously cut, break, or throw down any telegraph poles, or any tree, or other material used in any line of telegraph, or shall willfully and maliciously break, displace, or injure any insulator in use in any telegraph line, or shall willfully and maliciously cut, break, or remove from its insulator any wire used as a telegraph line, or shall, by the attachment of a ground wire, or by any other contrivance, willfully destroy the insulation of such telegraph line, or interrupt the transmission of the electric current through the same, or shall in any other manner willfully injure, molest, or destroy any property or materials appertaining to any telegraph line, or shall willfully interfere with the use of any telegraph line, or obstruct or postpone the transmission of any message over the same, or procure or advise any such injury, interference, or obstruction, the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by fine not to exceed five hundred dollars, or imprisonment not to exceed six months, or by both such fine and imprisonment, in the discretion of the court; and shall, moreover, be liable to the telegraph company whose property is injured, in a sum equal to one hundred times the amount of actual damages sustained thereby.

*Unlawful use of trade-mark belonging to telegraph company.*

§ 300. [2360.] The president or secretary of any telegraph company doing business in this state may file in the office of the secretary of state a copy of any printed blank or envelope, picture, or device used, or intended so to be, by said company, with his certificate that the same is commonly used, or is intended so to be, in the business of said company, as a distinguishing mark, notice, or index of said business, and thereupon such blank, envelope, picture, or device shall become the property of said company, and it shall not be lawful for any person, unless by the employment or permission of said company, to print, publish, distribute, or use, or cause to be printed, published, distributed, or used, either of them, or any copy, counterfeit, similitude, or imitation thereof. Any person willfully offending against the provisions of this section may be punished by fine not to exceed five hundred dollars, or imprisonment not to exceed six months.

## CHAPTER XIII.

## OF THE PUNISHMENT OF MISDEMEANORS GENERALLY.

## § 301. Punishment of misdemeanors where not elsewhere prescribed.

*Punishment of misdemeanors where not elsewhere prescribed.*

§ 301. [785.] Every person who is convicted of a misdemeanor, the punishment of which is not otherwise prescribed by any statute of this state, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.

## CHAPTER XIV.

## OF ATTEMPTS TO COMMIT CRIMES.

## § 302. Person may be convicted of attempt to commit crime.

## § 303. Attempts, how punished.

## § 304. Crime different from that intended, how punished.

## § 305. Punishment for attempt to commit murder.

*Person may be convicted of attempt to commit crime.*

§ 302. [1160.] Any person may be convicted of an attempt to commit a crime, although it appear on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such attempt, unless the court, in its discretion, discharges the jury, and directs such person to be tried for such crime.

**Child-stealing.** — Under one indictment or information a person may be convicted of the crime of attempting to take and entice away two children under the age of twelve years, with intent, etc.: *People v. Milne*, 60 Cal. 71.

**Arson.** — An indictment for an attempt to

burn a building need not describe the combustible materials used for that purpose: *Mary v. State*, 81 Am. Dec. 76. Under an indictment for arson, a party may be convicted of an attempt to the crime: *Mary v. State*, 81 Am. Dec. 76.

*Attempts — How punished.*

§ 303. [1161.] Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, when no provision is made by law for the punishment of such attempt, as follows:—

1. If the offense so attempted is punishable by imprisonment in the penitentiary for five years or more, or by imprisonment in the county jail, the person guilty of such attempt is punishable by imprisonment in the penitentiary or in the county jail, as the case may be, for a term not exceeding one half the longest term of imprisonment prescribed upon a conviction of the offense so attempted.

2. If the offense so attempted is punishable by imprisonment in the penitentiary for any term less than five years, the person guilty of



such attempt is punishable by imprisonment in the county jail for not more than one year.

3. If the offense so attempted is punishable by a fine, the offender convicted of such attempt is punishable by a fine not exceeding one half the largest fine which may be imposed upon a conviction of the offense so attempted.

4. If the offense so attempted is punishable by imprisonment and a fine, the offender convicted of such attempt may be punished by both imprisonment and fine, not exceeding one half the longest term of imprisonment, and one half the largest fine which may be imposed upon a conviction of the offense so attempted.

**Construction.** — Subdivisions identical with 1 and 2 of the above section have been construed as follows: That every person who is convicted of an attempt to commit an offense, which offense when completed is punishable by imprisonment in the penitentiary for a term less than five years, but which cannot exceed or extend to that period, is punishable by imprisonment in the county jail for not more than one year; and that every person who is convicted of an attempt to commit an offense, which offense when completed is punishable by imprisonment in the penitentiary, for five years or more, is punishable by imprisonment in the penitentiary for a term not exceeding one half the longest term of imprisonment prescribed upon a conviction of the offense so attempted: *Ex parte Hope*, 59 Cal. 423.

*Crime different from that intended — How punished.*

§ 304. [1162.] The last two sections do not protect a person who, in attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed.

*Punishment for attempting to commit murder.*

§ 305. [811.] Every person who shall attempt to commit the crime of murder by drowning or strangling another person, or by any means not constituting an assault with intent to commit murder, shall on conviction thereof be imprisoned in the penitentiary not more than ten years nor less than one year.

**Saving clause.** — By § 46 of the act of executions for crimes against statutes superseded March 2, 1891, provision is made saving pros- by that act.



# DECLARATION OF INDEPENDENCE.

• IN CONGRESS, JULY 4, 1776.

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## THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED.

When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident: that all men are created equal; that they are endowed by their creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and, accordingly, all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these colonies; and such is now the necessity which constrains them to alter their former systems of government. The history of the present king of Great



Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. To prove this, let facts be submitted to a candid world.

He has refused his assent to laws the most wholesome and necessary for the public good.

He has forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation, till his assent should be obtained; and, when so suspended, he has utterly neglected to attend to them.

He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature,—a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly for opposing, with manly firmness, his invasions on the rights of the people.

He has refused, for a long time after such dissolutions, to cause others to be elected; whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise; the state remaining, in the mean time, exposed to all the dangers of invasion from without, and convulsions within.

He has endeavored to prevent the population of these states; for that purpose obstructing the laws for naturalization of foreigners, refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent hither swarms of officers to harass our people, and eat out their substance.

He has kept among us, in times of peace, standing armies, without the consent of our legislature.

He has effected to render the military independent of and superior to the civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation:—

For quartering large bodies of armed troops among us:

For protecting them, by a mock trial, from punishment for any murders which they should commit on the inhabitants of these states:

For cutting off our trade with all parts of the world:

For imposing taxes on us without our consent:

For depriving us, in many cases, of the benefits of trial by jury:

For transporting us beyond seas to be tried for pretended offenses:

For abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies:

For taking away our charters, abolishing our most valuable laws, and altering, fundamentally, the forms of our government:

For suspending our own legislature, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated government here, by declaring us out of his protection, and waging war against us.

He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to complete the works of death, desolation, and tyranny, already begun, with circumstances of cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation.

He has constrained our fellow-citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends and brethren, or to fall themselves by their hands.

He has excited domestic insurrections amongst us, and has endeavored to bring, on the inhabitants of our frontiers, the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions.

In every stage of these oppressions, we have petitioned for redress in the most humble terms. Our repeated petitions have been answered only by repeated injury. A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Nor have we been wanting in attention to our British brethren. We have warned them, from time to time, of attempts, by their legislature, to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them, by the ties of our common kindred, to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They, too, have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them, as we hold the rest of mankind, enemies in war; in peace, friends.

We, therefore, the representatives of the United States of America, in general congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by authority of the good people of these colonies, solemnly publish and declare that these united colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown, and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved; and that, as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do. And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor.

JOHN HANCOCK.

*New Hampshire.*

JOSIAH BARTLETT,  
WILLIAM WHIPPLE,  
MATTHEW THORNTON.

JAMES SMITH,  
GEORGE TAYLOR,  
JAMES WILSON,  
GEORGE ROSS.

*Massachusetts Bay.*

SAMUEL ADAMS,  
JOHN ADAMS,  
ROBERT TREAT PAINE,  
ELBRIDGE GERRY.

*Delaware.*  
CÆSAR RODNEY,  
GEORGE READ,  
THOMAS M'KEAN.

*Rhode Island, etc.*

STEPHEN HOPKINS,  
WILLIAM ELLERY.

*Maryland.*  
SAMUEL CHASE,  
WILLIAM PACA,  
THOMAS STONE,  
CHARLES CARROLL, of Carrollton.

*Connecticut.*

ROGER SHERMAN,  
SAMUEL HUNTINGTON,  
WILLIAM WILLIAMS,  
OLIVER WOLCOTT.

*Virginia.*  
GEORGE WYTHE,  
RICHARD HENRY LEE,  
THOMAS JEFFERSON,  
BENJAMIN HARRISON,  
THOMAS NELSON, JR.,  
FRANCIS LIGHTFOOT LEE,  
CARTER BRAXTON.

*New York.*

WILLIAM FLOYD,  
PHILIP LIVINGSTON,  
FRANCIS LEWIS,  
LEWIS MORRIS.

*North Carolina.*  
WILLIAM HOOPER,  
JOSEPH HEWES,  
JOHN PENN.

*New Jersey.*

RICHARD STOCKTON,  
JOHN WITHERSPOON,  
FRANCIS HOPKINSON,  
JOHN HART,  
ABRAHAM CLARK.

*South Carolina.*  
EDWARD RUTLEDGE,  
THOMAS HEYWARD, JR.,  
THOMAS LYNCH, JR.,  
ARTHUR MIDDLETON.

*Pennsylvania.*

ROBERT MORRIS,  
BENJAMIN RUSH,  
BENJAMIN FRANKLIN,  
JOHN MORTON,  
GEORGE CLYMER,

*Georgia.*  
BUTTON GWINNETT,  
LYMAN HALL,  
GEORGE WALTON.



# CONSTITUTION OF THE UNITED STATES.

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- § 2. Constitution and organization of the House of Representatives.
- § 3. Constitution and organization of the Senate—Its power as a court of impeachment.
- § 4. Election of senators and representatives—Sessions of Congress.
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We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.

**Date of taking effect.**—This constitution went into operation on Wednesday, March 4, 1789: *Owings v. Speed*, 5 Wheat. 420.

**Nature of the government.**—The constitution was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble declares, “by the people of the United States”: *Martin v. Hunter’s Lessee*, 1 Wheat. 324. It required not the affirmance and could not be negated by the state governments. When adopted, it was of complete obligation, and bound the state sovereignties: *McCullough v. Maryland*, 4 Wheat. 404; *Chisholm v. Georgia*, 2 Dall. 471. The states are constituent parts of the United States; they are members of one great empire; for some purposes sovereign; for some purposes subordinate: *Cohen v. Virginia*, 6 Wheat. 414; *Buckner v. Finley*, 2 Pet. 586. The constitution is supreme over all the departments of the government, and anything which may be done, unauthorized by it, is unlawful: *Dodge v. Wolsey*, 18 How. 347. The union of the states is indissoluble by the act of any portion of them. The constitution, in all its provisions, looks to an indestructible union, composed of indestructible states: *Texas v. White*, 7 Wall. 724. For all the purposes of the national government, the people of the United States are an integral, not a composite, mass, and their unity and identity, in this view of the subject, are not affected by their segregation by state lines, for the purposes of state government and local administration: *White v. Hart*, 13 Wall. 650.

The authority of the several states over matters relating solely to their internal police is sovereign and absolute: *New York v. Miln*, 11 Pet. 102; *License Tax Cases*, 5 Wall. 462; *Kidd v. Pearson*, 128 U. S. 1.

The United States is a government, and con-

sequently a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment: *United States v. Maurice*, 2 Brock. 109. Through the instrumentality of the proper department, to which those powers are confined, it may enter into contracts not prohibited by law, and appropriate to the just exercise of those powers: *United States v. Tingey*, 5 Pet. 128. As a corporation it has capacity to sue, by its corporate title: *Dixon v. United States*, 1 Brock. 177; *Dugan v. United States*, 3 Wheat. 181. It may compromise a suit, and receive real and other property in discharge of the debt in trust, and sell the same: *United States v. Lanis’s Adm’rs*, 3 McLean, 365; *Neilson v. Lagow*, 12 How. 107.

The preamble to the constitution is constantly referred to by statesmen and jurists, to aid them in the exposition of its provisions: *Chisholm v. Georgia*, 2 Dall. 475; *Brown v. Maryland*, 12 Wheat. 455; 1 Story’s Com., sec. 6.

In construing the constitution, courts look into and regard the state of things existing when it was adopted: *Rhode Island v. Massachusetts*, 12 Pet. 657; *Dred Scott v. Sandford*, 19 How. 393.

Powers of government are not lost by non-user: *C. B. & Q. R’y Co. v. Cutts*, 94 U. S. 155.

What is implied in a constitution is as much a part of the constitution as what is expressed: *Ex parte Yarborough*, 110 U. S. 651.

**Contemporary interpretation of the constitution**, acquiesced and practiced for a long time, fixes its construction: *Cohen v. Virginia*, 6 Wheat. 264; *Lithograph Co. v. Sarony*, 111 U. S. 53; *Pollock v. Bridgeport Steamboat Co.*, 114 Id. 411.

## ARTICLE I.

**SECTION 1.** All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

**SECTION 2.** The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand; but each state shall have at least one representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their speaker and other officers, and shall have the sole power of impeachment.

**Representative must be an inhabitant:** See *Key's Case*, Clarke & Hall, 224. An inhabitant of a state is one who is "bona fide a member of the state, subject to all the requisitions of its laws, and entitled to all the privileges and advantages which they confer": *Bailey's Case*, Clarke & Hall, 411; *Forsyth's Case*, Id. 497.

**States can prescribe no additional qualifications.** — The constitution having fixed the qualifications of members, no additional qualifications can rightfully be required by the states: *Barney v. McCreery*, Clarke & Hall, 167.

**Modified as to basis of representation.** — For modification of the basis of representation, see Fifteenth Amendment, sec. 2.

**Direct tax.** — A tax on carriages is not such a direct tax: *Hylton v. United States*, 3 Dall. 171. Neither is a tax on the circulation of state banks: *Veazie Bank v. Fenno*, 8 Wall. 533.

This does not exclude the right to impose a direct tax upon the District of Columbia, in proportion to the census directed to be taken by the constitution: *Loughborough v. Blake*, 5 Wheat. 317.

**Vacancy by resignation.** — The executive of a state may receive the resignation of a member, and issue writs for a new election, without waiting to be informed by the house that a vacancy exists: *Mercer's Case*, Clarke & Hall, 44; *Edward's Case*, Id. 92.

**SECTION 3.** The Senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth



year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

The Vice-President of the United States shall be president of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers, and also a president *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law.

**The Senate a permanent body.** — The Senate is a permanent body; its existence is continued and perpetual: Cushing's Law of Legislative Assemblies, 19.

**Resignation of senator.** — The seat of a senator is vacated by a resignation addressed to the executive of the state, notwithstanding he may have received no notice that his resignation has been accepted: *Bledsoe's Case*, Clarke & Hall, 869.

**Appointment of senator by executive.** — It is not competent for the executive of a state, during the recess of the legislature, to appoint a senator, to fill a vacancy which *shall happen*, but has not happened at the time of the appointment: *Lanman's Case*, Clarke & Hall, 871.

**Vacancy by expiration of term.** — A vacancy "happens," within the meaning of the clause providing for appointment by the executive of the state, whenever the office of senator becomes vacant. The expiration of a senator's term, during a recess of the legislature, that

body having failed to elect his successor, causes a vacancy to happen; and though the executive of the state cannot anticipate the event, and make an appointment in advance of the vacancy, he may make the appointment when the preceding term has expired: *Charles Bell's Case*, Congressional Record for 1879.

**Senator must be a citizen:** See case of *Albert Gallatin*, Clarke & Hall, 871.

**Senate as a court of impeachment.** — It seems that on the trial of an impeachment of the President, there being then no Vice-President, the president *pro tempore* of the Senate, being a member of that body, is competent to be sworn as a member of the court: 3 Johns. Tr. 360. When the chief justice presides on the trial of an impeachment, he has a right to give the casting vote: 1 Johns. Tr. 185-187. In such case, the chief justice may decide all questions arising in the progress of the trial, subject to the power of the Senate: 1 Johns. Tr. 185, 186.

**SECTION 4.** The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

**When state fails to provide for election.** — Where the legislature of a state has failed to “prescribe the times, places, and manner” of holding elections, as required by the constitution, the governor may, in case of a vacancy, in his writ of election, give notice of the time and place of election; but a reason-

able time ought to be allowed for the promulgation of the notice: *Hoge's Case*, Clarke & Hall, 135. The constitution of Oregon has fixed, beyond the control of the legislature, the time for election of a representative in Congress: *Shiel v. Thayer*, 2 Cong. Elect. Cas. 349.

**SECTION 5.** Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in their judgment, require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the journal.

Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

**Evidence of election.** — The returns from the state authorities are *prima facie* evidence only of an election, and are not conclusive upon the house: *Spaulding v. Mead*, Clarke & Hall, 157; *Reed v. Cosden*, Id. 353. And the refusal of the executive of a state to grant a certificate of election does not affect the rights of one entitled to a seat: *Richard's Case*, Id. 95.

**Each house may punish contempts.** — This does not exclude the power to punish for contempts other than members of the house. The constitution says nothing of contempts. These were left to the operation of the common-law principle that every court has a right to protect itself from insult and contempt, without which right of self-protection they could not discharge their high and important duties: *Nugent's Case*, 1 Am. Law J. 139; *Anderson v. Dunn*, 6 Wheat. 204; 1 Story's Com., secs. 845–849; *Bolton v. Martin*, 1 Dall. 296.

**No general power to punish contempts.**

— While each house has the power to punish its own members for disorderly conduct, or for failing to attend its sittings, and to punish a witness for contumacious refusal to testify in a matter of which such house has jurisdiction to inquire, it has no general power to punish for contempt. An order by the house that a witness be committed for contempt in refusing to answer a question in the course of an investigation which Congress had no jurisdiction to pursue, is void; and the officer who executes such an order is liable for damages in action for false imprisonment: *Kilbourn v. Thompson*, 103 U. S. 168. *Anderson v. Dunn*, 6 Wheat. 204, criticised, and in part overruled: Id.

**Cause for expulsion of member.** — It seems to be settled that a member may be expelled for any misdemeanor, which, though not punishable by any statute, is inconsistent with the trust and duty of a member: *Blount's Case*, cited in 1 Story's Com., sec. 838; *Smith's Case*, 1 Hall L. J. 450.

**SECTION 6.** The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest



during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

**Privilege from arrest and civil process.** — This would seem to extend to all indictable offenses, as well those which are in fact attended with force and violence as those which are only constructive breaches of the peace of the government, inasmuch as they violate its good order: 1 Bla. Com. 166; 1 Story's Com., sec. 865.

They are privileged not only from arrest both on judicial and mesne process, but also from the service of a summons or other civil process, while in attendance on their public duties: *Geyer's Lessee v. Irwin*, 4 Dall. 107; *Nones v. Edsall*, 1 Wall. Jr. 191; 1 Story's Com., sec. 860; *Coxe v. McClenachan*, 3 Dall. 478.

This privilege is in the interest of the people as well as the member: *Anderson v. Rountree*, 1 Pinn. 115.

It protects, also, delegates to Congress from the territories: *Doty v. Strong*, 1 Pinn. 84.

One who goes to Washington duly commissioned to represent a state in Congress is privileged from arrest while going, remaining, and

returning, though it be subsequently decided by Congress that he is not entitled to a seat there; he is protected until he reaches home, if he return as soon as possible after such decision: *Dunton v. Halstead*, 4 Pa. L. J. 237.

**Privilege of debate.** — The protection given by the constitution to senators and representatives against liability for any "speech or debate" extends to written or oral speech, including reports, resolutions, and recommendations presented by members: *Kilbourn v. Thompson*, 103 U. S. 168.

**Acceptance of other office by senator or representative.** — The acceptance by a member of any office under the United States, after he has been elected to and taken his seat in Congress, operates as a forfeiture of his seat: *Van Ness's Case*, Clarke & Hall, 122.

To execute the duties of an office under the United States, after one is elected to Congress, is not a disqualification, such office being resigned prior to the taking of the seat: *Hammond v. Herrick*, Clarke & Hall, 287; *Earle's Case*, Id. 314; *Munford's Case*, Id. 316.

**SECTION 7.** All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States. If he approve he shall sign it, but if not he shall return it, with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.



Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment), shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

**When bills take effect.**—Every bill takes effect as a law from the time when it is approved by the President, and then its effect is prospective, and not retrospective. The doctrine that in law there is no fraction of a day is a mere legal fiction, and has no application in such a case: *In the Matter of Richardson*, 2 Story, 571; *People v. Campbell*, 1 Cal. 400. But see *In the Matter of Welman*, 20 Vt. 653; *In the Matter of Howes*, 21 Id. 619.

On July 7, 1856, the Senate of the United States decided, by a vote of thirty-four to seven, that two thirds of a quorum only were requisite to pass a bill over the President's

veto, and not two thirds of the whole Senate. In the ratification of treaties, it is expressly provided that two thirds of the senators present shall concur: See Cushing's Law of Legislative Assemblies, sec. 2387.

**Joint resolutions have effect of law.**—A joint resolution, approved by the President, or duly passed without his approval, has all the effect of a law. But separate resolutions of either house, except in matters appertaining to their own parliamentary rights, have no legal effect to constrain the action of the President or of the heads of departments: 6 Opin. 680.

SECTION 8. The Congress shall have power, —

To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations and among the several states and with the Indian tribes;

To establish an uniform rule of naturalization; and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post-offices and post-roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

**Power of taxation by Congress.**—The power to levy and collect taxes, duties, imposts, and excises is co-extensive with the territory of the United States: *Loughborough v. Blake*, 5 Wheat. 317. Congress may levy a tax upon certain businesses, by the imposition of a license fee: *License Tax Cases*, 5 Wall. 462; 5 Blatchf. 204. But it cannot levy a tax upon the salary of a judicial officer of a state: *Collector v. Day*, 11 Wall. 113.

Congress is not empowered to tax for those purposes which are within the exclusive province of the states: *Gibbons v. Ogden*, 9 Wheat. 199. The taxing power is not limited by the prohibition against taking private property without compensation: *Gilman v. Sheboygan*, 2 Black, 510.

**Restriction on taxing power of states.**—The states have no power to tax the loans of the United States: *Weston v. City Council of Charleston*, 2 Pet. 449, 465; *Bank of Commonwealth v. Commissioners of Taxes of New York*, 2 Black, 620; *Bank Tax Case*, 2 Wall. 200; *Van Allen v. Assessors*, 3 Id. 573; *People v. Commissioners*, 4 Id. 244; *Bradley v. People*, 4 Id. 459; *Bank v. Supervisors*, 7 Id. 26; *Bank v. Mayor of New York*, 7 Id. 16; *Society for Savings v. Coite*, 6 Id. 594; *Provident Institution v. Massachusetts*, 6 Id. 611; *Hamilton Co. v. Massachusetts*, 6 Id. 632; *Bank of Louisville v. Kentucky*, 9 Id. 353.

**State taxation of instrumentalities of the general government.**—The state cannot use its taxing powers in such manner as to defeat, embarrass, or burden the operations of the general government; and therefore cannot tax instrumentalities created by the general government for carrying on its operations: *McCullough v. Maryland*, 4 Wheat. 432; *Railroad Tax Cases*, 8 Saw. 238; *Santa Clara Tax Cases*, 9 Id. 165.

But such exemption does not, unless so declared by Congress, extend to instrumentalities

created by the state, and adopted by the general government for its convenience. Nor does the fact that the general government, in order to make a private corporation more available as an instrumentality for carrying on its operations, has conferred upon it additional privileges and benefits, protect it from taxation by the state: *Railway Co. v. Penniston*, 18 Wall. 5; *Santa Clara Tax Cases*, 9 Saw. 165.

**Power to regulate commerce.**—This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution: *Gibbons v. Ogden*, 9 Wheat. 196. Commerce with foreign nations and among the several states can mean nothing more than intercourse with those nations, and among those states, for the purposes of trade, be the object of trade what it may; and this intercourse must include all the means by which it can be carried on, whether by the free navigation of the waters of the several states, or by a passage overland through the states, where such passage becomes necessary to the commercial intercourse between the states: *Corfield v. Corryell*, 4 Wash. C. C. 378; *Pennsylvania v. Wheeling & Bel. Bridge Co.*, 18 How. 421; *Columbus Insurance Co. v. Peoria Bridge Co.*, 6 McLean, 70; *Columbus Insurance Co. v. Curtin*, 6 Id. 209; *Jolly v. Terre Haute Draw Bridge Co.*, 6 Id. 237; *United States v. Railroad Bridge Co.*, 6 Id. 518. This clause confers the power to impose embargoes: *Gibbons v. Ogden*, 9 Wheat. 191; *United States v. The William*, 2 Hall L. J. 255, 272; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196. And to punish crimes upon stranded vessels: *United States v. Coombs*, 12 Pet. 72. See also *Gibbons v. Ogden*, 9 Wheat. 263; *New York v. Miln*, 11 Pet. 102; *Cooly v. Board of Wardens*, 12 How. 299; *Smith v. Maryland*, 18 Id. 71; *Dunham v. Lamphere*, 3 Gray, 268; *Ex parte McNeil*, 13 Wall. 238;



*Edwards v. Steamship Panama*, Deady, 35; S. C., 1 Or. 418.

A state law which requires the masters of vessels engaged in foreign commerce to pay a certain sum to a state officer, on account of every passenger brought from a foreign country into the state, conflicts with the constitution and laws of the United States: *Smith v. Turner*, 7 How. 283; see also *Elkison v. Delusseline*, 2 Wheel. C. C. 56; 1 Opin. 659; 2 Id. 426; *Brown v. Maryland*, 12 Wheat. 419; *Nathan v. Louisiana*, 8 How. 73; *Mager v. Grima*, 8 Id. 490; *Thurlow v. Massachusetts*, 5 Id. 504; *State v. Allmond*, 4 Am. Law Reg. 538; *Withers v. Buckley*, 20 How. 84. Fees to port-wardens, when illegal, because a regulation of commerce: *Southern Steamship Co. v. Port-wardens of New Orleans*, 6 Wall. 31; *People v. Compagnie Générale*, 107 U. S. 59; *Gloucester Ferry Co. v. Pennsylvania*, 114 Id. 196; *People v. Pacific Mail Steamship Co.*, 8 Saw. 640.

Interstate commerce cannot be taxed by a state, even though the same amount of tax be laid on domestic commerce of the same class: *Robbins v. Shelby Taxing District*, 120 U. S. 489.

A statute imposing a license tax on drummers and others selling by sample within a certain taxing district is a regulation of interstate commerce, and unconstitutional, as applied to citizens of other states: Id.

The court of appeals of Texas, in *Ex parte Asher*, 27 Am. Law Reg. 77, characterizes the decision of the United States supreme court in the *Robbins Case*, *supra*, an "unwarranted assumption of constitutional authority," and expressly overrules it.

Congress has power to prevent the obstruction of any navigable river which is a means of commerce between any two or more states: *Works v. Junction Railroad*, 5 McLean, 426; *Jolly v. Terre Haute Draw Bridge Co.*, 6 Id. 237; *Devoe v. Pennre Ferry Bridge Co.*, 3 Am. Law Reg. 79. Where the stream is wholly within a single state, see *Veasie v. Moor*, 14 How. 568; *Wilson v. Blackbird Creek Marsh Co.*, 2 Pet. 251; *Silliman v. Hudson River Bridge Co.*, 2 Wall. 403; *Gilman v. Philadelphia*, 3 Id. 703; *The Passaic Bridges*, 3 Id. 782. Railways as a means of carrying on commerce are equally subject to the regulation of Congress as steamboats: *Gray v. Clinton Bridge*, 16 Am. Law Reg. 149.

**Limit of power over navigable waters.** — Congress has no power to authorize the destruction of the navigability of a navigable stream within a state, for purposes wholly unconnected with commerce and post-roads. Its power over such streams is limited to the regulation of commerce and the establishing of post-roads: *Mining Débris Case*, 9 Saw. 441.

**Local regulations by states.** — The states have power to make laws regulating the landing and receiving of passengers and freight coming to their ports from other states and from foreign countries, so far only as may be necessary to prevent confusion and collisions among vessels, and to insure safety and convenience, and facilitate the receiving and discharge of passengers and freight: *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

In the absence of legislation by Congress on the subject, a state law authorizing bridges or other structures across navigable streams which

are wholly within the state is not repugnant to the constitution of the United States: *Wilson v. Blackbird Creek Co.*, 2 Pet. 245; *Gilman v. Philadelphia*, 3 Wall. 713; *Pound v. Turcke*, 95 U. S. 459.

And generally, in respect to commercial matters, which are local and limited in their scope, not requiring national and uniform regulations, the states may regulate them until Congress interferes. But as soon as Congress acts, the state is excluded: *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Brown v. Houston*, 114 Id. 622.

**Regulation of carriers, warehousemen, etc.** — Employments carried on in the state which are in their nature public, such as those of common carriers, warehousemen, and the like, are subject to regulation by the legislative power of the state, not only as to the manner of conducting them, but also in respect of the charges therefor; and the fact that regulations made by the state may incidentally affect interstate commerce does not, in the absence of any action in the premises by Congress, affect their validity: *Munn v. Illinois*, 94 U. S. 113.

Railway corporations have extraordinary powers conferred upon them in order that they may the better serve the public as carriers for hire. They are engaged in a public employment, affecting the public interests, and are therefore subject to legislative control as to their rates of fare and freight, unless protected by their charters. So far as their business is carried on wholly within a single state, the regulation thereof is a matter of domestic concern, and wholly within the power of the state; and until Congress shall interfere, the state may make such regulations as may be necessary for the promotion of the general welfare of the people within its jurisdiction, even though in doing so those outside its jurisdiction may be incidentally affected: *Chicago etc. R. R. Co. v. Iowa*, 94 U. S. 155.

A charter granted to a railway company by a state legislature contained a provision authorizing the corporation "to demand and receive such sum or sums of money for the transportation of persons and property, and for storage of property, as it shall deem reasonable." The constitution of the state, in force at the time this charter was granted, provides that all acts creating corporations in the state "may be altered or repealed by the legislature at any time after their passage." Under this provision of the constitution, the state possesses the power to regulate, by legislative enactment, the rates of fares and freights to be charged by the company; and such regulation is not in violation of the constitution of the United States: *Peik v. Chicago etc. R. Co.*, 94 U. S. 164.

Whenever the subjects in regard to which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they are exclusively within the regulating control of Congress. The transportation of freight, or the subjects of commerce, is a constituent part of commerce itself; and a tax upon freight transported from state to state is a regulation of commerce among the states, and a state statute imposing such a tax is in conflict with this provision of the constitution of the United



States: *Case of the Freight Tax*, 15 Wall. 232; *P. C. S. S. Co. v. R. R. Commissioners*, 9 Saw. 253.

But a tax upon the *gross receipts* of a railway company is not a regulation of interstate commerce, nor a tax upon imports and exports; a statute of a state imposing a tax upon such gross receipts is not an infringement of the constitution of the United States, notwithstanding the fact that the gross receipts so taxed and made up in part from freights received for the transportation of merchandise from state to state: *Reading Railroad Co. v. Pennsylvania*, 15 Wall. 284.

**Regulation of commerce with the Indians.** — Under the power to regulate commerce with the Indian tribes, Congress have power to prohibit all intercourse with them, except under a license: *United States v. Cisa*, 1 McLean, 254. And may also prohibit the sale of liquor to an Indian, under the charge of an Indian agent, within the limits of a state: *United States v. Holliday*, 3 Wall. 407; *United States v. Shaw Mux*, 2 Saw. 364; *United States v. Earl*, 9 Id. 79. But this power does not confer on the national government a general jurisdiction over an Indian territory within the boundaries of a state: *United States v. Bailey*, 1 McLean, 234. An act of Congress may supersede a prior treaty with an Indian tribe: *The Cherokee Tobacco*, 11 Wall. 621.

**May regulate commerce with the Indians, irrespective of state lines.** — Congress has power to legislate upon the subject of intercourse with the Indian tribes wherever they exist, irrespective of state lines or governments: *United States v. Bridleman*, 7 Saw. 243; *United States v. Barnhart*, 10 Id. 491.

And this power includes the power to provide for the prosecution and punishment of persons who commit crimes against Indians upon reservations: *United States v. Bridleman*, *supra*; *United States v. Martin*, 8 Saw. 473; *United States v. Barnhart*, 10 Id. 491.

**Naturalization.** — The power to pass naturalization laws is exclusively in Congress: *Chirac v. Chirac*, 2 Wheat. 269; *United States v. Villato*, 2 Dall. 372; *Thurlow v. Massachusetts*, 5 How. 585; *Smith v. Turner*, 7 Id. 556; *Golden v. Prince*, 3 Wash. C. C. 314; *Dred Scott v. Sanford*, 19 How. 405. This power is exclusively in Congress: *Golden v. Prince*, 3 Wash. C. C. 313. To what the power extends: *In re Klein*, 1 How. 277; *Mitchell v. Great Works M. & M. Co.*, 2 Story, 648; *In re Arnold*, 16 Am. Law Reg. 624; *In re Muller*, Deady, 523.

**Bankrupt laws.** — The states have authority to pass bankrupt laws, provided they do not impair the obligation of contracts, and provided there be no act of Congress in force to establish a uniform system of bankruptcy conflicting with such laws: *Sturges v. Crowninshield*, 4 Wheat. 122; *McMillan v. McNeill*, 4 Id. 209; and see *Farm. & Mech. Bank v. Smith*, 6 Id. 131; *Ogden v. Saunders*, 12 Id. 213; *Mason v. Haile*, 12 Id. 370; *Boyle v. Zacharie*, 6 Pet. 348, 635; *Beers v. Haughton*, 9 Id. 329; *Cook v. Moffat*, 5 How. 295.

**To coin money.** — Congress has power to give to treasury notes the character and qualities of money: *Legal Tender Cases*, 12 Wall. 529; *Dooley v. Smith*, 13 Id. 604; *Railroad v.*

*Johnson*, 15 Id. 193; *Legal Tender Case*, 110 U. S. 421.

**Power to punish counterfeiting.** — The power to punish the crime of passing counterfeit money is possessed by the states: *Far v. Ohio*, 5 How. 410. Congress may provide for punishing the crime of bringing into the United States false, forged, and counterfeit coins, made in the similitude of coins of the United States, and also for the crime of uttering and passing the same: *United States v. Marigold*, 9 How. 560.

**Passing counterfeit money.** — The power to punish the making of counterfeit money rests exclusively in the general government. But the state has power to punish for uttering it, not because it debases or affects the currency, — a subject over which Congress has exclusive control, — but because it is a fraud upon those who are deceived into accepting it: *State v. Brown*, 2 Or. 221.

**Post-offices and post-roads.** — It is under the power to establish post-offices and post-roads that Congress has adopted the mail regulations of the Union, and punish all depredations on the mail: *Sturtevant v. City of Alton*, 3 McLean, 393. As to the power to establish post-roads, see *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. 421.

**Patents and copyright.** — Patents are entitled to a liberal construction, since they are not granted as restrictions upon the rights of the community, “but to promote the progress of science and the useful arts”: *Blanchard v. Sprague*, 3 Sum. 535; *Grant v. Raymond*, 6 Pet. 218; *Hogg v. Emerson*, 6 How. 486; *Brooks v. Fiske*, 15 Id. 223. The power of Congress upon the subject of patents is plenary by the terms of the constitution, and as there are no restraints on its exercise, there can be no limitation of their right to modify their legislation at their pleasure, so that they do not take away the rights of property in existing patents: *McClurg v. Kingsland*, 1 Id. 206. Therefore Congress has the power to grant the extension of a patent, which has been renewed under the act of 1836: *Bloomer v. Stolley*, 5 McLean, 158. Their power to reserve rights and privileges to assignees, on extending the terms of a patent, is incidental to the general power conferred by the constitution: *Blanchard Gun Stock Turning Factory v. Warner*, 1 Blatchf. 258. Congress is not empowered to pass laws for the benefit of authors and inventors, except as a means of promoting the progress of “science and the useful arts”: *Martinetti v. Maguire*, Deady, 223. It cannot grant the exclusive right to exhibit an immoral spectacle: Id. 222.

In the United States, an author has no exclusive property in a published work, except under some act of Congress: *Wheaton v. Peters*, 8 Pet. 591; and see *Dudley v. Mayhew*, 3 N. Y. 9.

**To define piracies.** — The crime of piracy is defined by the law of nations with reasonable certainty: *United States v. Smith*, 5 Wheat. 153. For definition of a pirate, see *United States v. Baker*, 5 Blatchf. 6.

Piracy being a crime against the law of nations, punishment by our nation is a bar to prosecution by another: *United States v. Pirates*, 5 Wheat. 197.

**To declare war.**—As a consequence of the power of declaring war and making treaties, the government possesses the power of acquiring territory either by conquest or treaty: *American Insurance Co. v. Canter*, 1 Pet. 542. When the legislative authority has declared war, the executive authority, to whom its execution is confided, is bound to carry it into effect; he has a discretion vested in him as to the manner and extent; but he cannot lawfully transcend the rules of warfare established among civilized nations: *Brown v. United States*, 8 Cranch, 153.

A state of actual war may exist without any formal declaration of it by either party; and this is true both of a civil and foreign war. A civil war exists whenever the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that courts cannot be kept open, and may be prosecuted on the same footing as if those opposing the government were foreign invaders: *Prize Cases*, 2 Black, 635. The effect of war upon the citizens of the hostile nations; *The William Bayley*, 5 Wall. 337. The President can recognize a state of war as actually existing, and the courts are bound by such recognition: *Semmes v. City Fire Insurance Co.*, 6 Blatchf. 445. Congress can determine what property of public enemies shall be confiscated: *United States v. Miller*, 11 Wall. 229. It may carry on a civil war as well as a foreign one: *Tyler v. Defrees*, 11 Id. 331. Authority to suppress rebellion is found in that to suppress insurrection and carry on war: *Texas v. White*, 7 Id. 700.

**Power to suppress rebellion.**—In the enforcement of rights against an armed rebellion, the United States government has all the powers both of sovereign and belligerent: *Lamar v. Browne*, 92 U. S. 187.

It has the right to treat rebels in arms as alien enemies, and may seize and confiscate their property: *United States v. Miller*, 11 Wall. 269.

**To raise and support armies.**—Congress has a constitutional power to enlist minors in the army or navy of the United States, without the consent of their parents: *United States v. Bainbridge*, 1 Mass. 71; *Case of Emanuel Roberts*, 2 Hall L. J. 172; *United States v. Stewart*, Crabb, 265; *Commonwealth v. Murray*, 4 Pa. St. 487; *Ex parte Brown*, 5 Cranch C. C. 554. Public policy requires that a minor shall be at liberty to enter into a contract to serve the state, whenever such contract is not positively forbidden by the state itself: *Commonwealth v. Gamble*, 11 Serg. & R. 94; *King v. Rutherford Greys*, 1 Barn. & C. 345. Under the authority "to raise and support armies," Congress has power to bestow bounties and pensions upon those who may engage in the military service of the United States: *United States v. Fairchilds*, 1 Abb. 75. Under act of 1862, the oath of a recruit as to his age is conclusive: *Ex parte Cline*, 1 Ben. 338; *Ex parte Stokes*, 1 Id. 341; *Ex parte Riley*, 1 Id. 408. The validity of an enlistment into the military service of the United States may be inquired into on *habeas corpus*: 1 Dill. 587.

**Army regulations.**—The army regulations made pursuant to authority of Congress have the force of law: *Gratiot v. United States*, WASH. CODE II.—48

4 How. 80. The duties and powers of military officers are regulated by law, and are for the courts to determine: *United States v. Williard*, 1 Pa. St. 539. Punishment of officers in the navy: 20 How. 165. Trial of civilian by military commission: *Ex parte Milligan*, 4 Wall. 3; *Ex parte Egan*, 5 Blatchf. 319. A military officer is not responsible for an act done in obedience to the command of his superior, not illegal on its face: *McCall v. McDowell*, Deady. 244.

**Power of Congress with respect to the militia.**—The act of 1795, which confers power on the President to call forth the militia in certain exigencies, is constitutional, and the President is the exclusive and final judge whether the exigency has arisen: *Martin v. Mott*, 12 Wheat. 19.

The militia of the several states are not subject to martial law, unless they are in the actual service of the United States: *Mills v. Martin*, 19 Johns. 7. Militiamen are not considered in the service of the United States until actually mustered in at the place of rendezvous: *Houston v. Moore*, 5 Wheat. 1; *Ex parte Inous*, 5 Blatchf. 166. So far as Congress has provided for organizing the militia, the legislative powers of the states are excluded: *Houston v. Moore*, 5 Wheat. 20. Resistance to enrollment and draft, under acts of 1863 and 1864: See *United States v. Scott*, 3 Wall. 642; *United States v. Murphy*, 3 Id. 649.

**Exclusive legislation over places of seat of government, forts, etc.**—This includes the power of taxation: *Loughborough v. Blake*, 5 Wheat. 317. The power of Congress over the District of Columbia is limited by the provisions of the constitution: *United States v. Moore*, 1 Cranch, 360, note.

The right of exclusive legislation carries with it the right of exclusive jurisdiction: *United States v. Cornell*, 2 Mason, 60, 91; 6 Opin. 577; *United States v. Donlan*, 5 Blatchf. 284; *United States v. Barney*, 5 Id. 294; *United States v. Stahl*, McCahon, 206; *Fort Leavenworth R. R. Co. v. Howe*, 414 U. S. 525. But the purchase of lands by the United States for public purposes, within the limits of a state, does not of itself oust the jurisdiction of such state over the lands so purchased: *United States v. Cornell*, 2 Mason, 60. The constitution prescribes the only manner in which the United States can acquire lands as a sovereign power, and they only hold as an individual when they obtain it otherwise: *Commonwealth v. Young*, Bright. N. P. 302; *People v. Godfrey*, 17 Johns. 225; *United States v. Traver*, 2 Wash. C. C. 490; *People v. Lent*, 2 Id. 548. Whether the states have the right to tax the lands purchased by the United States for public purposes, although purchased without the consent of the state, see *United States v. Weise*, 2 Wall. Jr. 72; 7 Opin. 628.

**Acquisition of territory.**—The United States, under the present constitution, cannot acquire territory to be held as a colony, to be governed at its will and pleasure. But it may acquire territory and govern it as such, until in the judgment of Congress it has sufficient population to entitle it to be admitted as a state of the Union: *Dred Scott v. Sanford*, 19 How. 447.

**Laws which may be necessary.**—This does not mean absolutely necessary, nor does



it imply the use of only the most direct and simple means calculated to produce the end: *Commonwealth v. Lewis*, 6 Binn. 290, 291; *McCullough v. Maryland*, 4 Wheat. 413; *United States v. Fisher*, 2 Cranch, 358; *Hepburn v. Griswold*, 8 Wall. 603; *Legal Tender Cases*, 12 Id. 457. And therefore Congress had power to charter the bank of the United States, as a necessary and useful instrument of the fiscal operations of the government: 12 Id. 316, 422. So, also, it has power, under this general authority, to provide for the punishment of any offenses which interfere with, obstruct, or prevent commerce or navigation with foreign states, and among the several states, although

such offenses may be committed on land: *United States v. Combs*, 12 Pet. 78. Congress, having the undisputed power to provide a paper currency for the whole country, may therefore restrain the circulation of any notes not issued under its own authority: *Pease Bank v. Fenno*, 8 Wall. 533. Congress, having the power to suspend the writ of *habeas corpus* in case of rebellion or invasion, may therefore pass laws for the protection or indemnity of persons engaged in making arrests without legal warrant or cause, in pursuance of an act authorizing such suspension: *McCall v. McDowell*, Deady, 254.

SECTION 9. The migration or importation of such persons as any of the states now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or *ex post facto* law shall be passed.

No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any state.

No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by laws; and a regular statement and account of the receipts and expenditure of all public money shall be published from time to time.

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state.

**Suspension of the writ of *habeas corpus*.** — The President has no power to suspend the privilege of the writ of *habeas corpus*, except as authorized and directed by Congress: *Ex parte Merryman*, Taney, 253; *McCall v. McDowell*, Deady, 259. Congress is the exclusive judge of "when, in cases of rebellion or invasion," the public service requires the suspension of "the privilege of the writ"; and in such case it may suspend it generally, or in particular cases, and it may suspend it directly or commit the matter to the judgment of the President, within the proper limits: *McCall v. McDowell*, Deady, 249. The national courts and judges have the power to apply the writ of *habeas corpus* to all cases which it would reach at common law, provided it is not issued

to any person in jail, unless confined under or by color of the authority of the United States: *Ex parte Des Rochers*, 1 McAll. 68.

Federal courts, or judges thereof, have no power to bring up, by *habeas corpus*, a prisoner who is in custody under sentence of a state court for any purpose other than to testify: *Ex parte Dorr*, 3 How. 103. But compare *Ex parte Royall*, 117 U. S. 241. It is essential to the safety of every government that, in a great crisis, there should be a power somewhere of suspending the writ of *habeas corpus*: *Ex parte Milligan*, 4 Wall. 125.

**Retrospective laws not forbidden.** — The constitution does not prohibit the states from passing retrospective laws generally, but only *ex post facto* laws: *Watson v. Mercer*, 8



**Pet. 110.** Retrospective laws divesting vested rights are impolitic and unjust; but they are not *ex post facto* laws within the meaning of the constitution, not repugnant to its provisions: *Albee v. May*, 2 Paine, 74; unless they impair the obligations of a contract: *Baltimore and Susquehanna R. R. Co. v. Nesbit*, 10 How. 401. Should a statute declare that contracts founded upon immoral or illegal considerations, whether made or to be made, should be valid and binding, such a statute, although retrospective, would not be repugnant to the constitution of the United States: *Satterlee v. Matthewson*, 2 Pet. 412. Under the form of creating a qualification, or attaching a condition, the states cannot, in effect, inflict a punishment for a past act, which was not punishable at the time it was committed: *Cummings v. Missouri*, 4 Wall. 277. A statute which authorizes the imposition of a tax, according to a previous assessment, is not retrospective: *Locke v. New Orleans*, 4 Id. 172. A state law, changing the place of trial from one county to another in the same district, is not an *ex post facto* law: *Gut v. Minnesota*, 9 Id. 35. The constitution of a state is a "law," within the meaning of this prohibition: *Railway Co. v. McClure*, 10 Id. 511.

**Ex post facto.**—Laws relating to the remedy or mode of procedure, when they affect a substantial right to which the accused was entitled under the law as it existed when the alleged offense was committed, are within the inhibition against the passing of *ex post facto* laws. Any law is *ex post facto* which is enacted after the offense was committed, and which, in relation to it or its consequences, alters the situation of the accused to his disadvantage: *King v. Missouri*, 107 U. S. 221.

*Ex post facto* laws are such as create or aggravate crime, or increase the punishment, or

change the rules of evidence for the purposes of conviction: *Calder v. Bull*, 3 Dall. 390. The phrase only applies to penal and criminal laws, which inflict forfeitures or punishments, and not to civil proceedings which affect private rights retrospectively: *Watson v. Mercer*, 8 Pet. 110; *Carpenter v. Penn*, 17 How. 463; *Fletcher v. Peck*, 6 Cranch, 138.

An act of Congress requiring attorneys, in order to continue in the exercise of their profession, to subscribe a test oath as to past conduct, is in the nature of a bill of pains and penalties, and therefore unconstitutional: *Ex parte Garland*, 4 Wall. 333.

**Pilotage laws.**—State laws requiring payment of pilotage fees are not repugnant to the constitutional provision that "vessels bound to or from one state" shall not be obliged "to enter, clear, or pay duties in another": *Cooley v. Board of Wardens*, 12 How. 314; *Wilson v. McNamee*, 102 U. S. 572.

**Money to be drawn only after appropriation.**—Whether the public moneys at the disposal of the postmaster-general are technically in the treasury or not, the spirit of this provision applies to them, and ought to be faithfully observed in their expenditure: 3 Opin. 13. No other remedy exists for a creditor of the government; he cannot have a lien on the public property in his possession: *United States v. Barney*, 3 Hall L. J. 130; 2 Wash. C. C. 513.

**Office under foreign state.**—The position of commercial agent is an office within the meaning of the provision that no person holding office of profit or trust under the United States shall accept any office from a foreign state, and therefore a marshal of the United States cannot be a commercial agent of a foreign state: 6 Opin. 409.

**SECTION 10.** No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility.

No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No state shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

**State shall not emit bills of credit.**—As to what constitutes a bill of credit, see *Brisco v. Bank of Kentucky*, 11 Pet. 257; *Craig v. Missouri*, 4 Id. 410; 8 Id. 40; *Darrington v.*

*Bank of Alabama*, 13 How. 12; *Woodruff v. Trapnall*, 11 Id. 205; *Curran v. Arkansas*, 16 Pet. 317. Treasury notes issued as currency are engagements to pay in coined money of the

United States: *Bank v. Supervisors*, 7 Wall. 26. Right of Congress to issue bills of credit established by practice and decisions: *Veazie Bank v. Fenno*, 8 Id. 533, 548. Congress has power to make notes of the United States a legal tender in payment of all debts, public or private: *The Legal Tender Cases*, 12 Id. 457.

A law so changing the rules of evidence that the accused may be convicted upon less or different evidence than would have been sufficient when the alleged offense was committed is *ex post facto*: *Cummings v. Missouri*, 4 Wall. 277.

The constitutional inhibition of *ex post facto* laws cannot be evaded by giving civil form to proceedings which are in substance criminal: *Cummings v. Missouri*, 4 Wall. 277.

**Laws impairing the obligation of contracts.** — There is nothing in the constitution prohibiting the passage by Congress of laws impairing the obligation of contracts. The restriction is upon the states: *The Sinking Fund Cases*, 99 U. S. 700.

This provision has never been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice: *Dartmouth College v. Woodward*, 4 Wheat. 629. A private charter is such a contract: *Dartmouth College v. Woodward*, 4 Id. 518. An act incorporating a banking institution: *Providence Bank v. Billings*, 4 Pet. 514; *Gordon v. Appeal Tax Court*, 3 How. 133; *Planters' Bank v. Sharp*, 3 Id. 301; *Curran v. Arkansas*, 15 Id. 304. A grant of land by the legislature of a state: *Fletcher v. Peck*, 6 Cranch, 87; *Terret v. Taylor*, 9 Id. 43; and so is a compact between two states: *Green v. Biddle*, 8 Wheat. 1; *Allen v. McKean*, 1 Sum. 276; 2 Parsons on Contracts, 400. An appointment to a salaried office is not a contract within the meaning of the constitution: *Butler v. Penn.*, 10 How. 402. All contracts are subject to the right of eminent domain existing in the several states, and the exercise of this power does not conflict with the constitution: *West River Bridge Co. v. Dix*, 6 How. 507; *Rundle v. Delaware and Raritan Canal Co.*, 14 Id. 80. Nor does the exercise of the power of taxation: *Providence Bank v. Billings*, 4 Pet. 514. So the states may pass limitation acts: *Jackson v. Lamphire*, 3 Id. 289; *Hawkins v. Barney's Lessee*, 5 Id. 457; *Bronson v. Kinzie*, 1 How. 315; *Phelon v. Virginia*, 8 Id. 168. Exemption laws: *Bronson v. Kinzie*, 1 Id. 315; *Terry v. Anderson*, 95 U. S. 628; *Kashkonong v. Burton*, 104 Id. 608. Insolvent laws discharging the person of a debtor from imprisonment: *Mason v. Haile*, 12 Wheat. 370; *Beirs v. Haughton*, 9 Pet. 329. Recording acts, postponing elder to a younger title, after a limited period: *Jackson v. Lamphire*, 3 Id. 329. And laws relating to divorces: *Dartmouth College v. Woodward*, 4 Wheat. 629. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration do not impair the obligation of the contract; but if that effect be produced, it is immaterial whether it be done by acting on the remedy or directly on the contract itself: *Bronson v. Kinzie*, 1 How. 316; *Tennessee v. Sneed*, 96 U. S. 69; *Edwards v. Kearzey*, 96 Id. 595.

The extent of the change is immaterial; any postponement or acceleration of the performance of a contract impairs its obligation: *Green v. Biddle*, 8 Wheat. 175; *McCracken v. Hayward*, 2 How. 608.

A state law changing the stipulations of a contract, or relieving a debtor from a strict and literal compliance with its requirements, impairs its obligation, and is void: *Murray v. Charleston*, 96 U. S. 432.

The contract of marriage is not within this constitutional restriction: *Rugh v. Ottenheimer*, 6 Or. 231.

**Charters of corporations** granted under constitutions or other general provisions, reserving the right to alter and amend charters generally, are taken subject to those general provisions, and are not protected against amendment by constitutional provisions forbidding the passage of laws impairing the obligation of contracts: *Chicago etc. R. R. Co. v. Iowa*, 94 U. S. 155; *Peike v. Chicago etc. R. R. Co.*, 94 Id. 164; *The Sinking Fund Cases*, 99 Id. 700; *Spring Valley Water Works v. Schottler*, 110 Id. 347; *Spring Valley Water Works v. Bartlett*, 8 Saw. 555.

This clause of the constitution does not affect the laws of Texas, passed before its admission into the Union: *League v. De Young*, 11 How. 185. A state legislature may, by contract, surrender the right of taxation, as to the property of a corporation: *State Bank of Ohio v. Knoop*, 16 Id. 369; *McGee v. Mathis*, 4 Wall. 143; *Home of the Friendless v. Rouse*, 8 Id. 430; *Washington University v. Rouse*, 8 Id. 439; *Wilmington R. R. Co. v. Reid*, 13 Id. 254. Law commuting taxes, when a contract: *Chicago v. Sheldon*, 9 Id. 50. A law does not necessarily impair the obligation of a contract because it may affect it retrospectively, or because it enhances the difficulty, or diminishes the value of performance, provided it leaves the obligation of performance in full force: *Curtis v. Whitney*, 13 Id. 68. A law modifying the remedy, which in any impairs substantial rights, is within the prohibition and so far void: *White v. Hart*, 13 Id. 646. An act which gives an additional remedy to the holder of a contract does not impair its obligation: *Gordon v. S. F. Canal Co.*, 1 McAll. 520.

**Imports and exports.** — The words "imports" and "exports," in the clause forbidding the states to lay duties thereon, do not apply to goods brought from one state into another. They are limited to goods brought into the United States from foreign countries: *Woodruff v. Perham*, 8 Wall. 123; *Brown v. Houston*, 114 U. S. 622.

**Inspection laws.** — A state law imposing a license tax on insurance companies incorporated by other states is not unconstitutional: *Paul v. Virginia*, 8 Wall. 168.

**State cannot lay tonnage duties.** — A state cannot impose a tax upon vessels licensed and enrolled under the laws of the United States, at so much per ton of the registered tonnage: *State Tonnage Cases*, 12 Wall. 204; *Pect v. Morgan*, 19 Id. 581.

**States not to enter into compacts with each other or with foreign powers.** — These words are used in their broadest sense; they were intended to cut off all negotiation and intercourse between the state authorities



and foreign nations: *Holmes v. Jennison*, 14 Pet. 572, 574. No state can, without the consent of Congress, enter into any agreement or compact, to deliver up fugitives from justice from a foreign state, who may be found within its limits: *Holmes v. Jennison*, *supra*; 3 Opin. 661; *In re Doo Woon*, 9 Saw. 436. This prohibition is political in its character, and has no reference to a mere matter of contract, or the grant of a franchise, which in no wise conflicts with the powers delegated to the general government: *Union Branch R. R. Co. v. East Tennessee and Georgia R. R. Co.*, 14 Ga. 327. A compact entered into between two states, with the assent of Congress, is binding on those states, and the citizens thereof: *Fluger v. Pool*, 1 McLean, 185; 11 Pet. 185. A compact between two states, with the assent of Congress, is a contract the obligation of which is protected by the constitution: *Green v. Bidale*, 8 Wheat. 1. The consent of Congress to a compact between two states need not be express; it may be inferred from legislation: *Virginia v. West Virginia*, 11 Wall. 39.

## ARTICLE II.

SECTION 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows:—

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the state may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest, on the list, the said house shall in like manner choose the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote. A quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them, by ballot, the Vice-President.]

The Congress may determine the time of choosing the electors, and



the day on which they shall give their votes, which day shall be the same throughout the United States.

No person, except a natural-born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall, then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

The President shall, at stated times, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the constitution of the United States."

[That portion of this section which is inclosed in brackets is superseded by the Twelfth Amendment.]

**Functions of President.**—An act done by one President, vesting a right in another person, is not subject to review or reversal by his successor: 6 Opin. 603. The President

cannot control a statute, nor dispense with its execution: *Kendall v. United States*, 12 Pet. 523. Nor authorize a secretary to omit the performance of an act enjoined by law: *Marbury v. Madison*, 1 Cranch, 137. Nor suspend the writ of *habeas corpus* without authority from Congress: *McCall v. McDowell*, Deady, 259.

**SECTION 2.** The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate shall appoint, ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by

law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session.

**President as commander of militia.** — The President is not obliged, personally, to take command of the militia. He may place them under the command of officers of the army of the United States: 2 Opin. 711, 712; 2 Story's Com., secs. 1490-1492.

**Pardons.** — The power conferred on the President of granting pardons is unlimited, except in case of impeachment, and is not subject to legislative control: *Ex parte Garland*, 4 Wall. 334. He may pardon as well before trial and conviction as afterwards: 6 Opin. 20; and after the expiration of the imprisonment, which forms a part of the sentence: *Stetler's Case*, Phila. 302. He may grant a conditional pardon: *Ex parte Wells*, 18 How. 307; 1 Opin. 341. Provided the condition be compatible with the genius of our constitution and laws: 1 Id. 482. Where the condition is such that the government has no power to carry it into effect, the pardon will be in effect unconditional: 5 Id. 368; *Flavel's Case*, 8 Watts & S. 197; *United States v. Wilson*, 7 Pet. 161; *People v. Potter*, 1 Park Cr. 47. The pardoning power includes that of remitting fines, penalties, and forfeitures, under the revenue laws: *United States v. Morris*, 10 Wheat. 246; *McLane v. United States*, 6 Pet. 404; 2 Opin. 329; the passenger laws: 6 Id. 393; the laws prohibiting the slave trade: 4 Id. 573; fines imposed on defaulting jurors: 3 Id. 317; 4 Id. 458; for a contempt of court: 3 Id. 622; and in criminal cases: 3 Id. 418. But the President has no power to remit the forfeiture of a bail bond: 4 Id. 144. Nor, it seems, can he, by a pardon, defeat a legal interest or right which has become vested in a private citizen; as, for example, the vested right of an officer making a seizure: *United States v. Lancaster*, 4 Wash. C. C. 64; 4 Opin. 576; 6 Id. 615; 5 Id. 532, 570; *United States v. Harris*, 9 Int. Rev. Rec. 21; *The Magaretta*, 2 Gall. 515. The grant of the pardoning power neither requires nor authorizes the President to re-examine the case upon new facts; nor to grant a pardon upon the assumption of the new facts alleged. To do either would be an abuse of that power: 1 Opin. 359. A pardon is a private, though official, act; it must be delivered to and accepted by the criminal, and cannot be noticed by the court, unless brought before it judicially, by plea, motion, or otherwise: *United States v. Wilson*, 7 Pet. 150. The President alone can pardon offenses committed in a territory in violation of acts of Congress: 7 Opin. 561. He has power to order a *nolle prosequi* in any stage of a criminal proceeding in the name of the United States: 5 Id. 729. A pardon granted upon condition blots out the offense if proof is made of compliance with the condition: *United States v. Klein*, 13 Wall. 128.

**Appointments to office.** — The nomina-

tion and appointment are voluntary acts, and distinct from the commissioning: *Marbury v. Madison*, 1 Cranch, 155, 156. Even after confirmation, the President may, in his discretion, withhold a commission; and until a commission has been signed, the appointment is not fully consummated: 4 Opin. 218.

The Senate cannot originate an appointment; its constitutional action is confined to a simple affirmation or rejection of the President's nominations; and such nominations fail whenever it disagrees to them: 3 Opin. 188.

The power of the President to appoint to office necessarily includes the power of removal, where the constitution has not otherwise provided. He may remove a territorial judge: 5 Opin. 288; 3 Id. 673; 4 Id. 603, 608, 609; 4 Elliott's Debates, 350; *Ex parte Hennen*, 13 Pet. 259. But as to the power of removal where the tenure is fixed by Congress, see *United States v. Guthrie*, 17 How. 284. He may cause a military officer to be stricken from the rolls, without a trial by court-martial, notwithstanding a decision in his favor by a court of inquiry: 4 Opin. 1; see 2 Story's Com., sec. 538. An appointment, confirmed by the Senate, is complete when the commission is signed and sealed: *United States v. Le Baron*, 19 How. 73. The President cannot make a removal without the consent of the Senate or in pursuance of authority conferred by Congress: *United States v. Avery*, Deady, 204.

The authority to appoint ambassadors, etc., gives him power to appoint diplomatic agents of any rank, at any place or time, in his discretion, subject to the approbation of the Senate, and this power cannot be limited by act of Congress: 7 Opin. 186.

The effect of this and other clauses in the constitution on the subject of appointments to office is to declare that all offices under the federal government, except where the constitution may otherwise provide, shall be established by law: *United States v. Maurice*, 2 Brock. 96.

Clerks of courts are such officers; and in such cases the power of removal is incident to the power of appointment: *Ex parte Hennen*, 13 Pet. 230, 259.

He may fill, during a recess of the Senate, a vacancy that occurred by expiration of a commission during a previous session: 1 Opin. 631. So he may fill a vacancy which has occurred by the expiration of a former temporary appointment, the Senate having neglected to act on a nomination to fill the office: 3 Opin. 673; 4 Id. 523; 2 Id. 525. See 4 Id. 361.

The commission of an officer appointed during a recess, who is afterwards nominated and rejected, is not thereby determined; it continues in force to the end of the next session, unless sooner determined by the President: 2 Opin. 366; 4 Id. 30.



**SECTION 3.** He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

**Take care that the laws be faithfully executed.**—As incident to this power, he has authority to appoint agents to make investigations required by acts of Congress, but cannot pay them without an appropriation: 4 Opin. 248. It is not, in general, judicious for him, in the exercise of this power, to interfere with the functions of subordinate officers, further than to remove them for any neglect or

abuse of their official trust: 2 Id. 288. But where combinations exist among the citizens of one of the states to obstruct the acts of Congress, and the question of the constitutionality of such laws is made in suits against the marshal of the United States, the President is justified in assuming his defense on behalf of the United States: 6 Id. 220, 500.

**SECTION 4.** The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

**Impeachment.**—No previous statute is necessary to authorize an impeachment for any official misconduct. What are and what are not high crimes and misdemeanors is to be ascertained by a recurrence to the rules of the common law: 1 Story's Com., sec. 790. For the rules of proceedings prescribed in cases of impeachment, see Peck's Trial, 56, 59.

**Who are "civil officers."**—A Senator or Representative in Congress is not a "civil officer of the United States" within the meaning of this section: Blount's Trial, 22, 102; Whart. St. Tr. 260, 316; Story's Com., secs. 793, 802. Nor is a territorial judge, he not being a constitutional but a legislative officer: 3 Opin. 409.

## ARTICLE III.

**SECTION 1.** The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

**Source and nature of jurisdiction in United States courts.**—The jurisdiction of the courts of the United States depends exclusively on the constitution and laws of the United States: *Livingston v. Jefferson*, 1 Brock. 203; *American Ins. Co. v. Canter*, 1 Pet. 511; 1 Curt. Com., sec. 4; *United States v. Denner*, Hemp. 320; *United States v. Alberty*, Id. 414. Questions in their nature political, or which are, by the constitution and laws, submitted to the legislative or executive departments, are not subjects of judicial cognizance: *Marbury v. Madison*, 1 Cranch, 166, 170; *Gelston v. Hoyt*, 3 Wheat. 247; *Tutcher v. Borden*, 7 How. 1; *United States v. Holliday*, 3 Wall. 407; *Georgia v. Stanton*, 6 Id. 50; *United States v. Baker*, 5 Blatchf. 6; *United States v. The Hornet*, 2 Chic.

L. N. 89; *United States v. Avery*, Deady, 214. Although a state cannot confer jurisdiction on a national court, it may give a right to which, other things allowing, such a court may give effect: *Clarke v. Smith*, 13 Pet. 203; *Felt v. Creighton*, 24 How. 163; *Ex parte McNeil*, 13 Wall. 243; *Sheldon v. Sell*, 8 How. 441. The courts of the United States are courts of limited but not inferior jurisdiction; their judgments are conclusive between the parties until reversed, although the jurisdiction do not appear on the record: *McCormick v. Sullivan*, 10 Wheat. 192; *Ex parte Watkins*, 3 Pet. 193; *Kennedy v. Georgia State Bank*, 8 How. 586.

Congress, having the power to establish inferior courts, must, as a necessary consequence, have the right to define their respective juris-



dictions: *Sheldon v. Sell*, 8 How. 448, 449; *Osborne v. United States Bank*, 9 Wheat. 738. It is not in the power of Congress to assign to the judiciary any but judicial duties: *Hayburn's Case*, 2 Dall. 410, note; *United States v. Todd*, 13 How. 52.

Courts in which the judges hold their offices for a specified number of years are not constitutional courts, in which the judicial powers conferred by the constitution can be deposited: *American Ins. Co. v. Canter*, 1 Pet. 511, 546. The territorial courts are not United States

district courts, though invested with federal jurisdiction: *United States v. Gilson*, 2 Chic. L. N. 98. They are legislative, not constitutional, courts, and their jurisdiction and practice are regulated by Congress, or the territorial legislature: *Lacy v. Abbott*, 1 Am. L. T. 84; *Clinton v. Englebrecht*, 13 Wall. 434.

**Judge's salary not taxable.** — This section prohibits the imposition of a tax upon a judge's salary: *Commonwealth v. Mann*, 5 Watts & S. 415; 2 Story's Com., sec. 1053 a.

**SECTION 2.** The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers, and consuls; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more states; — between a state and citizens of another state; — between citizens of different states; — between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

**When cases arise.** — A case arises, within the meaning of the constitution, whenever any question respecting the constitution, laws, or treaties of the United States has assumed such a form that the judicial power is capable of acting on it: *Osborne v. United States Bank*, 9 Wheat. 819. Whenever a general rule as to property, or personal rights, or injuries to either is established by state legislation, its enforcement by a national court in a case between proper parties is a matter of course, and the jurisdiction of the court in such case is not subject to state limitations: *Railway Co. v. Whitten*, 13 Wall. 286. The judiciary is a co-ordinate branch of the government, and may declare a statute to be void as repugnant to the constitution: *Van Horn's Lessee v. Dorrance*, 2 Dall. 308; *Calder v. Bull*, 3 Id. 399; *Dartmouth College v. Woodward*, 4 Wheat. 625; *Darby v. Wright*, 3 Blatchf. 170; *United States v. Klein*, 13 Wall. 143.

**Cases in law.** — By cases in law is to be understood suits in which legal rights are to be ascertained and determined, in contradistinc-

tion to those where equitable rights are recognized and equitable remedies administered, or where the proceeding is in the admiralty: *Parsons v. Bedford*, 3 Pet. 447; *Robinson v. Campbell*, 3 Wheat. 212.

**Cases in equity.** — By cases in equity is to be understood suits in which relief is sought, according to the principles and practices of the equity jurisdiction as established in English jurisprudence: *Robinson v. Campbell*, 3 Wheat. 222, 223; *United States v. Howland*, 4 Id. 108; *Lorman v. Clark*, 2 McLean, 570; *Lawman v. Clark*, 4 Id. 18; *Gordon v. Hobart*, 2 Sam. 401; *Pratt v. Northam*, 5 Mass. 95; *Cropper v. Coburn*, 2 Curt. 465.

**Arising under the constitution and laws of the United States.** — A case is said to arise under the constitution or a law of the United States whenever its correct decision depends on the construction of either: *Cohens v. Virginia*, 6 Wheat. 379. A bill in equity to enforce specific performance of a contract to convey a patent is not "a case arising under the laws of the United States"

as to patents, so as alone to give jurisdiction to its courts: *Nesmith v. Calvert*, 1 Wood. & M. 34.

**Other questions may be involved.** — The judicial power of the United States over a particular case is not excluded by the fact that questions are involved which do not at all depend upon the constitution or laws of the United States. When a question to which the judicial power of the Union is extended by the constitution forms an ingredient in the original cause, it is within the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or law may be involved in it: *Railway Co. v. Mississippi*, 101 U. S. 141; *Bylie v. Hawke*, 6 Saw. 593; *Probstel v. Hoque*, 8 Id. 592.

To sustain the jurisdiction of the United States courts, it is not necessary to assume that the party invoking that jurisdiction is entitled to the relief sought; it is enough that the controversy turns upon the proper construction or application of the constitution or laws of the United States: *Hatch v. Willamette Iron Bridge Co.*, 7 Saw. 127.

A controversy which turns upon the existence, effect, or operation of an act of Congress arises under such act; and the courts of the United States have jurisdiction of a suit brought to determine the same: *Hughes v. N. P. R. Co.*, 9 Saw. 313.

**Laws of the United States incidentally involved.** — An action cannot be said to arise under a law of the United States simply because its construction in some respect is or may be incidentally involved in the trial: *Dowell v. Griswold*, 5 Saw. 39.

**Criminal cases.** — The federal courts have no jurisdiction of common-law crimes; nor is there any abstract principle of the common law pervading the constitution by virtue of which they can take such jurisdiction: *Pennsylvania v. Wheeling etc. Bridge Co.*, 13 How. 563.

**Jurisdiction cannot be extended by statute.** — Statutes of the United States cannot extend the jurisdiction of the federal courts beyond those conferred by the constitution: *Hodgson v. Bowerbank*, 5 Cranch, 303.

**How jurisdictional fact pleaded.** — An averment that an action arises out of a law of the United States is not sufficient to confer jurisdiction; nor is it sufficient to allege that the trial will necessarily involve the construction of certain acts of Congress; but it must appear, from the facts stated, how the case arises under the laws: *Dowell v. Griswold*, 5 Saw. 39.

**Cases affecting public ministers.** — The federal courts have jurisdiction of all suits "affecting" public ministers, although they may not be parties to the record: *Osborne v. United States Bank*, 9 Wheat. 854; *United States v. Ortega*, 11 Id. 467; *United States v. Ramera*, 2 Dall. 297.

The recognition of the executive of the United States is conclusive as to the public character of the party: *Dupont v. Pichon*, 4 Dall. 321; *United States v. Ortega*, 4 Wash. C. C. 531.

**Must affect them directly.** — To bring a case within this provision the public minister must have an interest in the result of the pro-

ceeding. A criminal action violating the law of nations, by violently assaulting a public minister, is not a case affecting the minister: *United States v. Ortega*, 11 Wheat. 467.

**Admiralty jurisdiction.** — This embraces what was known and understood in the United States as the admiralty and maritime jurisdiction, at the time when the constitution was adopted: *Genesee Chief v. Fitzhugh*, 12 How. 438; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 Id. 344; *Waring v. Clark*, 5 Id. 441. The jurisdiction of the admiralty courts in this country, at the time of the Revolution, and for a century before, was more extensive than that of the high court of admiralty in England: Id. This jurisdiction extends to the navigable rivers and lakes of the United States, without regard to the ebb and flow of the tides of the ocean: *Genesee Chief v. Fitzhugh*, 12 Id. 438. It embraces all maritime contracts, wheresoever the same may be made or executed, and whatever may be the form of the stipulations; and all torts and injuries committed upon waters within its jurisdiction: *De Lorio v. Est*, 2 Gall. 398; *Gloucester Ins. Co. v. Younger*, 2 Curt. 322. Crimes and offenses against the laws of the United States: *Corfield v. Coryell*, 4 Wash. C. C. 371; *United States v. Berens*, 3 Wheat. 336. Cases of seizure for breach of the revenue laws, and those made in the exercise of the rights of war: *The Vengeance*, 3 Dall. 297; *The Sally*, 2 Cranch, 406; *The Betsey*, 4 Id. 443; *The Samuel*, 1 Wheat. 9; *The Ontario*, 1 Id. 20. Another class of cases by which jurisdiction has always been exercised in the admiralty courts in this country, though denied in England, are suits by ship-carpenters, and material-men, for repairs and necessities made and furnished to ships, whether foreign or in the port of the state to which they do not belong, or in the home port, if the municipal law of the state gives a lien for the same: *Gardner v. The New Jersey*, 1 Pet. Adm. 227; *Stevens v. The Sandwich*, 1 Id. 233, note; *Lore v. The Brig President*, 4 Wash. C. C. 453; *The Ship Robert Fulton*, 1 Paine, 620; *Davis v. A New Brig*, Gilp. 473; *The General Smith*, 4 Wheat. 438; *The St. Jago de Cuba*, 9 Id. 409; *Peyroux v. Howard*, 7 Pet. 324; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 390; *Wick v. The Samuel Strong*, 6 McLean, 590. The admiralty jurisdiction is not limited to tide-waters, but extends to all the lakes and navigable waters of the United States: *The Eagle*, 8 Wall. 15. Liens for repairs and supplies, when enforced in admiralty: *The Grapeshot*, 8 Id. 129; *The Guy*, 8 Id. 158; *The Lulu*, 10 Id. 197; *The Kalorama*, 10 Id. 208; *The Custer*, 10 Id. 215. The grant of jurisdiction, in cases of admiralty cognizance conferred upon the national courts, is exclusive of those of the states: *The Moses Taylor*, 4 Id. 411; *The Hine*, 4 Id. 556. In all cases where a maritime lien arises, the original jurisdiction to enforce it, by a proceeding *in rem*, is exclusively in the courts of the United States: *The Belfast*, 7 Id. 624. The admiralty and maritime jurisdiction of the United States is not limited by the statutes or judicial prohibitions of England; the same defined: 1 Id. 21. Claims for half pilotage, for tender and refusal of services, are cases of admiralty jurisdiction: *The Wright, Deady*, 597; *The America*, 2 Am.



**L. R. 458; *The California*, 1 Saw. 453.** Under Rule XII, of 1872, material-men may enforce their lien for supplies furnished a vessel at her home port or elsewhere: *The Augusta*, 5 Pa. Law Rep. 230; 2 Saw. See *The Harrison*, 2 Abb. 84, note.

**When the United States shall be a party.**—An action cannot be prosecuted against the United States without being authorized by Congress: *Cohens v. Virginia*, 6 Wheat. 411. See *Murray's Lessee v. Hoboken Land Improvement Co.*, 18 How. 283. But this does not prevent the exercise of appellate jurisdiction, to obtain by writ of error a reversal of a judgment which has been rendered in favor of the United States: *Id.* Nor does it preclude individuals, when sued by the United States, from availing themselves of credits or set-offs against the United States: *United States v. Bank of Metropolis*, 15 Pet. 392; see act of February 24, 1855, establishing court of claims, 10 Stat. 612. Where the United States is plaintiff, and the defendant pleads a set-off, no judgment can be rendered against the government for a sum ascertained to be due the defendant: *United States v. Eckford*, 6 Wall. 484. In the court of claims the government is liable for refusing to receive and pay for what it has agreed to purchase: *Gibbons v. United States*, 8 Id. 269. Where the United States have dedicated land to a particular use, they may sue in a court of equity to prevent its diversion to other purposes: *United States v. Illinois C. R. Co.*, 1 Chic. L. N. 427. When property of the United States, liable to be proceeded against *in rem*: *The Davis*, 10 Wall. 15. *Audita querela* does not lie against: *Avery v. United States*, 12 Id. 304.

**Controversies between states.**—The clause conferring jurisdiction over controversies between two or more states includes a suit brought by one state against another, to determine a question of disputed boundary: *Rhode Island v. Massachusetts*, 12 Pet. 557; *Florida v. Georgia*, 17 How. 478; *Missouri v. Iowa*, 10 Id. 1. There must be a state government competent to represent the state, to enable it to sue in the supreme court: *Texas v. White*, 7 Wall. 700. This clause only applies to members of the Union, and public bodies owing obedience and conformity to its constitution and laws: *Scott v. Jones*, 5 How. 377. A state is within the operation of this clause only when it is a party to the record, as a plaintiff or defendant in its political capacity: *Osborne v. United States Bank*, 9 Wheat. 738; 1 Curt. Com., sec. 63. A suit against the governor of a state in his official capacity is a suit against the state: *Kentucky v. Ohio*, 24 How. 66.

**But state must be a real party in interest.**—This clause does not give jurisdiction to the United States over cases in which a state, which is one of the parties to the record, is merely a nominal party, without any real interest in the result. When the object of a suit by one state against another is to protect the rights or redress the wrongs of an individual citizen of the former, it is not a controversy between the two states, within the meaning of the constitution: *New Hampshire v. Louisiana*, 108 U. S. 76.

**Controversies between a state and citi-**

**zens of another state.**—The jurisdiction of the United States over suits by individual against a state was taken away by the Eleventh Amendment. But the officers charged by a law of the state with the carrying into effect of its statute may be enjoined by the federal court from doing so, if the laws are in violation of the constitution. The state not being a party to the record, its indirect interest in the result does not bring the case within the Eleventh Amendment: *Osborne v. United States Bank*, 9 Wheat. 738.

**Between citizens of different states.**—This clause does not embrace cases where one of the parties is a citizen of a territory or the District of Columbia: *Hepburn v. Eliza*, 2 Cranch, 445; *Corporation of New Orleans v. Winter*, 1 Wheat. 91; *Barney v. Baltimore*, 6 Wall. 280; *Watson et al. v. Brooks et al.*, 8 Saw. 316. Citizenship, when spoken of in the constitution, in reference to the jurisdiction of the federal courts, means nothing more than residence: *Lessee of Cooper v. Galbraight*, 3 Wall. C. C. 546; *Gassies v. Ballou*, 6 Pet. 761; *Shelton v. Tiffin*, 6 How. 163; *Lessee of Butler v. Farnsworth*, 4 Wash. C. C. 101. But a free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a citizen within the meaning of the constitution, nor entitled to sue in that character in the federal courts: *Dred Scott v. Sanford*, 19 How. 393. The law declared to be otherwise by the Fourteenth Amendment. A native of the United States, residing abroad, who has taken an oath of allegiance to a foreign government, is not a citizen of any state entitled to sue in a national court: *Prentiss v. Brennan*, 2 Blatchf. 162.

A corporation created by and transacting business in a state is to be deemed an inhabitant of the state, capable of being treated as a citizen, for all purposes of suing and being sued: *Louisville R. R. Co. v. Litson*, 2 How. 497; *Marshal v. Baltimore and Ohio R. R. Co.*, 16 Id. 414. The judiciary act confines the jurisdiction on the ground of citizenship to cases where the suit is between a citizen of a state where the suit is brought and a citizen of another state; and although the constitution gives a broader extent to the judicial power, the actual jurisdiction of the circuit courts is governed by the acts of Congress: *Maffat v. Sobey*, 2 Paine, 103; see act of February 28, 1839; and *Taylor v. Cook*, 2 McLean, 516. Where the suit is brought by an assignee: See *Assignee of Brainard v. Williams*, 4 Id. 122; *Sheldon v. Sill*, 8 How. 411. The constitution has defined the limits of the judicial power, but has not prescribed how much of it shall be exercised by the circuit courts: *Turner v. Bank of North America*, 4 Dall. 10; *McIntyre v. Wood*, 7 Cranch, 506; *Kendall v. United States*, 12 Pet. 616; *Cary v. Curtis*, 3 How. 245; *Coal Co. v. Blatchford*, 12 Wall. 172; *Rice v. Houston*, 13 Id. 66. Congress has conferred upon the federal courts but a portion of the jurisdiction contemplated by the constitution: *Clarke v. Janesville*, 4 Am. L. R. 593. A suit by a corporation in its corporate name is conclusively presumed to be brought by citizens of the state which created it: *O. & M. Railway Co. v. Wheeler*, 1 Black, 286. A municipal corporation, erected by a state, within its limits, may



be sued in a national court by a citizen of another state: *Cowles v. Mercer Co.*, 7 Wall. 118. A bona fide conveyance of land to a citizen of another state will sustain the jurisdiction, whatever the motives of the grantor: *McDonald v. Smalley*, 1 Pet. 620; *Smith v. Kernochen*, 7 How. 198; *Jones v. Teague*, 18 Id. 76. Parties have a clear right to acquire property by purchase or gift, for the purpose of maintaining a suit in a national court concerning it: 3 Am. L. T. 127; 1 Saw. 66; *Osborne v. B. C. R. Co.*, 5 Blatchf. 366.

**Must be a real dispute between citizens of different states.** — If the case does not involve a real and substantial controversy between citizens of different states, federal courts have no jurisdiction. A transfer of property which is merely colorable and collusive, for the purpose of bringing the case in the federal courts, gives the plaintiff no standing: *Williams v. Nottawa*, 104 U. S. 209; *Haices v. Oakland*, 104 Id. 450; *Detroit v. Dean*, 106 Id. 537; *Manning v. Hayden*, 106 Id. 586.

**Lands claimed under grants of different states.** — Cases of grants made by different states are within the jurisdiction, notwithstanding one of the states, at the time of the first grant, was part of the other: *Town of Pawlet v. Clark*, 9 Cranch, 292. It is the grant which passes the legal title, and if the controversy is founded upon conflicting grants of different states, the federal courts have jurisdiction, whatever may have been the prior equitable title of the parties: *Colson v. Lewis*, 2 Wheat. 377.

**Indian tribe not a foreign state.** — An Indian tribe or nation within the United States is not a "foreign state," within the meaning of this clause: *Cherokee Nation v. Georgia*, 5 Pet. 1. The pueblo Indians of New Mexico being citizens thereof, by the treaty of Guadalupe Hidalgo, became citizens of the United States: 1 Chic. L. N. 169.

**Suits by aliens.** — If the party to the record be an alien, he is within this clause, whether he sue in his own right, or as a trustee, if he have a substantial interest as trustee: *Chappeldelaine v. Dechenaur*, 4 Cranch, 366. And if the nominal plaintiff, although a citizen, sue for the use of an alien who is the real party in interest, the case is within the jurisdiction: *Brown v. Strode*, 5 Id. 303. A foreign corporation is an alien for this purpose: *Society for Propagating Gospel v. Town of N. Haven*, 8 Wheat. 464. But in all these cases the opposite party must be a citizen, and this must appear from the record: *Jackson v. Tarentyman*, 2 Pet. 156; *Hinckley v. Byrne*, Dedy, 224. A mere declaration to become a citizen under the naturalization laws is not sufficient to prevent an alien from being regarded as a foreign subject within the meaning of this clause: *Baird v. Byre*, 3 Wall. Jr. An alien may sue in the circuit court, though a resident of the same state as the citizen defendant: *Budlove v. Nocolet*, 7 Pet. 413. In an action by a citizen of a state against the subject of a foreign state, the circuit court has jurisdiction on account of the character of the parties, without reference to the fact of which of them is plaintiff or defendant, or of what state of the United States the plaintiff is a citizen: *Hinckley v. Byrne*, Dedy, 224.

**When foreign consul is a party.** — A state court has no jurisdiction of a suit against a consul; and whenever this defect of jurisdiction is suggested, the court will quash the proceedings. It is not necessary that it should be by plea before general imparlance: *Mauhardt v. Soderstrom*, 1 Binn. 138; *Davis v. Packard*, 6 Pet. 41; *Commonwealth v. Kosloff*, 5 Serg. & R. 545; *Griffin v. Dominguer*, 2 Duer, 659. A consul, however, may be summoned as a garnishee in an attachment from a state court. *Kedderlin v. Meyer*, 2 Miles, 242. And he may maintain a suit in a state court: *Sagony v. Wiseman*, 2 Ben. 240. The jurisdiction of the supreme court in suits against consuls, although original, is not exclusive of the circuit courts: *United States v. Ravara*, 2 Dill. 297; *St. Luke's Hospital v. Barclay*, 3 Blatchf. 259; *Graham v. Stucken*, 4 Id. 50.

#### **Agreement not to sue in federal court.**

— An agreement to abstain in all cases from resorting to the courts of the United States is against public policy and void: *Insurance Co. v. Morse*, 20 Wall. 445; *Doyle v. Insurance Co.*, 94 U. S. 535.

#### **Original jurisdiction of supreme court.**

— The circuit courts have no jurisdiction of a cause in which a state is a party: *Gale v. Babcock*, 4 Wash. C. C. 199. The supreme court has not original jurisdiction of a suit brought by a state against its own citizens: *Pennsylvania v. Quicksilver Co.*, 10 Wall. 553.

Congress has no power to confer original jurisdiction on the supreme court in other cases than those enumerated in this section: *Marbury v. Madison*, 1 Cranch, 137; *In the Matter of Metzger*, 5 How. 176, 191; *In re Kaine*, 14 Id. 119; *Ex parte Yerger*, 8 Wall. 98. In those cases in which original jurisdiction is given to the supreme court, founded on the character of the parties, the judicial power of the United States cannot be exercised in its appellate form: *Osborne v. United States Bank*, 9 Wheat. 520. But if a case draws in question the laws, constitution, or treaties of the United States, though a state be a party, the jurisdiction of the federal courts is appellate; for in such case the jurisdiction is founded, not upon the character of the parties, but upon the nature of the controversy: *Cohens v. Virginia*, 6 Wheat. 382; *Martin v. Hunter's Lessee*, 1 Id. 337. A suit against the governor of a state in his official character is a suit against the state: *Kentucky v. Ohio*, 24 How. 66. The jurisdiction of the supreme court is conferred by the constitution: *Smith v. Allyn*, 1 Pa. St. 453. Affirmative words in the constitution, declaring in what cases the supreme court shall have original jurisdiction, must be construed negatively as to all other cases: *Ex parte Vallandigham*, 1 Wall. 252. Congress cannot confer jurisdiction on the supreme court by an act authorizing the transfer of causes to it from the circuit courts: *The Alicia*, 7 Id. 571; *Ex parte Yerger*, 8 Id. 85; *The Nonesuch*, 9 Id. 504.

Acts of Congress affirming the appellate jurisdiction of the supreme court except from it all cases not expressly therein provided for; and the repeal of such an act necessarily negatives jurisdiction under it of the cases therein described: *Ex parte McCardle*, 7 Wall. 512; *Ex parte Yerger*, 8 Id. 85. In the exercise of its appellate jurisdiction, the supreme court may,

by *habeas corpus*, relieve from unlawful imprisonment one held in military custody, who has been remanded after a hearing before a circuit court: *Ex parte Yerger*, 8 Id. 94.

**Jury not judges of the law.** -- This does not constitute them judges of the law in criminal cases: *United States v. Morris*, 1 Curt. C. C. 23, 49; *United States v. Shive*, Bald. 510; *United States v. Battisic*, 2 Sum. 240; and see *Townsend v. The State*, 2 Blackf. 152; *Pierce v. The State*, 13 N. H. 536; *Commonwealth v. Porter*, 10 Met. 263; Wharton on Homicide, 481. It only embraces those crimes

which by former laws and customs had been tried by jury: *United States v. Duane*, Wall. C. C. 106; *United States v. Mayer*, 1 Deady, 128; *United States v. Dodge*, 1 Id. 189.

**Crimes against United States. when triable.** -- A crime committed against the laws of the United States, without the limits of a state, is not local, but may be tried at such place as Congress shall designate: *United States v. Dawson*, 15 How. 488; *United States v. Jackalor*, 1 Black, 484; *United States v. Furlong*, 5 Wheat. 184.

**SECTION 3.** Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.

**What necessary to constitute treason.**

— There must be an actual levying of war; a *conspiracy* to subvert the government by force is not treason, nor is the mere enlistment of men who are not assembled a levying of war: *Ex parte Boleman*, 4 Cranch, 75; *United States v. Hamway*, 2 Wall. Jr. 140; 2 Id. 136; 4 Am. L. J. 83. And no man can be convicted of treason who was not present when the war was levied: 2 Burr's Trial, 401, 439. An unnaturalized alien cannot be guilty of treason against the United States: *United States v. Villato*, 2 Dall. 370. An insurrection to prevent

by force and intimidation the execution of an act of Congress is treason by levying war: *United States v. Mitchell*, 2 Dall. 348; *United States v. Fries*, Whart. St. Tr. 458; 2 Wall. Jr. 134; *United States v. Hamway*, 2 Id. 140; *United States v. Horie*, 1 Pa. 265.

**Proof of treason.** — This, it seems, refers to the proofs on the trial, and not to the preliminary hearing before the committing magistrate, or the proceeding before the grand jury: 2 Wall. Jr. 138; *United States v. Guiner*, 4 Phila. 396; Burr's Trial, 196. But see Fries's Trial, 14 Whart. St. Tr. 480.

## ARTICLE IV.

**SECTION 1.** Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

**Full faith and credit to be given to judgments.** — A judgment of a state court has the credit, validity, and effect, in every other court within the United States, which it had in the state where it was rendered: *Hampton v. McConnell*, 3 Wheat. 234; *Sarchel v. The Sloop Davis*, Crabbe, 185. And it matters not that it was commenced by an attachment of property, if the defendant afterwards appeared and took defense: *Mayhew v. Thatcher*, 6 Wheat. 129. Such judgments, as far as the courts rendering them had jurisdiction, are to have in all courts full faith and credit, in which the merits of the judgment are never put in issue, with the qualification that it appears by the record that the party had notice: *Benton v. Bergot*, 10 Serg. & R. 242; *Christmas v. Russel*, 5 Wall. 290. By the act of Congress they have not conclusive effect, but only *such* effect as they possessed in the state whence they

were taken: *Green v. Sarmino*, 3 Wash. C. C. 17; *Bank of the State of Alabama v. Dalton*, 9 How. 528. And therefore whatever pleas would be good therein, in such state, and none others, can be pleaded in any other court in the United States: *Hampton v. McConnell*, 3 Wheat. 234; *Mills v. Duryee*, 7 Cranch, 484. It is competent to show that the judgment was obtained by fraud, or that the court rendering it had no jurisdiction: *Warren Man. Co. v. Etna Insurance Co.*, 2 Paine, 502; *Steele v. Smith*, 7 Watts & S. 447. A plea of the statute of limitations, in an action on a judgment of another state, goes to the remedy; and is governed by the *lex fori*: *McElmoyle v. Cohn*, 13 Pet. 313; *Bacon v. Howard*, 20 How. 22. A state legislature cannot bar an action on a judgment given in another, by a statute of limitation: *Christmas v. Russel*, 5 Wall. 298.

See act of 26th of May, 1790: 1 Stat. 122.



The legislation of Congress amounts to this, that the judgment of another state shall be record evidence of the demand, and that the defendant, when sued on the judgment, cannot go behind it and controvert the contract, or other cause of action, on which the judgment is founded; that it is evidence of an established demand, which, standing alone, is conclusive between the parties to it: *Bank of the State of Alabama v. Dutton*, 9 How. 528; *Christmas v. Russel*, 5 Wall. 301. The act of 1790 does not apply to the records of the national courts: *Mason v. Townson*, 1 Cranch C. C. 190. *Sem-ble*, that the act does not apply where the record of a state court is sought to be used in

a national court: *Bennet v. Bennet, Doady*, 307; see Stats., sec. 733.

**Judgments without jurisdiction.** — The provision that full faith and credit shall be given in each state to the judicial proceedings of the courts of the other states applies to such proceedings only so far as such courts have proceeded within their jurisdiction. If they act without jurisdiction, their records and proceedings are entitled to no credit: *D'Arcy v. Ketchum*, 11 How. 165; *Borden v. Fitch*, 14 Id. 334; *Board of Public Works v. Columbia College*, 17 Wall. 521; *Thompson v. Whitman*, 18 Id. 457.

**SECTION 2.** The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

**Citizens of each state entitled to the privileges and immunities of citizens in the several states.** — This does not apply to corporations: *Warren Mfg. Co. v. Etna Ins. Co.*, 2 Paine, 502; but see *Holmes v. Nelson*, Phila. 218; *Paul v. Virginia*, 8 Wall. 168. Since the adoption of the constitution, no state can, by any subsequent law, make a foreigner, or any other description of persons, citizens of the United States, nor entitle them to the rights and privileges secured to citizens by that instrument: *Dred Scott v. Sandford*, 19 How. 393. Since the adoption of the Thirteenth Amendment, a negro born in the United States is a citizen thereof: *In re Turner*, 1 Am. L. T. 9. Birth and allegiance are simultaneous; citizens within the meaning of the constitution are free inhabitants born in the United States, or who have been naturalized by act of Congress: *United States v. Rhodes*, 1 Am. L. T. 22. A person born abroad in the course of a voyage made by his father, who was a citizen of the United States, is to be deemed such citizen also: *United States v. Gordon*, 5 Blatchf. 18. By the common law, a child born within the allegiance of the United States is born a subject thereof, without reference to the political status or condition of its parents: *McCay v. Campbell*, 5 Am. L. T. 407. During the period of the joint occupation of the Oregon territory, a child born therein of parents who were British subjects is not a citizen of the United States: *Id.*

This is confined to those privileges and immunities which are, in their nature, *fundamental*; which belong, of right, to the citizens of all free governments; and which have, at all

times, been enjoyed by the citizens of the several states which compose this Union from the time of their independence. They may all be comprehended under the following heads: protection by government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through or reside in any other state, for the purpose of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus*; to institute and maintain actions of any kind in the court of the state; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes and impositions than are paid by the other citizens of the state, — may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: *Coryfield v. Coryell*, 4 Wash. C. C. 380, 381. And to this clause of the constitution, it seems, may be properly referred the right which, it has been asserted, is possessed by a citizen of one state to pass freely with his slaves through the territory of another state, in which slavery is not recognized: *United States v. Williamson*, 4 Am. L. R. 19; see *People v. Lemmon*, 5 L. R. 486, *contra*. It does not embrace privileges conferred by the local laws of a state: *Conner v. Elliot*, 18 How. 591; such as the right of representation or election: *Murray v. McCarty*, 2 Munf. 393; the privileges and



immunities secured to citizens of each state in the several states, by this provision, and those privileges and immunities which are common to the citizens in the latter states under their constitution and laws, by virtue of their being citizens; special privileges enjoyed by citizens in their own states, and not secured in other states by this provision: *Paul v. Virginia*, 8 Wall. 180; *Liverpool Ins. Co. v. Massachusetts*, 10 Id. 567; *Ducat v. Chicago*, 10 Id. 410.

**Who are citizens.** — The word "citizens," as used in the constitution, means members of a political community. *Citizens* are those who have associated themselves together as a political community: *Minor v. Happersett*, 21 Wall. 162; *United States v. Cruikshank*, 92 U. S. 542. "People" and "citizens," as the words are employed in the constitution, are synonymous: *Dred Scott v. Sanford*, 19 How. 490. Women are citizens, and always were. Their citizenship does not depend on the Fourteenth Amendment. They are entitled to enjoy all the privileges and immunities of citizenship the same as men: *Minor v. Happersett*, 21 Wall. 162.

**Indians not citizens.** — Indians, though born in the United States, are not citizens unless they have been incorporated into the body politic by the national government: *Ex parte Reynolds*, 1 Dill. 348; *McKay v. Campbell*, 2 Saw. 119.

**The right of suffrage** is not a necessary attribute of national citizenship; but the right not to be denied the privilege of an elector on account of race, color, or previous condition of servitude is. Interference by state authority with the right to vote cannot be remedied by the national government, except in case such interference is upon the ground of race, color, or previous condition of servitude: *United States v. Cruikshank*, 92 U. S. 542.

**Surrender of fugitives from justice.** — It is not necessary that the crime charged should constitute an offense at common law: *In re William Fetter*, 23 N. J. L. 311. It is enough that it is a crime against the laws of the state from which he fled: *Johnson v. Riley*, 13 Ga. 97; *In re Clark*, 9 Wend. 221. These words, "treason, felony, or crime," include every offense made punishable by the laws of the state where the act is committed: *Kentucky v. Ohio*, 24 How. 66. The governor of a state, upon a demand made for the surrender of a fugitive from justice, has no right to exercise any discretionary power as to the nature or character of the crime charged: *Id.* The governor of a state has no authority to cause the arrest and surrender of a citizen, as a fugitive from justice, unless it appear that the alleged

crime was committed in the state which makes the demand: *Ex parte Smith*, 3 McLean, 121. Governors of states, in issuing warrants for such arrest and surrender, act by authority of the laws of the United States, though the state may have legislated on the same subject: *Id.*; *In re Doo Woon*, 9 Saw. 417; *In re Robb*, 9 Id. 568. The national courts have authority to inquire into the legality of the arrest of one held by virtue of such warrant: *Id.*

A fugitive from justice may be arrested and detained, until a formal requisition can be made by the proper authority: *Commonwealth v. Deacon*, 10 Serg. & R. 135; *Dow's Case*, 18 Pa. St. 39; *In re William Fetter*, 23 N. J. L. 311.

The alleged crime must have been committed in the state from which the party is claimed to be a fugitive; and he must be actually a fugitive from that state: *Ex parte Smith*, 3 McLean, 133; *Haywood's Case*, 1 Am. L. J. 231; *In re William Fetter*, 23 N. J. L. 311.

**Persons held to service.** — This includes apprentices: *Boaler v. Cummins*, 1 Am. L. J. 654.

This does not extend to the case of a slave voluntarily carried by his master into another state, and there leaving him under the protection of some law declaring him free: *Butler v. Hopper*, 1 Wash. C. C. 499; *Vaughn v. Williams*, 3 McLean, 530; *Pierce's Case*, 1 West. Leg. Obs. 14. Slavery is a municipal regulation; is local and cannot exist without authority of law: *Miller v. McQuerry*, 5 McLean, 469. But the question whether slaves are made free by going into a state where slavery is not tolerated, with the permission of their master, is purely one of local law, and to be determined by the courts of the state in which they may be found: *Strader v. Graham*, 10 How. 82; *Dred Scott v. Sanford*, 19 Id. 396; *In re Perkins*, 2 Cal. 424.

As to slaves escaping and taking refuge among the Indian tribes, see 3 Opin. 370; and 6 Id. 302.

The owner of a slave is clothed with full authority, in every state of the Union, to seize and recapture his slave whenever he can do it without a breach of the peace, or any illegal violence: *Prigg v. Penn.*, 16 Pet. 539; but see *Giltner v. Gorham*, 4 McLean, 402. The constitution, however, recognizes slaves as property, and pledges the federal government to protect it: *Dred Scott v. Sanford*, 19 How. 395. A statute punishing the harboring or secreting a fugitive slave is not in conflict with the constitution or laws of the United States: *Moore v. Illinois*, 14 Id. 123.

**SECTION 3.** New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property

belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

**Formation of new states.** — All measures commenced and prosecuted with a design to subvert the territorial government, and to establish and put in force in its place a new government, without the consent of Congress, are unlawful. But the people of any territory may peaceably meet together in primary assemblies, or in conventions chosen by such assemblies, for the purpose of petitioning Congress to abrogate the territorial government, and to admit them into the Union as an independent state, and if they accompany their petition with a constitution framed and agreed upon by their primary assemblies, or by a convention of delegates chosen by such assemblies, there is no objection to their power to do so, nor to any measures which may be taken to collect the sense of the people in respect to it; provided such measures be prosecuted in a peaceable manner, in subordination to the existing government, and in subserviency to the power of Congress to adopt, reject, or disregard them at their pleasure: 2 Opin. 726. It seems that the recognition of a state government is a political and not a judicial question: See *Scott v. Jones*, 5 How. 343. Congress has no power to impose on any new state on its admission into the Union any restrictions or limitations not imposed upon all: *Pollard v. Hagan*, 3 Id. 312; *Permoli v. New Orleans*, Id. 589; *Strader v. Graham*, 10 Id. 82; *Veazie v. Moor*, 14 Id. 568; *Scott v. Sanford*, 19 Id. 395; *Seabury v. Field*, 1 McAll. 4.

The consent of Congress to the formation of a new state within the jurisdiction of another need not be expressly given; it may be inferred from legislation: *Virginia v. West Virginia*, 11 Wall. 39.

**Power over the public lands.** — The power of Congress to dispose of the public lands is not limited to making sales; they may be leased: *United States v. Gratiot*, 1 McLean, 454; 14 Pet. 526; 4 Opin. 487. But no property belonging to the United States can be disposed of except by authority of an act of Congress: *United States v. McColl*, 1 Paine, 646. Congress alone has the power to make and authorize appropriations of the public lands: *United States v. Fitzgerald*, 15 Pet. 407; *Irwin v. Marshall*, 20 How. 558. Congress has no power to organize a board of revision to annul titles confirmed many years previously by the authorized agents of the government: *Reichart v. Felps*, 6 Wall. 160. Whenever a tract of land has been appropriated to the public use, it is severed from the mass of the public domain, and subsequent laws of sale are not construed to embrace it: *Wilcox v. Jackson*, 14 Pet. 498. A grant may be made by statute, and a confirmation by law is to all intents and purposes a grant: *Strother v. Lucas*, 12 Id. 441; *Field v. Seabury*, 19 How. 323, 333; *Chapman v. School District No. 1*, 1 Deady, 113; *Glasgow v. Horter*, 1 Black, 595; *Griffin v. Gibb*, 1 McAll. 217. A congressional grant of lands to a state, to be located under the direction of its legislature on any lands of the United

States, is a complete title from the time of making the selection: *Lessieur v. Price*, 12 How. 59. A public grant conveying a present beneficial interest is irrevocable: *Rice v. M. & N. Railway Co.*, 1 Black, 358. The act of September 28, 1850 (9 Stat. 519), concerning swamp and overflowed lands, conferred a present vested right therein, which excepted them from subsequent railway grants: *Railway Co. v. Smith*, 9 Wall. 95. The power of Congress to dispose of the public domain is subject to no limitations; it cannot be interfered with or its exercise embarrassed by any state legislation: *Gibson v. Choteau*, 13 Id. 99.

The term "territory," as here used, is merely descriptive of one kind of property, and is equivalent to the word "lands": *United States v. Gratiot*, 14 Pet. 537. The power over the public lands is vested in Congress by the constitution without limitation, and has been considered the foundation on which the territorial governments rest: Id. 526. On the acquisition of territory by treaty, the United States does not succeed to the prerogative rights of the former sovereign, but holds it subject to the institutions and laws of its own government: *Pollard v. Hagan*, 3 How. 212. Congress has the power to govern the territories of the United States, and in so doing exercises the combined powers of the national and state governments: *Am. Ins. Co. v. Canter*, 1 Pet. 542; *Benner v. Porter*, 9 How. 255; *Cross v. Harrison*, 16 Id. 194; *Stacy v. Abbott*, 1 Am. L. T. 84; *Murrin v. Converse*, 2 Chic. L. N. 113. This clause applies only to territory within the chartered limits of some one of the states when they were colonies of Great Britain. It does not apply to territory acquired by the present federal government, by treaty or conquest, from a foreign nation: *Dred Scott v. Sanford*, 19 How. 395. The United States, under the present constitution, cannot acquire territory to be held as a colony, to be governed at its will and pleasure. But it may acquire territory which at the time has not a population that fits it to become a state, and may govern it as a territory until it has a population which, in the judgment of Congress, entitles it to be admitted as a state of the Union. During the time it remains a territory, Congress may legislate over it within the scope of its constitutional powers in relation to citizens of the United States, and may establish a territorial government, and the form of this local government must be regulated by the discretion of Congress, but with powers not exceeding those which Congress itself, by the constitution, is authorized to exercise over citizens of the United States in respect to their rights of persons or rights of property: *Scott v. Sanford*, 19 How. 395. The various territorial governments have been organized by Congress upon the theory of leaving to the inhabitants thereof all the powers of self-government consistent with the supremacy and supervision of national authority: *Clinton v. Englebrecht*, 13 Wall. 441.



**SECTION 4.** The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

**Restoration of subverted state governments.** — Authority to provide for the restoration of state governments, when subverted and overthrown, is derived from the obligation of the United States to guarantee to every state in the Union a republican form of government: *Texas v. White*, 7 Wall. 726.

## ARTICLE V.

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

**An amendment to the constitution need not be presented to the President for his approval:** *Hollingsworth v. Virginia*, 2 Dall. 378.

## ARTICLE VI.

All debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution as under the confederation.

This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.



**The nature and effect of treaties.** — Whenever a right grows out of or is protected by a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected: *Owings v. Norwood's Lessee*, 5 Cranch, 348; *Fairfax v. Lessee of Hunter*, 7 Id. 627; *Ware v. Hylton*, 3 Dall. 242-284; *Lessee of Gordon v. Halliday*, 1 Wash. C. C. 291; *Doe ex dem. Fisher v. Harnden*, 1 Paine, 59; *Gordon v. Kerr*, 1 Wash. C. C. 322; *Worcester v. Georgia*, 6 Pet. 515; 6 Opin. 291. But though a treaty is a law of the land, and its provisions must be regarded by the courts as equivalent to an act of the legislature when it operates directly on a subject, yet if it be merely a stipulation for future legislation by Congress, it addresses itself to the political and not to the judicial department; and the latter must await the action of the former: *Foster v. Neilson*, 2 Pet. 253; *Jones v. Walker*, 2 Pa. St. 688. A treaty ratified with proper formalities is, by the constitution, the supreme law of the land; and the courts have no power to examine into the authority of the persons by whom it was entered into on behalf of the foreign nation: *Doe v. Braden*, 16 How. 635. A treaty is binding upon contracting parties, unless otherwise provided, from the day of its date. The ratification relates back to the time of signing: *Davis v. Parish of Concordia*, 9 How. 289. When territory is ceded, the national character continues for commercial purposes, until actual delivery; but between the time of signing and such delivery, the sovereignty of the ceding power ceases, except for strictly municipal purposes: Id.; *Haver v. Yaker*, 9 Wall. 34. But where a treaty operates upon individual rights, the principle of relation does not apply, and so far as it affects them it is not considered concluded until there is an exchange of ratifications: Id. A treaty between a foreign government and the United States cannot enlarge the constitutional powers of the latter: *New Orleans v. United States*, 10 Pet. 662. Where specific lands are reserved for the use of an Indian tribe, by treaty, its effect is to confirm the original Indian title, which will prevail against any other derived from the government: *Gaines v. Nicholson*, 9 How. 356. Rules of interpretation favorable to the Indian tribes are to be adopted in construing our treaties with them: *The Kansas Indians*, 5 Wall. 737. It results from the nature and fundamental principles of our government that a treaty cannot change the constitution; but a treaty may supersede a prior act of Congress, and an act of Congress may supersede a

prior treaty: *The Cherokee Tobacco*, 11 Wall. 620.

The stipulations of a treaty are paramount to the provisions of a state constitution: *Gordon v. Kerr*, 1 Wash. C. C. 322. Congress may supersede by statute a prior treaty: *The Cherokee Tobacco*, 11 Wall. 616. Congress has no constitutional power to settle the rights under treaties, except in cases purely political; when a case arises between individuals, under a treaty, the construction of it is the peculiar province of the judiciary: *Wilson v. Wall*, 6 Id. 89.

**Treaty may include intercourse as well as traffic.** — The government, as the treaty-making power, may determine what aliens shall be allowed to land in the United States, and upon what conditions they may remain. The subject belongs exclusively to the general government: *Ah Kow v. Nunn*, 5 Saw. 552; *Baker v. Portland*, 5 Id. 566.

An act of the legislature of a state prohibiting contractors for improvement of streets from employing Chinese on such work, but not excluding other aliens therefrom, is void because in conflict with a treaty between the United States and the Chinese empire: *Baker v. Portland*, 5 Saw. 566.

**The states and the United States are separate governments.** — The government of the United States and the government of a state are distinct and independent of each other within their respective spheres of action, although existing and exercising their powers within the same territorial limits; and whenever any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the national government have supremacy until the validity of the different enactments and authorities are determined by the tribunals of the United States. A state judge has no jurisdiction to issue a writ of *habeas corpus*, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority or claim and color of the authority of the United States. The writ should be refused; and when a writ of *habeas corpus* is served on a marshal or other person having a prisoner in custody under the authority of the United States, it is his duty by a proper return to make known to the state judge or court the authority by which he holds him. But, at the same time, it is his duty not to obey the process of the state, but to obey and execute the process of the United States: *Ableman v. Booth*, 21 How. 506; *Tarbell's Case*, 13 Wall. 397.

## ARTICLE VII.

The ratification of the conventions of nine states shall be sufficient for the establishment of this constitution between the states so ratifying the same.

Done in convention by the unanimous consent of the states present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the

United States of America the twelfth. IN WITNESS whereof we have hereunto subscribed our names.

GEO. WASHINGTON—  
*President and Deputy from Virginia.*

*New Hampshire.*  
JOHN LANGDON,  
NICHOLAS GILMAN.

*Massachusetts.*  
NATHANIEL GORHAM,  
RUFUS KING.

*Connecticut.*  
WM. SAML. JOHNSON,  
ROGER SHERMAN.

*New York.*  
ALEXANDER HAMILTON.

*New Jersey.*  
WIL: LIVINGSTON,  
WM. PATERSON,  
DAVID BREARLEY,  
JONA: DAYTON.

*Pennsylvania.*  
B. FRANKLIN,  
ROBT. MORRIS,  
THOS. FITZSIMONS,  
JAMES WILSON,  
THOMAS MIFFLIN,  
GEO. CLYMER,  
JARED INGERSOLL,  
GOUV. MORRIS.

*Delaware.*  
GEO: READ,  
JOHN DICKINSON,  
JACO: BROOM,  
GUNNING BEDFORD, JR.  
RICHARD BASSETT.

*Maryland.*  
JAMES MCHENRY,  
DANL. CARROLL,  
DAN. OF ST. THOS. JENIFER.

*Virginia.*  
JOHN BLAIR,  
JAMES MADISON, JR.

*North Carolina.*  
WM. BLOUNT,  
HU. WILLIAMSON,  
RICHD. DOBBS SPAIGHT.

*South Carolina.*  
J. RUTLEDGE,  
CHARLES PINCKNEY,  
CHARLES COTESWORTH PINCKNEY,  
PIERCE BUTLER.

*Georgia.*  
WILLIAM FEW,  
ABR. BALDWIN.

Attest: WILLIAM JACKSON, *Secretary.*

**Origin, adoption, and ratification of the constitution.**—The constitution of the United States was adopted by the convention of delegates,—or deputies as they were called,—appointed in pursuance of the resolution of the Congress of the confederation of February 21, 1787, on September 17, 1787, and was ratified by the conventions of the several states as follows: Delaware, Dec. 7, 1787; Pennsylvania, Dec. 12, 1787; New Jersey, Dec. 18, 1787; Georgia, Jan. 2, 1788; Connecticut, Jan. 9, 1788; Massachusetts, Feb. 6, 1788; Maryland, Apr. 28, 1788; South Carolina, May 23, 1788; New Hampshire, June 21, 1788; Virginia, June 26, 1788; New York, July 26, 1788; North Carolina, Nov. 21, 1789; Rhode Island, May 29, 1790.

The following extract from the journal of the Congress of the confederation shows when the constitution took effect:—

IN CONGRESS,  
Saturday, September 13, 1788.

On the question to agree to the following proposition, it was resolved in the affirmative by the unanimous votes of nine states, viz.: of New Hampshire, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Virginia, South Carolina, and Georgia.

Whereas, the convention assembled in Philadelphia, pursuant to the resolution of Congress on the 21st of February, 1787, did, on the 17th

of September in the same year, report to the United States in Congress assembled a constitution for the people of the United States; whereupon, Congress, on the 28th of the same September, did resolve unanimously, "that the said report, with the resolutions and letter accompanying the same, be transmitted to the several legislatures, in order to be submitted to a convention of delegates chosen in each state by the people thereof, in conformity to the resolves of the convention made and provided in that case": and whereas, the constitution so reported by the convention, and by Congress transmitted to the several legislatures, has been ratified in the manner therein declared to be sufficient for the establishment of the same, and such ratifications, duly authenticated, have been received by Congress, and are filed in the office of the secretary; therefore,

*Resolved*, That the first Wednesday in January next be the day for appointing electors in the several states, which, before the said day, shall have ratified the said constitution; that the first Wednesday in February next be the day for the electors to assemble in their respective states, and vote for a President; and that the first Wednesday in March next be the time, and the present seat of Congress the place, for commencing proceedings under the said constitution.



## ARTICLES

### IN ADDITION TO AND AMENDATORY OF THE CONSTITUTION OF THE UNITED STATES,

PROPOSED BY CONGRESS AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

#### ARTICLE I.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

**Limitations of the national power.** — The first ten of the amendatory articles were proposed at the same time, September 25, 1789, and were ratified by the requisite number of states; the last state necessary to complete the three fourths ratifying them on December 15, 1791. They are limitations upon the powers of the national government, not upon those of the states: *Barron v. Baltimore*, 7 Pet. 243; *Livingston v. Moore*, 7 Id. 551; *Fox v. Ohio*, 5 How. 434; *Smith v. Maryland*, 18 Id. 76; *Withers v. Buckley*, 20 Id. 84; *Pervear v. Commonwealth*, 5 Wall. 475; *Edwards v. Elliott*, 21 Id. 557; *Pearson v. Yewdell*, 95 U. S. 294.

**Protection of religion.** — The constitution of the United States makes no provision for protecting the citizens of the respective states in their religious liberties; that is left to the state constitutions and laws: *Permoli v. First Municipality*, 3 How. 589. In controversies in a civil court concerning the property

rights of religious societies, when such rights are dependent on a question of doctrine, discipline, ecclesiastical law, rule, or custom, or church government, and that has been decided by the highest tribunal within the organization to which it has been carried, the civil court will accept that decision as conclusive, and be governed by it, in its application to the case before it: *Watson v. Jones*, 13 Wall. 713.

**Religious belief no protection to crime.** — While Congress has not power to prohibit the free exercise of religious belief, neither religious belief nor church authority can afford protection to criminal acts. An act of Congress prohibiting polygamy in the territories, and prescribing punishment therefor, is not an infringement of this article of the constitution; and the fact that the practice of polygamy is enjoined by the church to which the defendant belongs is no defense against a prosecution for that crime: *Reynolds v. United States*, 98 U. S. 145.

#### ARTICLE II.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

#### ARTICLE III.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.



## ARTICLE IV.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**Warrants not to issue except on probable cause.** — This refers only to process issued under the authority of the United States: *Smith v. Maryland*, 18 How. 71. And it has no application to proceedings for the recovery of debts, as a treasury distress-warrant: *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 Id. 272. No department of the government can disturb the safeguards of civil liberty incorporated in the constitution, except the one concerning the writ of *habeas corpus*: *Ex parte Mulligan*, 4 Wall. 125. Criminal process cannot be awarded upon the suggestion of the district attorney, unsupported by oath: *United States v. Burr*, 2 Whart. Cr. Cas. 573; *United States v. Shephard*, 1 Abb. 432. A peace-officer may arrest persons engaged in an affray with-

out warrant: *United States v. Pignel*, 1 Cranch C. C. 310. And for a breach of the peace committed in his view: *United States v. Hart*, Pet. C. C. 390. All officers of the United States are liable to the ordinary process for arrest and detention, when accused of felony: *United States v. Kerby*, 7 Wall. 482. It is not necessary on a preliminary hearing that the *corpus delicti* should be established independently of the prisoner's confession: *United States v. Bloomgart*, 2 Ben. 356. A commitment by a justice of the peace is bad, unless it set forth a good, certain cause, supported by oath: *Ex parte Buford*, 3 Cranch, 448. Arrest for trial is a proceeding belonging to the judiciary, not to the executive branch of the government: 1 Opin. 229.

## ARTICLE V.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

**What are infamous crimes.** — Infamous crimes, within the meaning of this article of the constitution, are such only as fall within the definition of the terms at common law. They are such crimes as at common law rendered a person convicted of them incompetent thereafter to testify in a court of justice; such as "not only involve falsehood, but may also injuriously affect the public administration of justice by the introduction therein of falsehood and fraud," — forgery, perjury, subornation of perjury, and the like: *United States v. Bock*, 4 Saw. 211. Infamous crimes are treason, felony, and every species of the *crimen falsi*, such as perjury, conspiracy, and barratry: *Parker v. People*, 20 Johns. 460.

**When criminal proceedings by information.** — The constitution recognizes the right to pursue the common-law course of proceeding by criminal information in all but capital and infamous cases: *United States v. Shephard*, 1 Abb. 432.

**Twice in jeopardy.** — The United States and the respective states being separate sovereignties, the same act may be an offense against both the state and the United States. In such case punishment by one does not prevent punishment by the other. Though but one act, the offenses against the respective sovereignties are different offenses: *United States v. Marigold*, 9 How. 565; *Morse v. People*, 14 Id. 17; *United States v. Cruikshank*, 92 U. S. 542; *United States v. Barnhart*, 10 Saw. 491.

**Court may discharge jury without verdict.** — The court may discharge a jury from giving a verdict in a capital case without the consent of the prisoner, whenever in their opinion there is a manifest necessity for such an act, or the ends of public justice would be otherwise defeated: *United States v. Percz*, 9 Wheat. 519; *United States v. Haskell*, 4 Wash. C. C. 402; *United States v. Watkins*, 3 Cranch C. C. 443; *United States v. Book*, 2 Id. 294;

*United States v. Gilbert*, 2 Sum. 19; *United States v. Harding*, 1 Wall. Jr. 127; 2 Opin. 665.

**"Due process of law."**—A distress-warrant issued by the treasury department against a defaulting receiver of public moneys is "due process of law": *Murray v. Hoboken L. & I. Co.*, 18 How. 274. The words "law of the land" mean "due process of law": 18 Id. 276; *Greene v. Briggs*, 1 Curt. 311.

What is due process of law in a state is regulated by the law of the state: *Walker v. Sarinnet*, 92 U. S. 90; and see *Ex parte Wall*, 107 Id. 265; and *Kennard v. Louisiana*, 92 Id. 480.

**Taking private property for public use.**—The right to take private property for public use is incident to all governments; but the obligation to make compensation is concomitant: *Bonaparte v. C. & A. R'y Co.*, Bald. 205; *Jones v. Walker*, 2 Pa. St. 205; *Chesapeake and Ohio Canal Co. v. Union Bank*, 4 Cranch C. C. 75; *Dextraigne v. Fox*, 2 Blatchf. 95; *United States v. Jones*, 109 U. S. 513. A law cannot authorize the taking of property for any other than a public use; and a road or a canal is a public use, if the public have a right of passage for a stipulated, reasonable, and

uniform toll; otherwise, if the toll amount to a prohibition: *Bonaparte v. C. & A. R'y Co.*, Bald. 222. By the general law of European nations and the common law of England, it was a qualification of the right of eminent domain that compensation should be made for private property taken or sacrificed for public use. And the constitutional provisions of the states and United States, which declare that private property shall not be taken for public use without just compensation, were intended to establish this principle beyond legislative control. It is not necessary that property should be absolutely *taken*, in the narrowest sense of that word, to bring the case within the protection of this provision; there may be such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the constitution. The backing of water so as to overflow the lands of an individual, or any other superinduced addition of water, earth, sand, or other material or artificial structure placed on land, if done under statutes authorizing it for the public benefit, is such a taking as by the constitutional provision demands compensation: *Pumpely v. Green Bay Co.*, 13 Wall. 176.

## ARTICLE VI.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

**The right of trial by jury.**—This is only to be intended of those crimes which, by our former laws and customs, had been tried by jury: *United States v. Duane*, Wall. C. C. 106. It is the province of the court to decide the law and the jury the facts: *United States v. Battiste*, 2 Sum. 234; *Settinus v. United States*, 5 Cranch C. C. 584. The powers of the jury are exactly alike in civil and criminal cases: Id. The jury have no right to decide upon the constitutionality of a statute on which the defendant is indicted: *United States v. Lyon*, Whart. St. Tr. 333; *United States v. Cooper*, Id. 659; *United States v. Callender*, Id. 688; *United States v. Shire*, Bald. 511; *United States v. Riley*, 5 Blatchf. 204. Whether the United States, at a particular time, were at peace or in war, is a question of law, to be decided by the court: *Jones v. Walker*, 2 Pa. St. 694. Whether certain acts are a part of the official duty of an officer, is a question of law for the court: *United States v. Buchanan*, 8 How. 83. It is the exclusive province of the jury to judge of the weight of evidence: *Ewing v. Burnett*, 11 Pet. 41; *United States v. Lamb*, 12 Id. 1; *Richardson v. Boston*, 19 How. 263; *Hyde v. Stone*, 20 Id. 170. The jury are the exclusive judges of the credibility

of the witnesses: *United States v. Brown*, 4 McLean, 142; *United States v. Cole*, 5 Id. 514. The court may give their opinion on matters of fact to the jury, being careful to distinguish between such opinions and those on matters of law; the former being entitled to such influence only as the jury may think proper, whilst the latter are conclusive: *Games v. Stiles*, 14 Pet. 322. It is the province of the jury to draw from the evidence all such conclusions as it conduces to prove, and which, in their judgment, it does prove: *Bank of M. v. Gutschlick*, 14 Id. 19. Assuming that all the testimony adduced by either party is true, if it does not support his issue, it is the duty of the court so to instruct the jury; whether there be any evidence, is a question for the court; whether there be sufficient evidence, is for the jury: *Chandler v. Von Roeder*, 24 How. 224. The right of the court to decide on the legal effect of a written instrument cannot be controverted, but a question of boundary is always for the jury: *Barclay v. Howell*, 6 Pet. 499. What is color of title is for the court; but the question of good faith in the one claiming under it is for the jury: *Wright v. Mattison*, 18 How. 50. If there be any evidence *tending to*



establish a fact in issue, it must be submitted to the jury: *Drakely v. Gregg*, 8 Wall. 242. On a charge of infringement, the question of the identity of the two instruments or machines must be left to the jury, if there is so much resemblance as raises the question at all: *Tucker v. Spaulding*, 13 Id. 455. Where there are no disputed facts in a case, the court may tell the jury, in an absolute form, how they should find: *Bevacs v. United States*, 13 Id. 61.

The right of trial by jury was intended as well for a state of war as one of peace: *Ex parte Milligan*, 4 Id. 3.

**Process for witnesses.** — Any person charged with a crime in the courts of the United States has a right, before as well as after indictment, to the process of the court, to compel the attendance of his witnesses: 1 Burr's Trial, 179; *United States v. Moore*, Wall. C. C. 23.

## ARTICLE VII.

[Proposed by Congress, September 25, 1789; ratified December 15, 1791.]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

**Suits at common law.** — This includes not merely modes of proceeding known to the common law, but all suits not of equity or admiralty jurisdiction, in which legal rights are settled and determined: *Parsons v. Bedford*, 3 Pet. 433; 3 Dall. 297; *Webster v. Reed*, 11 How. 437; *Bains v. The Schooner James and Catherine*, Bald. 544. It does not apply to an examination as to the claims for services, under the fugitive-slave law: *Miller v. McQuerry*, 5 McLean, 469; *In re Martin*, 2 Paine, 348. Nor to a motion for summary relief: *Banning v. Taylor*, 24 Pa. St. 289.

The right to trial by jury is for the benefit of the parties litigating, and may be waived by them: *United States v. Rathbone*, 2 Paine, 578; *Parsons v. Armor*, 3 Pet. 413. But the circuit courts have no power to order a peremptory nonsuit against the will of the plaintiff: *Elmore v. Grymes*, 1 Id. 469; *D'Wolf v. Raboud*, 1 Id. 476; *Crane v. Lessee of Morris*, 6 Id. 598; *Thompson v. Campbell*, Hemp. 8. The legislature may prescribe the process of taking property for public use, and the mode of ascertaining compensation, without a jury trial: *Bonaparte v. C. & A. Railway Co.*, Bald. 205. The collection of taxes is not a judicial but a ministerial act, and a party thus deprived of his property is not constitutionally entitled to a trial by jury: *Ex parte Meador*,

1 Chic. L. N. 425; 18 Am. L. R. 557; *Holland v. Soule*, Deady, 413.

See *Davidson v. Burr*, 2 Cranch C. C. 515; *Madlox v. Stewart*, 2 Id. 523. This applies to facts tried by a jury in a cause in a state court, and therefore an act of Congress (March 3, 1863) which provides for the removal of a judgment in a state court, where the cause was tried by a jury, to the United States circuit court for a retrial on the facts and the law, is unconstitutional and void: *The Justices v. Murray*, 9 Wall. 274.

The common law here alluded to is not the common law of any individual state, but the common law of England; according to which facts once tried by a jury are never re-examined unless a new trial be granted in the discretion of the court, before which the suit is depending, for good cause shown, or unless the judgment of such court be reversed by a superior tribunal on a writ of error, and a new trial ordered: *United States v. Wonson*, 1 Gall. 20.

**No application to state courts.** — The provision that the right of trial by jury shall be preserved has no application to the state courts. It is a restriction upon the general government alone: *Barron v. Baltimore*, 7 Pet. 247; *Edwards v. Elliott*, 21 Wall. 557; *Pearson v. Yewdell*, 95 U. S. 294.

See note to First Amendment.

## ARTICLE VIII.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**Bail.** — Bail ought to be required in a sum sufficient to insure the appearance of the accused, but not so large as to amount to oppression: *United States v. Burr*, 1 Burr's Trial, 18, 104.

The discretion of the magistrate, in taking bail in a criminal case, is to be guided by the compound consideration of the ability of the prisoner and the atrocity of the offense: *United States v. Lawrence*, 4 Cranch C. C. 518. A

fugitive from justice is not bailable: *In re Kaine*, Bright. Fed. Dig. 205.

**Restriction on the general government.** — This article is a restriction of the powers of the general government, not upon the states: *Perrear v. Commonwealth*, 5 Wall. 475. See note to First Amendment.

**Unusual punishment.** — The disfranchisement of a citizen is not an unusual punishment: *Barber v. People*, 20 Johns. 459.



See *James v. Commonwealth*, 12 Serg. & R. 220.

A law which prescribes a punishment of not less than thirty nor more than sixty lashes on

the bare back for stealing mules, is held not void as being contrary to this article of the constitution of the United States: *Garcia v. Territory*, 1 N. Mex. 415.

## ARTICLE IX.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

## ARTICLE X.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

## ARTICLE XI.

[Proposed by Congress March 5, 1794; ratified January 8, 1798.]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

**Cases in admiralty.**—This restriction does not extend to suits of admiralty or maritime jurisdiction: *Olmstead's Case*, Bright. N. P. 9. See *Ex parte Madrazo*, 7 Pet. 627.

**State indirectly interested.**—If the state be not necessarily a defendant, though its interest may be affected by the decision, the courts of the United States are bound to exercise jurisdiction: *Louisville Railroad Co. v. Letson*, 2 How. 550; *United States v. Peters*, 5 Cranch, 115. A court of admiralty has no jurisdiction of a suit by an individual against a state, where the property is not in the custody of the court, or within its jurisdiction: *Ex parte Madrazo*, 7 Pet. 627. A suit against the governor of a state in his official character is a suit against the state: *Kentucky v. Ohio*, 24 How. 66. Although a state is not liable to be sued, yet an injunction will lie against its

agents to restrain the execution of an unconstitutional law: *Osborne v. Bank of United States*, 9 Wheat. 739. A state, by becoming interested with others in a banking or trading corporation, or by owning all the capital stock, does not impart to that corporation any of its privileges or prerogatives; it lays down its sovereignty so far as respects the transactions of the corporation, and exercises no power or privileges in respect to those transactions not derived from the charter: *Bank of United States v. Planters' Bank of Georgia*, 9 Wheat. 904; *Bank of Kentucky v. Miston*, 3 Pet. 431; *Briscoe v. Bank of Kentucky*, 11 Id. 324; *Louisville Railroad Co. v. Letson*, 2 How. 497; *Darrington v. Bank of Alabama*, 13 Id. 12; *Curran v. Arkansas*, 15 Id. 309; and see *Cohens v. Virginia*, 6 Wheat. 264.

## ARTICLE XII.

[Proposed by Congress December 12, 1803; ratified September 5, 1804.]

The electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom at least shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the gov-

ernment of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote. A quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

**Duties of presidential electors.** — By the act of Congress of March 1, 1792, the electors are required to meet in their respective states on the first Wednesday in December next after their election, and vote for President and Vice-President, and to transmit and deliver the "lists" to the president of the Senate before the second Wednesday of January following; and on that day the votes are to be

counted.

**Acts of President de facto.** — On a motion to discharge a defendant arrested upon a *capias ad respondendum*, by a marshal appointed by the President *de facto* of the United States, the court will not decide the question whether he has been duly elected to that office: *Peyton v. Brent*, 3 Cranch C. C. 424.

## ARTICLE XIII.

[Proposed by Congress February 1, 1865; declared ratified December 18, 1865.]

**SECTION 1.** Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

**SECTION 2.** Congress shall have power to enforce this article by appropriate legislation.

**Scope of this amendment.** — The Thirteenth Amendment relates only to slavery and its incidents, and the legislative power thereby conferred upon Congress extends only to the

subject of slavery and matters connected therewith: *Civil Rights Cases*, 109 U. S. 3. Being denied equal accommodations in public inns, conveyances, and the like, is not slavery nor a



badge of slavery, and is not repugnant to this article of the constitution: *Id.*

The emancipation of a native-born slave, by the Thirteenth Amendment, removed the disability of slavery, and made him a citizen of the United States; subject, however, to any lawful restrictions imposed upon his right to vote, or other powers or privileges: *United States v. Rhodes*, 1 Abb. 28; *Turner's Case*, 1 Id. 83. This amendment did not avoid a contract for the sale of a slave, made before it took effect; and a state constitution declaring such

a contract annulled is itself void, and of no effect: *Osborn v. Nicholson*, 13 Wall. 654.

The act of April 9, 1866 (14 Stat. 27), known as the "civil rights" bill, is constitutional, and an appropriate method of exercising the power conferred on Congress by this section: *United States v. Rhodes*, 1 Abb. 28; *Turner's Case*, 1 Id. 86. A criminal proceeding is not to be considered as affecting a person within the meaning of section 3 of the civil rights act, who is a mere witness therein: *Byles v. United States*, 13 Wall. 540.

## ARTICLE XIV.

[Proposed by Congress June 16, 1866; declared ratified July 28, 1868.]

**SECTION 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

**Scope of this amendment as to citizenship.** — The power of granting exclusive rights, when necessary and proper to effectuate a purpose which had in view the public good, has always been exercised by the state legislatures, and is not forbidden to them by either of the last three amendments to the constitution. The main purpose of these amendments was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppressions of the white men who had formerly held them in slavery. The first clause of the Fourteenth Amendment defines citizenship of the United States and of the states, and thereby recognizes the distinction between citizenship of a state and of the United States. The second clause protects from hostile legislation of the states the privileges and immunities of citizens of the United States as distinguished from those of citizens of the states. The privileges and immunities of citizens of the United States are those which arise out of the nature of the general government, its constitution, or the laws made in pursuance thereof; and these are placed by the Fourteenth Amendment under the protection of Congress; but the privileges and immunities of citizens of the states, with these exceptions, embrace generally those fundamental rights for the security and establishment of which society is instituted; and they remain under the care of the state governments: *The Slaughter House Cases*, 16 Wall. 36; *Bradwell v. State of Illinois*, 16 Id. 130. The Indian tribes within the limits of the United States, and the several members of such tribes, while they adhere to and form a part of the tribes to which they belong, are not, within the meaning of the Fourteenth Amendment, subject to the jurisdiction of the United States; and therefore such Indians have not become citizens of the United States, by virtue of that amendment: Rep. Sen. Jud. Com., by Mr. Senator Carpenter, Dec. 14, 1870; see 1 Dill. 348. note. The Indian tribes within

the territory of the United States are independent political communities, and a child of a member thereof, though born within the limits of the United States, is not a citizen thereof, because not born subject to its jurisdiction: *McKay v. Campbell*, 2 Saw. 119.

**Citizenship of the state.** — *Seem*, that one who has become a citizen of a state may elect to remain a citizen of that state, and yet actually change his residence to another state, without affecting his citizenship: *Sharon v. Hill*, 10 Saw. 666.

**Privileges and immunities of citizens.** — The right to vote is not one of those "privileges and immunities" which are protected by this article, but the right not to be excluded therefrom on account of race, color, or previous condition of servitude is. Congress has no power to give a remedy for interference with the right of suffrage by a state, except in cases where such interference is on the ground of race, color, or previous condition of servitude: *Minor v. Happersett*, 21 Wall. 162; *United States v. Cruikshank*, 92 U. S. 542; *McKay v. Campbell*, 1 Saw. 374.

The right to sell intoxicating liquors is not one of the privileges and immunities of citizenship which the states are forbidden to abridge: *Bartemeyer v. Iowa*, 18 Wall. 129; *Foster v. Kansas*, 112 U. S. 201. Nor is the right to practice law: *Bradwell v. Illinois*, 16 Wall. 130.

**What is due process of law.** — "Due process of law," as used in the constitution, includes legal notice of the proceeding, and a prescribed opportunity to be heard upon the question involved therein: *Pennoyer v. Neff*, 95 U. S. 714; *Burns v. Multnomah R. R. Co.*, 3 Saw. 543; *The Santa Clara Tax Case*, 9 Id. 165.

One who is imprisoned for violation of a void ordinance of a municipal corporation of a state is imprisoned by the state without due process of law: *In re Lee Tong*, 9 Saw. 333.

But a person imprisoned under a valid law,



although there is error in the proceeding resulting in the commitment, is not imprisoned without due process of law: *In re Ah Lee*, 6 Saw. 410.

**Equal protection of the laws.** — Equality of protection, which this amendment to the constitution forbids the states to deny to any person, implies, not only equal accessibility to the courts for the prevention and redress of wrongs and the protection and enforcement of rights, but equal exemption with others similarly situated from all charges and burdens of every kind: *In re Ah Fong*, 3 Saw. 144; *Ah Kow v. Nunan*, 5 Id. 552; *San Mateo County v. S. P. R. Co.*, 8 Id. 238; *Santa Clara Railway Tax Case*, 9 Id. 165.

A state statute prohibiting all aliens incapable of becoming electors of the state from fishing in the waters of the state violates the Fourteenth Amendment to the constitution of the United States: *In re Ah Chong*, 6 Saw. 451.

The Fourteenth Amendment, in declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including among

them that of taxation: *San Mateo County v. S. P. R. Co.*, 8 Saw. 238; *Santa Clara Railway Tax Case*, 9 Id. 165.

The inhibition upon the state applies to all the instrumentalities and agencies employed in its government, and in every department and branch thereof: *Parrott's Case*, 6 Saw. 349.

Private corporations are persons within the meaning of the Fourteenth Amendment, and are entitled the same as natural persons to the equal protection of the laws, so far as their property is concerned: *San Mateo County v. S. P. R. Co.*, 8 Saw. 238; *Santa Clara Tax Case*, 9 Id. 165.

**Prohibitory upon the states only.** — The Fourteenth Amendment is prohibitory upon the states only, and the legislation which it authorizes Congress to adopt for its enforcement is not direct legislation upon the matters prohibited to the states, but *corrective* legislation to counteract and redress the effect of such prohibited state laws: *The Civil Rights Cases*, 109 U. S. 3.

This amendment abrogates a constitutional provision of a state limiting the right of suffrage to the white race: *Neal v. Delaware*, 103 U. S. 370.

**SECTION 2.** Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

**SECTION 3.** No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any state, who having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each house remove such disability.

**SECTION 4.** The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection, or rebellion, shall not be questioned. But neither the United States nor any state

shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## ARTICLE XV.

[Proposed by Congress February 27, 1869; declared ratified March 30, 1870.]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

**How far right to vote is affected by this article.** — The several states, notwithstanding this amendment, have the power to deny the right of suffrage to any citizens of the United States on account of age, sex, place of birth, vocation, want of property or intelligence, neglect of civic duties, crime, or other cause not specified in said amendment: *McKay v. Campbell*, 1 Saw. 375; *United States v. Antony*, 5 Chic. L. N. 462.

The power of Congress over the subject of

the right to vote in the several states is conferred by the Fifteenth Amendment, and is confined to the enforcement of such amendment by preventing the states from discriminating between citizens of the United States, in the matter of the right to vote on account of race, color, or previous condition of servitude: *McKay v. Campbell*, 1 Saw. 375; *United States v. Antony*, 5 Chic. L. N. 462; *United States v. Cruikshank*, 92 U. S. 542.

# TREATY BETWEEN UNITED STATES AND GREAT BRITAIN.

## IN REGARD TO LIMITS WESTWARD OF THE ROCKY MOUNTAINS.

[Concluded June 15, 1846; proclaimed by the President August 5, 1846.]

	<b>P R E A M B L E.</b>	<b>ARTICLE III.</b>
		Rights of Hudson Bay Company and British subjects.
<b>Boundaries.</b>	<b>ARTICLE I.</b>	<b>ARTICLE IV.</b>
		Protection of Puget Sound Agricultural Company.
	<b>ARTICLE II.</b>	<b>ARTICLE V.</b>
<b>Navigation of Columbia River.</b>		Ratification and exchange.

Whereas, a treaty between the United States of America and her Majesty, the Queen of the United Kingdom of Great Britain and Ireland, was concluded and signed by their plenipotentiaries at Washington, on the fifteenth day of June last, which treaty is word for word as follows:—

The United States of America and her Majesty, the Queen of the United Kingdom of Great Britain and Ireland, deeming it to be desirable for the future welfare of both countries that the state of doubt and uncertainty which has hitherto prevailed respecting the sovereignty and government of the territory on the northwest coast of America, lying westward of the Rocky or Stony Mountains, should be finally terminated by an amicable compromise of the right mutually asserted by the two parties, over the said territory, have respectively named plenipotentiaries to treat and agree concerning the terms of such settlement; that is to say: The President of the United States of America has, on his part, furnished with full powers James Buchanan, Secretary of State of the United States, and her Majesty, the Queen of the United Kingdom of Great Britain and Ireland, has, on her part, appointed the right honorable Richard Pakenham, a member of her Majesty's most honorable Privy Council, and her Majesty's envoy extraordinary and minister plenipotentiary to the



United States; who, after having communicated unto each other their respective full powers, found in good and due form, have agreed upon and concluded the following articles:—

### ARTICLE I.

From the point on the forty-ninth parallel of north latitude, where the boundary laid down in existing treaties and conventions between the United States and Great Britain terminates, the line of boundary between the territories of the United States, and those of her Britannic Majesty shall be continued westward along the said forty-ninth parallel of north latitude to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly, through the middle of the said channel, and of Fuca Straits to the Pacific Ocean; *provided, however*, that the navigation of the whole of the said channel and straits, south of the forty-ninth parallel of north latitude, remain free and open to both parties.

### ARTICLE II.

From the point at which the forty-ninth parallel of north latitude shall be found to intersect the great northern branch of the Columbia River, the navigation of the said branch shall be free and open to the Hudson's Bay Company, and to all British subjects trading with the same, to the point where the said branch meets the main stream of the Columbia, and thence down the said main stream to the ocean, with free access into and through the said river or rivers, it being understood that all the usual portages along the line thus described shall, in like manner, be free and open. In navigating the said river or rivers, British subjects, with their goods and produce, shall be treated on the same footing as citizens of the United States; it being, however, always understood that nothing in this article shall be construed as preventing, or intended to prevent, the government of the United States from making any regulations respecting the navigation of the said river or rivers, not inconsistent with the present treaty.

### ARTICLE III.

In the future appropriation of the territory south of the forty-ninth parallel of north latitude, as provided in the first article of this treaty, the possessory rights of the Hudson's Bay Company, and of all British subjects who may be already in the occupation of land or other property lawfully acquired within the said territory, shall be respected.

**"Possessory rights" of British subjects.**—The stipulation of the United States as to the possessory rights of British subjects in the occupation of land in Oregon did not constitute a grant to such British subjects, nor confer upon them any interest in the soil:

*Cowenia et al. v. Hannah et al.*, 3 Or. 465; *Town v. De Haven et al.*, 5 Saw. 146.

Such stipulation was merely a promise by the United States to Great Britain, for a violation of which the only remedy would be a claim upon the United States for compensation: *Town v. De Haven et al.*, *supra*.

#### ARTICLE IV.

The farms, lands, and other property of every description belonging to the Puget Sound Agricultural Company on the north side of the Columbia River shall be confirmed to the said company. In case, however, the situation of those farms and lands should be considered by the United States to be of public and political importance, and the United States government should signify a desire to obtain possession of the whole, or of any part thereof, the property so required shall be transferred to the said government, at a proper valuation, to be agreed upon between the parties.

#### ARTICLE V.

The present treaty shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof, and by her Britannic Majesty; and the ratifications shall be exchanged at London, at the expiration of six months from the date hereof, or sooner if possible.

In witness whereof, the respective plenipotentiaries have signed the same, and have affixed thereto the seals of their arms.

Done at Washington, the fifteenth day of June, in the year of our Lord one thousand eight hundred and forty-six.

JAMES BUCHANAN. [L. s.]

RICHARD PAKENHAM. [L. s.]

And whereas, the said treaty has been duly ratified on both parts, and the respective ratifications of the same were exchanged at London, on the seventeenth ultimo, by Louis McLane, envoy extraordinary and minister plenipotentiary of the United States, and Viscount Palmerston, her Britannic Majesty's principal secretary of state for foreign affairs, on the part of their respective governments,—

Now, therefore, be it known, that I, James K. Polk, President of the United States of America, have caused the said treaty to be made public, to the end that the same, and every clause and article thereof, may be observed and fulfilled with good faith by the United States and the citizens thereof.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington, this fifth day of August, in the  
year of our Lord one thousand eight hundred and forty-six,  
[L. s.] and of the independence of the United States the seventy-  
first.

JAMES K. POLK.

By the President:

JAMES BUCHANAN, *Secretary of State*.



# NATURALIZATION OF ALIENS.

## LAWS OF THE UNITED STATES IN RELATION THERETO.

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|--|---|
| § 1. Any free white person may be naturalized. How to proceed.                           | § 6. Five years' residence necessary in all cases.  |
| § 2. Naturalization of persons who have served in the armies of the United States.       | § 7. Alien enemies not to be admitted to citizenship.   |
| § 3. Naturalization of persons who have served in merchant vessels of the United States. | § 8. Children of naturalized citizens are citizens.   |
| § 4. Naturalization of persons on attaining age of majority.                             | § 9. Widow and children of aliens who have not completed naturalization to be admitted; on what conditions. |
| § 5. Naturalization laws extended to persons of African descent.                         | § 10. Children born abroad, whose fathers were citizens, are citizens.                                      |
|  | § 11. Wives of citizens are citizens; in what cases.  |
|  | § 12. Special provision for persons born in Oregon.   |

§ 1. [Rev. St., § 2165.] An alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise:—

*First.* He shall declare on oath or affirmation, before a circuit or district court of the United States, or a district or supreme court of a territory, or a court of record of any of the states having common-law jurisdiction and a seal and clerk, two years, at least, prior to his admission, that it is *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty; and particularly, by name, the prince, potentate, state, or sovereignty of which such alien may be at the time a citizen or subject.

*Second.* He shall, at the time of his application to be admitted, declare on oath or affirmation before some one of the courts specified that he will support the constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty; and particularly, by name, to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; which proceeding shall be recorded by the clerk of the court.

*Third.* It shall be made to appear to the satisfaction of the court admitting said alien that he has resided within the United States five

years at least, and within the state or territory where such court is at the time held, one year at least; and that, during that time, he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same; but the oath of the applicant shall in no case be allowed to prove his residence.

*Fourth.* In case the alien, applying to be admitted to citizenship, has borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility in the court to which his application is made, and his renunciation shall be recorded in the said court.

*Fifth.* Any alien who was residing within the limits and under the jurisdiction of the United States before the twenty-ninth day of January, 1795, may be admitted to become a citizen, on due proof made to some one of the courts above specified, that he has resided two years, at least, within and under the jurisdiction of the United States, and one year, at least, immediately preceding his application within the state or territory where such court is at the time held; and on his declaring on oath or affirmation that he will support the constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty; and particularly, by name, the prince, potentate, state, or sovereignty, whereof he was before a citizen or subject; and also, on its appearing to the satisfaction of the court that during such term of two years he has behaved as a man of good moral character, attached to the constitution of the United States, and well disposed to the good order and happiness of the same; and when the alien, applying for admission to citizenship, has borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came, on his, moreover, making in the court an express renunciation of his title or order of nobility; all the proceedings, required in this condition to be performed in the court, shall be recorded by the clerk thereof.

*Sixth.* Any alien who was residing within the limits, and under the jurisdiction of the United States, between the eighteenth day of June, 1798, and the eighteenth day of June, 1812, and who has continued to reside within the same, may be admitted to become a citizen of the United States, without having made any previous declaration of his intention to become such; but whenever any person, without a certificate of such declaration of intention, makes application to be admitted a citizen, it must be proved to the satisfaction of the court that the applicant was residing within the limits and under the jurisdiction of the United States before the eighteenth day of June, 1812, and has continued to reside within the same; and the residence of the

applicant within the limits and under the jurisdiction of the United States, for at least five years immediately preceding the application, must be proved by the oath of citizens of the United States, which citizens shall be named in the record as witnesses; and such continued residence within the limits and under the jurisdiction of the United States, when satisfactorily proved, and the place where the applicant has resided for at least five years, shall be stated and set forth, together with the names of such citizens, in the record of the court admitting the applicant.

[Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that the declaration of intention to become a citizen of the United States, required by section two thousand one hundred and sixty-five of the Revised Statutes of the United States, may be made by an alien before the clerk of any of the courts named in said section two thousand one hundred and sixty-five; and all such declarations heretofore made before any such clerk are hereby declared as legal and valid as if made before one of the courts named in said section.]

[This section is taken from the United States Revised Statutes. It is, however, a compilation and arrangement by the revisers, from various acts of Congress on the subject of naturalization. The introductory clause, declaring what persons may be naturalized, is from the act of April 14, 1802. The subdivision designated as "*first*" is from an act of May 26, 1824; subdivisions "*second*" to "*fifth*" are from the act of April 14, 1802; subdivision "*sixth*," except the part inclosed in brackets, is from acts of March 22, 1816, and May 24, 1818; and that part inclosed in the brackets is from an act of February 1, 1876. This last clause would appear to be logically a distinct section; but being embodied in this form in section 2165 of the Revised Statutes, it is deemed safest to insert it here in the same form.]

**Free white persons.**—In the Revised Statutes of the United States, the words "being a free white person," when they occur at the beginning of this section, are omitted, making the section read "an alien may be admitted," etc. The same omission occurs in section 2167. The omission, however, was an inadvertence on the part of the revisers, these words being still a part of the statute: *In re Ah Yup*, 5 Saw. 155.

**Chinese cannot be admitted.**—Persons of the Mongolian race are not white persons, within the meaning of the naturalization laws, and cannot be admitted to citizenship: *In re Ah Yup*, 5 Saw. 153.

**A person who is half Indian is not a white person, and cannot be admitted:** *In re Camille*, 6 Saw. 541.

The naturalization laws are extended, by special enactment, over persons of African descent: *Vide* § 5.

**Married women.**—A married woman may be naturalized: *Ex parte Pic*, 1 Cranch C. C. 372. And that, without the concurrence of

her husband: *Priest v. Cummings*, 16 Wend. 617. See also *infra*, § 16. But the statutes of naturalization do not apply to Indians: 7 Opin. 746. And see *Dred Scott v. Sanford*, 19 How. 405.

**Jurisdiction of state courts.**—Congress having prescribed a uniform rule of naturalization may give to the state courts jurisdiction under it: *State v. Penny*, 10 Ark. 621. And to the territorial courts: *Biddle v. Richard, Clarke & Hall*, 407. But see *Ex parte Knowles*, 4 Am. L. R. 598; 5 Cal. 300; *Hayden v. Dudley*, 10 Law Rep. 371.

**Expatriation.**—Intimately connected with the subject of naturalization is what is usually denominated the right of expatriation. It is the doctrine of the English law that natural-born subjects owe an allegiance which is intrinsic and perpetual, and which cannot be divested by any act of their own. The question has been frequently discussed in the courts of the United States, but it remains to be definitely settled by judicial decision. The better opinion, however, would seem to be, that a citizen cannot renounce his allegiance to the United States without the permission of government, to be declared by law; and that, as there is no existing regulation in the cases, the rule of the English common law remains unaltered: See *Talbot v. Johnson*, 3 Dall. 133; *Bee*, 25; *United States v. Williams*, 4 Hall L. J. 461; *Whart. St. Tr.* 652; *Murray v. The Charming Betsy*, 2 Cranch, 120; *United States v. Gillies*, Pet. C. C. 159; *The Santissima Trinidad*, 7 Wheat. 347; *Inglis v. Trustees of the Sailors Snug Harbor*, 3 Pet. 99; *Shanks v. Dupont*, 3 Id. 242; 2 Kent's Com. 45; 2 Story's Com., sec. 1104, note; *Wheaton's International Law*, 122, note; *Stoughton v. Taylor*, 2 Pa. St. 652. Birth and allegiance are simultaneous; citizens, within the meaning of the constitution and laws, are free inhabitants, born in the United States, or who have been naturalized by an act of Congress: *United*



*States v. Rhodes*, 1 Abb. 40. An American citizen, domiciled in a foreign country, who has taken an oath of allegiance to the foreign sovereign, is not under the protection of the United States: *The Charming Betsy*, 2 Cranch, 64.

**Act of July 27, 1868.** — By act of Congress of July 27, 1868 (Rev. St., sec. 1999), it is declared that "any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic."

**Procedure.** — An omission to name the sovereign will not invalidate the declaration of intention: *Ex parte Smith*, 8 Blackf. 395.

It is not sufficient that the applicant took both the oaths at the time of making his declaration: *Richards v. McDaniel*, 2 Nott & McC. 351.

It is not necessary that the record of naturalization should show all the legal prerequisites were complied with, the judgment being conclusive of such compliance: *Stark v. Chesapeake Insurance Co.*, 7 Cranch, 420; *Spratt v. Spratt*, 4 Pet. 406; *Ritchie v. Putnam*, 13 Wend. 524; see *Campbell v. Gordon*, 6 Cranch, 176. A certificate of naturalization irregularly obtained may be set aside: *Richards v. McDaniel*, 2 Nott & McC. 351. Naturalization cannot be proved by parol: *Stade v. Minor*, 2 Cranch C. C. 139; *Price v. Barber*, 13 Leg. Int. 140.

**Only courts having clerks can naturalize.** — A court of record without any clerk or prothonotary, or other recording officer, distinct from the judge, is not competent to receive an alien's preliminary declaration: *Ex parte Cregg*, 2 Curt. C. C. 98.

**No order necessary.** — The certificate of a competent court that the alien has taken the requisite oath raises a presumption that the court was satisfied by competent evidence in regard to his moral character, etc. No order is necessary to prove admission. The oath

confers the rights: *Campbell v. Gordon*, 6 Cranch, 176.

**Good moral character.** — An alien, before he can be admitted to citizenship under the provisions of this section, must prove to the satisfaction of the court that he has conducted himself as a person of good moral character during all the period of his residence in the United States. He must not simply have sustained a good reputation, but his conduct must have been such as comports with good character: *In re Spenser*, 5 Saw. 195.

A person who has committed perjury or other infamous crime, though in other respects his conduct may have been good, has not behaved as a person of such good moral character, and is not entitled to be admitted to citizenship: *Id.*

**Proof, how made.** — The residence and good moral character of the applicant cannot be established by affidavits, but must be proved in court by the testimony of witnesses: *Anonymous*, 7 Hill, 137. The powers conferred upon the courts to naturalize aliens are judicial, and not ministerial, and require an examination into each case sufficient to satisfy the court: *In the Matter of Clark*, 18 Barb. 444.

A deposition that the deponents have known the applicant "since the year 1793, in New York," is not evidence that he was residing there before the 29th of January, 1795: *Ex parte Tucker*, 1 Cranch C. C. 89.

**Transcript need not show judge's title to office.** — It is not necessary, in order to show a valid decree of naturalization, that the transcript thereof be accompanied by a certificate that the judge who made the order was commissioned and qualified: *St. Paul R. R. Co. v. Burton*, 111 U. S. 788.

**Inaccuracy of recitals not fatal.** — The validity of a judgment admitting alien to citizenship is not impaired by inaccuracies in the recitals therein. They are no part of the judgment: *In re McCoppin*, 5 Saw. 630.

§ 2. [Rev. St., § 2166.] Any alien, of the age of twenty-one years and upward, who has enlisted or may enlist in the armies of the United States, either the regular or the volunteer forces, and has been or may be hereafter honorably discharged, shall be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become such; and he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen; and the court admitting such alien shall, in addition to such proof of residence and good moral character as is now provided by law, be satisfied by competent proof of such person's having been honorably discharged from the service of the United States, as aforesaid.

[This section is from the act of July, 17, 1862.]

**Persons who have served in the armies of the United States.** — This provision applies only to persons who have served in the

land forces. It does not embrace those who have served only in the naval or marine corps: *In re Bailey*, 2 Saw. 200.

§ 3. [Rev. St., § 2174.] Every seaman, being a foreigner, who declares his intention of becoming a citizen of the United States in any

competent court, and shall have served three years on board of a merchant vessel of the United States, subsequent to the date of such declaration, may, on his application in any competent court, and the production of his certificate of discharge and good conduct during that time, together with the certificate of his declaration of intention to become a citizen, be admitted a citizen of the United States; and every seaman, being a foreigner, shall, after his declaration to become a citizen of the United States, and after he shall have served such three years, be deemed a citizen of the United States for the purpose of manning and serving on board any merchant vessel of the United States, anything to the contrary in any act of Congress to the contrary notwithstanding; but such seaman shall, for all purposes of protection, as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen.

[This section is from the act of July 7, 1872.]

§ 4. [Rev. St., § 2167.] Any alien, being a free white person, under the age of twenty-one years, who has resided in the United States three years next preceding his arriving at that age, and who has continued to reside therein to the time he may make application to be admitted a citizen thereof, may, after he arrives at the age of twenty-one years, and after he has resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States, without having made the declaration required in the first condition of section 2165; but such alien shall make the declaration required therein at the time of his admission; and shall further declare on oath, and prove to the satisfaction of the court, that, for two years next preceding, it has been his *bona fide* intention to become a citizen of the United States; and he shall, in all other respects, comply with the laws in regard to naturalization.

[From act of May 26, 1824.]

**To what minors applicable.** — This section applies to those persons only who were minors at the time of their arrival in the United States: *Matter of Bramlee*, 9 Ark. 191.

§ 5. [Rev. St., § 2169.] The provisions of this title shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent.

[Act of February 18, 1875.]

**Effect of emancipation.** — The emancipation of native-born persons of color, by the Thirteenth Amendment to the constitution, made them citizens of the United States: *United States v. Rhodes*, 1 Abb. 40.

§ 6. [Rev. St., § 2170.] No alien shall be admitted to become a citizen, who has not, for the continued term of five years next preceding his admission, resided within the United States.

[Act of July 14, 1870.]

§ 7. [Rev. St., § 2171.] No alien who is a native, citizen, or subject, or a denizen of any country, state, or sovereignty with which the



United States are at war at the time of his application, shall be then admitted to become a citizen of the United States; but persons resident within the United States, or the territories thereof, on the eighteenth day of June, in the year one thousand eight hundred and twelve, who had before that day made a declaration, according to law, of their intention to become citizens of the United States, or who were on that day entitled to become citizens without making such declaration, may be admitted to become citizens thereof, notwithstanding they were alien enemies at the time, and in the manner prescribed by the laws heretofore passed on that subject; nor shall anything herein contained be taken or construed to interfere with or prevent the apprehension and removal, agreeably to law, of any alien enemy at any time previous to the actual naturalization of such alien.

[Acts of April 14, 1802, and July 30, 1813.] **Can alien enemy be allowed to make declaration of intention?**—It is the last step only that is forbidden by the law prohibiting the naturalization of alien enemies. They may make their declaration of intention to become citizens, as they gain thereby no rights or advantages: *The Case of William Little*, 2 Browne, 218. Directly opposed to this decision is *Ex parte Newman*, 2 Gall. 11; see note to § 9.

§ 8. [Rev. St., § 2172.] The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passage of any law on that subject, by the government of the United States, may have become citizens of any one of the states under the laws thereof, being under the age of twenty-one years, at the time of naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; but no person heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great Britain during the Revolutionary War, shall be admitted to become a citizen without the consent of the legislature of the state in which such person was proscribed.

[Act of March 26, 1804.] **Scope of this section as to minors.**—This act is prospective in operation, and applies to subsequent, as well as precedent, naturalization: *West v. West*, 8 Paige, 433. It is sufficient that the minors were residents of the United States at the time of the passage of the act: *Campbell v. Gordon*, 6 Cranch, 177; *Vint v. Heirs of King*, 2 Am. L. R. 713.

§ 9. [Rev. St., § 2168.] When any alien who has complied with the first condition specified in section 2165 dies before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law.

[Act of March 26, 1804.] **Widow and children alien enemies.**—The proviso in the act of April 14, 1802, forbidding the naturalization of alien enemies, extends to the case of the widow and children of an alien dying before completing his naturalization, who apply to take the requisite oaths under the act of March 26, 1804. They cannot, therefore, be allowed to take the oaths, while their native sovereign is at war with the United States: *Ex parte Averington*, 5 Binn. 371.



§ 10. [Rev. St., § 1993.] Children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were, or may be at the time of their birth, citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to persons whose fathers never resided in the United States.

[Act of April 14, 1802.]

§ 11. [Rev. St., § 1994.] Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed to be a citizen.

[Act of February 10, 1855.]

**Citizenship of citizen's wife.** — Any woman who might lawfully be naturalized, and who is the wife of a citizen, is herself a citizen whether her husband's citizenship existed at the time of the passage of this law or not, and irrespective also of whether he was a citizen at the time of the marriage. His citizenship, whenever it exists, confers citizenship on her: *Kelly v. Owens*, 7 Wall. 496.

**Citizenship of citizen's widow.** — Being the wife of a citizen confers citizenship upon a woman who might lawfully be naturalized, stands in the place of naturalization, and makes her a citizen to all intents, and not merely a

person who is to be deemed a citizen during the continuance of the marriage relation; and therefore she remains a citizen after the death of her husband: *Leonard v. Grant*, 6 Saw. 603.

**"Might herself be lawfully naturalized."** — The restriction of citizenship as a consequence of wifehood to those women who might themselves "be lawfully naturalized," does not require that they shall possess the qualifications of residence, good moral character, etc., as in case of a person who applies to a court to be admitted to become a citizen, but merely that they must be of the class or race of persons who may be naturalized under existing laws: *Leonard v. Grant*, 6 Saw. 603.

§ 12. [Rev. St., § 1995.] All persons born in the district of country formerly known as the territory of Oregon, and subject to the jurisdiction of the United States at this time, are citizens of the United States in the same manner as if born elsewhere in the United States.

[Act of May 18, 1872.]

**Persons born in Oregon.** — From October 20, 1818, to the negotiation of this treaty, this territory was jointly occupied by the United States and Great Britain, and during such occupation the country, as to British subjects therein, was British soil, and subject to the jurisdiction of the king of Great Britain; but as to citizens of the United States, it was American soil, and subject to the jurisdiction of the United States, and therefore a child born in such territory in 1823, of British subjects, was born in the allegiance of the king of Great Britain, and not that of the United States: *McKay v. Campbell*, 5 Am. L. T. 408; 2 Saw. 119; see *United States v. Tom*, 1 Or. 27.

**Crimes in connection with naturalization.** — By act of Congress of July 14, 1870, false oaths of applicants and witnesses are declared perjury and punishable by imprisonment at hard labor from one year to five, and fine from three hundred to one thousand

dollars. False personation, by witness, of another person; forging any of the certificates, records, etc., connected with naturalization; uttering false papers; disposing of naturalization papers to persons not entitled to them; using name of dead or fictitious person in naturalization and many other specified acts of kindred nature are declared misdemeanors, and punishable by imprisonment not exceeding five years, a fine not exceeding one thousand dollars, or both. All persons aiding and abetting the commission of these acts are principals, and punishable accordingly. Any person who knowingly uses, for the purpose of registration as a voter, any naturalization papers fraudulently granted, or for such purpose falsely represents himself to be a citizen of the United States, is guilty of a misdemeanor, and punishable by fine not exceeding one thousand dollars, or imprisonment not exceeding two years, or both.



# ENABLING ACT.

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**AN ACT TO PROVIDE FOR THE DIVISION OF DAKOTA INTO TWO STATES AND TO ENABLE THE PEOPLE OF NORTH DAKOTA, SOUTH DAKOTA, MONTANA, AND WASHINGTON TO FORM CONSTITUTIONS AND STATE GOVERNMENTS, AND TO BE ADMITTED INTO THE UNION ON AN EQUAL FOOTING WITH THE ORIGINAL STATES, AND TO MAKE DONATIONS OF PUBLIC LANDS TO SUCH STATES.**

[Approved February 22, 1889.]

§ 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, that the inhabitants of all that part of the area of the United States now constituting the territories of Dakota, Montana, and Washington, as at present described, may become the states of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.

§ 2. The area comprising the territory of Dakota shall, for the purposes of this act, be divided on the line of the seventh standard parallel produced due west to the western boundary of said territory; and the delegates elected as hereinafter provided to the constitutional convention in districts north of said parallel shall assemble in convention, at the time prescribed in this act, at the city of Bismarck; and the delegates elected in districts south of said parallel shall at the same time assemble in convention at the city of Sioux Falls.

§ 3. That all persons who are qualified by the laws of said territories to vote for representatives to the legislative assemblies thereof are hereby authorized to vote for and choose delegates to form conventions in said proposed states; and the qualifications for delegates to such conventions shall be such as by the laws of said territories, respectively, persons are required to possess to be eligible to the legislative assemblies thereof; and the aforesaid delegates to form said conventions shall be apportioned within the limits of the proposed states, in such districts as may be established as herein provided, in proportion to the population of each of such counties and districts, as near as may be, to be ascertained at the time of making said apportionments by the persons hereinafter authorized to make the same,



from the best information obtainable, in each of which districts three delegates shall be elected, but no elector shall vote for more than two persons for delegates to such conventions; that said apportionments shall be made by the governor, the chief justice, and the secretary of said territories; and the governors of said territories shall, by proclamation, order an election of the delegates aforesaid in each of said proposed states, to be held on the Tuesday after the second Monday in May, eighteen hundred and eighty-nine, which proclamation shall be issued on the fifteenth day of April, eighteen hundred and eighty-nine; and such elections shall be conducted, the returns made, the result ascertained, and the certificates to persons elected to such convention issued in the same manner as is prescribed by the laws of said territories regulating elections therein for delegates to Congress; and the number of votes cast for delegates in each precinct shall also be returned. The number of delegates to said conventions respectively shall be seventy-five; and all persons residents in said proposed states, who are qualified voters of said territories as herein provided, shall be entitled to vote upon the election of delegates, and under such rules and regulations as said conventions may prescribe, not in conflict with this act, upon the ratification or rejection of the constitutions.

§ 4. That the delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said territories, except the delegates elected in South Dakota, who shall meet at the city of Sioux Falls, on the fourth day of July, eighteen hundred and eighty-nine, and after organization shall declare, on behalf of the people of said proposed states, that they adopt the constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and state governments, for said proposed states respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the constitution of the United States and the principles of the Declaration of Independence. And said conventions shall provide, by ordinances irrevocable without the consent of the United States, and the people of said states:—

*First.* That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said states shall ever be molested in person or property on account of his or her mode of religious worship.

*Second.* That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the

disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the states on lands or property therein belonging to or which may hereafter be purchased by the United States, or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said states from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said states so long and to such extent as such act of Congress may prescribe.

*Third.* That the debts and liabilities of said territories shall be assumed and paid by said states, respectively.

*Fourth.* That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of said states, and free from sectarian control.

§ 5. That the convention which shall assemble at Bismarck shall form a constitution and state government for a state to be known as North Dakota, and the convention which shall assemble at Sioux Falls shall form a constitution and state government for a state to be known as South Dakota; *provided*, that at the election for delegates to the constitutional convention in South Dakota, as hereinbefore provided, each elector may have written or printed on his ballot the words "For the Sioux Falls constitution," or the words "Against the Sioux Falls constitution," and the votes on this question shall be returned and canvassed in the same manner as for the election provided for in section three of this act; and if a majority of all votes cast on this question shall be "For the Sioux Falls constitution," it shall be the duty of the convention which may assemble at Sioux Falls, as herein provided, to resubmit to the people of South Dakota, for ratification or rejection at the election hereinafter provided for in this act, the constitution framed at Sioux Falls and adopted November third, eighteen hundred and eighty-five, and also the articles and propositions separately submitted at that election, including the question of locating the temporary seat of government, with such changes only as relate to the name and boundary of the proposed state, to the reapportionment of the judicial and legislative districts, and such amendments as may be necessary in order to comply with the provisions of this act; and if

a majority of the votes cast on the ratification or rejection of the constitution shall be for the constitution irrespective of the articles separately submitted, the state of South Dakota shall be admitted as a state in the Union under said constitution as hereinafter provided; but the archives, records, and books of the territory of Dakota shall remain at Bismarck, the capital of North Dakota, until an agreement in reference thereto is reached by said states. But if at the election for delegates to the constitutional convention in South Dakota a majority of all the votes cast at that election shall be "Against the Sioux Falls constitution," then and in that event it shall be the duty of the convention which will assemble at the city of Sioux Falls on the fourth day of July, eighteen hundred and eighty-nine, to proceed to form a constitution and state government as provided in this act the same as if that question had not been submitted to a vote of the people of South Dakota.

§ 6. It shall be the duty of the constitutional convention of North Dakota and South Dakota to appoint a joint commission, to be composed of not less than three members of each convention, whose duty it shall be to assemble at Bismarck, the present seat of government of said territory, and agree upon an equitable division of all property belonging to the territory of Dakota, the disposition of all public records, and also adjust and agree upon the amount of the debts and liabilities of the territory, which shall be assumed and paid by each of the proposed states of North Dakota and South Dakota; and the agreement reached respecting the territorial debts and liabilities shall be incorporated in the respective constitutions, and each of said states shall obligate itself to pay its proportion of such debts and liabilities the same as if they had been created by such states respectively.

§ 7. If the constitutions formed for both North Dakota and South Dakota shall be rejected by the people at the elections for the ratification or rejection of their respective constitutions, as provided for in this act, the territorial government of Dakota shall continue in existence the same as if this act had not been passed. But if the constitution formed for either North Dakota or South Dakota shall be rejected by the people, that part of the territory so rejecting its proposed constitution shall continue under the territorial government of the present territory of Dakota, but shall, after the state adopting its constitution is admitted into the Union, be called by the name of the territory of North Dakota, or South Dakota, as the case may be; *provided*, that if either of the proposed states provided for in this act shall reject the constitution which may be submitted for ratification or rejection at the election provided therefor, the governor of the territory in which such proposed constitution was rejected shall issue his proclamation reconvening the delegates elected to the convention which formed such



rejected constitution, fixing the time and place at which said delegates shall assemble; and when so assembled they shall proceed to form another constitution, or to amend the rejected constitution, and shall submit such new constitution, or amended constitution, to the people of the proposed state for ratification or rejection, at such time as said convention may determine; and all the provisions of this act, so far as applicable, shall apply to such convention so reassembled, and to the constitution which may be formed, its ratification or rejection, and to the admission of the proposed state.

§ 8. That the constitutional convention which may assemble in South Dakota shall provide by ordinance for resubmitting the Sioux Falls constitution of eighteen hundred and eighty-five, after having amended the same as provided in section five of this act, to the people of South Dakota for ratification or rejection at an election to be held therein on the first Tuesday in October, eighteen hundred and eighty-nine; but if said constitutional convention is authorized and required to form a new constitution for South Dakota, it shall provide for submitting the same in like manner to the people of South Dakota for ratification or rejection at an election to be held in said proposed state on the said first Tuesday in October. And the constitutional conventions which may assemble in North Dakota, Montana, and Washington shall provide in like manner for submitting the constitutions formed by them to the people of said proposed states, respectively, for ratification or rejection, at elections to be held in said proposed states on said first Tuesday in October; at the elections provided in this section, the qualified voters of said proposed states shall vote directly for or against the proposed constitutions, and for or against any articles or propositions separately submitted. The returns of said elections shall be made to the secretary of each of said territories, who, with the governor and chief justice thereof, or any two of them, shall canvass the same; and if a majority of the legal votes cast shall be for the constitution, the governor shall certify the result to the President of the United States, together with a statement of the votes cast thereon, and upon separate articles or propositions, and a copy of said constitution, articles, propositions, and ordinances. And if the constitutions and governments of said proposed states are republican in form, and if all the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States to issue his proclamation announcing the result of the election in each, and thereupon the proposed states which have adopted constitutions and formed state governments as herein provided shall be deemed admitted by Congress into the Union, under and by virtue of this act, on an equal footing with the original states, from and after the date of said proclamation.

§ 9. That until the next general census, or until otherwise provided by law, said states shall be entitled to one representative in the House of Representatives of the United States, except South Dakota, which shall be entitled to two; and the representatives to the fifty-first Congress, together with the governors and other officers provided for in said constitutions, may be elected on the same day of the election for the ratification or rejection of the constitutions; and until said state officers are elected and qualified under the provisions of each constitution, and the states, respectively, are admitted into the Union, the territorial officers shall continue to discharge the duties of their respective offices in each of said territories.

§ 10. That upon the admission of each of said states into the Union, sections numbered sixteen and thirty-six in every township of said proposed states, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter-section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said states for the support of common schools, such indemnity lands to be selected within said states in such manner as the legislature may provide, with the approval of the Secretary of the Interior; *provided*, that the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act, until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain.

§ 11. That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislatures shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

§ 12. That upon the admission of each of said states into the Union, in accordance with the provisions of this act, fifty sections of the unappropriated public lands within said states, to be selected and located in legal subdivisions, as provided in section ten of this act, shall be and are hereby granted to said states for the purpose of

erecting public buildings at the capital of said states for legislative, executive, and judicial purposes.

§ 13. That five per centum of the proceeds of the sales of public lands lying within said states which shall be sold by the United States subsequent to the admission of said states into the Union, after deducting all the expenses incident to the same, shall be paid to the said states, to be used as a permanent fund, the interest of which only shall be expended for the support of common schools within said states respectively.

§ 14. That the lands granted to the territories of Dakota and Montana by the act of February eighteenth, eighteen hundred and eighty-one, entitled "An act to grant lands to Dakota, Montana, Arizona, Idaho, and Wyoming for university purposes," are hereby vested in the states of South Dakota, North Dakota, and Montana, respectively, if such states are admitted into the Union, as provided in this act, to the extent of the full quantity of seventy-two sections to each of said states, and any portion of said lands that may not have been selected by either of said territories of Dakota or Montana may be selected by the respective states aforesaid; but said act of February eighteenth, eighteen hundred and eighty-one, shall be so amended as to provide that none of said lands shall be sold for less than ten dollars per acre, and the proceeds shall constitute a permanent fund to be safely invested and held by said states severally, and the income thereof be used exclusively for university purposes. And such quantity of the lands authorized by the fourth section of the act of July seventeenth, eighteen hundred and fifty-four, to be reserved for university purposes in the territory of Washington, as, together with the lands confirmed to the vendees of the territory by the act of March fourteenth, eighteen hundred and sixty-four, will make the full quantity of seventy-two entire sections, are hereby granted in the like manner to the state of Washington for the purposes of a university in said state. None of the lands granted in this section shall be sold at less than ten dollars per acre; but said lands may be leased in the same manner as provided in section eleven of this act. The schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said states respectively, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be used for the support of any sectarian or denominational school, college, or university. The section of land granted by the act of June sixteenth, eighteen hundred and eighty, to the territory of Dakota, for an asylum for the insane, shall, upon the admission of said state of South Dakota into the Union, become the property of said state.

§ 15. That so much of the lands belonging to the United States as



have been acquired and set apart for the purpose mentioned in "An act appropriating money for the erection of a penitentiary in the territory of Dakota," approved March second, eighteen hundred and eighty-one, together with the buildings thereon, be, and the same is, hereby granted, together with any unexpended balances of the moneys appropriated therefor by said act, to said state of South Dakota for the purposes therein designated; and the states of North Dakota and Washington shall respectively have like grants for the same purpose and subject to like terms and conditions, as provided in said act of March second, eighteen hundred and eighty-one, for the territory of Dakota. The penitentiary at Deer Lodge City, Montana, and all lands connected therewith and set apart and reserved therefor, are hereby granted to the state of Montana.

§ 16. That ninety thousand acres of land, to be selected and located as provided in section ten of this act, are hereby granted to each of said states, except to the state of South Dakota, to which one hundred and twenty thousand acres are granted for the use and support of agricultural colleges in said states, as provided in the acts of Congress making donations of lands for such purpose.

§ 17. That in lieu of the grant of land for purposes of internal improvement made to new states by the eighth section of the act of September fourth, eighteen hundred and forty-one, which act is hereby repealed as to the states provided for by this act, and in lieu of any claim or demand by the said states, or either of them, under the act of September twenty-eighth, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, making a grant of swamp and overflowed lands to certain states, which grant it is hereby declared is not extended to the states provided for in this act, and in lieu of any grant of saline lands to said states, the following grants of land are hereby made, to wit:—

To the state of South Dakota: For the school of mines, forty thousand acres; for the reform school, forty thousand acres; for the deaf and dumb asylum, forty thousand acres; for the agricultural college, forty thousand acres; for the university, forty thousand acres; for state normal schools, eighty thousand acres; for public buildings at the capital of said state, fifty thousand acres; and for such other educational and charitable purposes as the legislature of said state may determine, one hundred and seventy thousand acres; in all, five hundred thousand acres.

To the state of North Dakota: A like quantity of land as is in this section granted to the state of South Dakota, and to be for like purposes and in like proportion, as far as practicable.

To the state of Montana: For the establishment and maintenance of a school of mines, one hundred thousand acres; for state normal

**schools, one hundred thousand acres; for agricultural colleges, in addition to the grant hereinbefore made for that purpose, fifty thousand acres; for the establishment of a state reform school, fifty thousand acres; for the establishment of a deaf and dumb asylum, fifty thousand acres; for public buildings at the capital of the state, in addition to the grant hereinbefore made for that purpose, one hundred and fifty thousand acres.**

**To the state of Washington: For the establishment and maintenance of a scientific school, one hundred thousand acres; for state normal schools, one hundred thousand acres; for public buildings at the state capital, in addition to the grant hereinbefore made for that purpose, one hundred thousand acres; for state charitable, educational, penal, and reformatory institutions, two hundred thousand acres.**

**That the states provided for in this act shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act. And the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective states may severally provide.**

**§ 18. That all mineral lands shall be exempted from the grants made by this act. But if sections sixteen and thirty-six, or any subdivision or portion of any smallest subdivision thereof in any township, shall be found by the Department of the Interior to be mineral lands, said states are hereby authorized and empowered to select, in legal subdivisions, an equal quantity of other unappropriated lands in said states in lieu thereof, for the use and the benefit of the common schools of said states.**

**§ 19. That all lands granted in quantity or as indemnity by this act shall be selected under the direction of the Secretary of the Interior, from the surveyed, unreserved, and unappropriated public lands of the United States within the limits of the respective states entitled thereto. And there shall be deducted from the number of acres of land donated by this act for specific objects to said states the number of acres in each heretofore donated by Congress to said territories for similar objects.**

**§ 20. That the sum of twenty thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the treasury not otherwise appropriated, to each of said territories for defraying the expenses of the said conventions, except to Dakota, for which the sum of forty thousand dollars is so appropriated, twenty thousand dollars each for South Dakota and North Dakota, and for the payment of the members thereof, under the same rules and regulations and at the same rates as are now provided by law for the payment of the territorial legislatures. Any money hereby appropriated not neces-**

sary for such purpose shall be covered into the treasury of the United States.

§ 21. That each of said states, when admitted as aforesaid, shall constitute one judicial district, the names thereof to be the same as the names of the states, respectively; and the circuit and district courts therefor shall be held at the capital of such state for the time being, and each of said districts shall, for judicial purposes until otherwise provided, be attached to the eighth judicial circuit, except Washington and Montana, which shall be attached to the ninth judicial circuit. There shall be appointed for each of said districts one district judge, one United States attorney, and one United States marshal. The judge of each of said districts shall receive a yearly salary of three thousand five hundred dollars, payable in four equal installments, on the first days of January, April, July, and October of each year, and shall reside in the district. There shall be appointed clerks of said courts in each district, who shall keep their offices at the capital of said state. The regular terms of said courts shall be held in each district, at the place aforesaid, on the first Monday in April and the first Monday in November of each year, and only one grand jury and one petit jury shall be summoned in both said circuit and district courts. The circuit and district courts for each of said districts, and the judges thereof, respectively, shall possess the same powers and jurisdiction, and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations. The marshal, district attorney, and clerks of the circuit and district courts of each of said districts, and all other officers and persons performing duties in the administration of justice therein, shall severally possess the powers and perform the duties lawfully possessed and required to be performed by similar officers in other districts of the United States; and shall, for the services they may perform, receive the fees and compensation allowed by law to other similar officers and persons performing similar duties in the state of Nebraska.

§ 22. That all cases of appeal or writ of error heretofore prosecuted and now pending in the supreme court of the United States upon any record from the supreme court of either of the territories mentioned in this act, or that may hereafter lawfully be prosecuted upon any record from either of said courts, may be heard and determined by said supreme court of the United States. And the mandate of execution or of further proceedings shall be directed by the supreme court of the United States to the circuit or district court hereby established within the state succeeding the territory from which such record is or may be pending, or to the supreme court of such state, as the nature of the case may require; *provided*, that the mandate of execution or of further



proceedings shall, in cases arising in the territory of Dakota, be directed by the supreme court of the United States to the circuit or district court of the district of South Dakota, or to the supreme court of the state of South Dakota, or to the circuit or district court of the district of North Dakota, or to the supreme court of the state of North Dakota, or to the supreme court of the territory of North Dakota, as the nature of the case may require. And each of the circuit, district, and state courts herein named shall, respectively, be the successor of the supreme court of the territory, as to all such cases arising within the limits embraced within the jurisdiction of such courts, respectively, with full power to proceed with the same, and award mesne or final process therein; and that from all judgments and decrees of the supreme court of either of the territories mentioned in this act, in any case arising within the limits of any of the proposed states prior to admission, the parties to such judgment shall have the same right to prosecute appeals and writs of error to the supreme court of the United States as they shall have had by law prior to the admission of said state into the Union.

§ 23. That in respect to all cases, proceedings, and matters now pending in the supreme or district courts of either of the territories mentioned in this act at the time of the admission into the Union of either of the states mentioned in this act, and arising within the limits of any such state, whereof the circuit or district courts by this act established might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases, the said circuit and district courts, respectively, shall be the successors of said supreme and districts courts of said territory; and in respect to all other cases, proceedings, and matters pending in the supreme or district courts of any of the territories mentioned in this act at the time of the admission of such territory into the Union, arising within the limits of said proposed state, the courts established by such state shall, respectively, be the successors of said supreme and district territorial courts; and all the files, records, indictments, and proceedings relating to any such cases shall be transferred to such circuit, district, and state courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause, or proceeding now pending, or that prior to the admission of any of the states mentioned in this act shall be pending in any territorial court in any of the territories mentioned in this act, shall abate by the admission of any such state into the Union, but the same shall be transferred and proceeded with in the proper United States circuit, district, or state court, as the case may be; *provided, however,* that in all civil actions, causes, and proceedings in which the United States is not a party, transfers shall not be made to the

circuit and district courts of the United States, except upon written request of one of the parties to such action or proceeding filed in the proper court; and in the absence of such request, such cases shall be proceeded with in the proper state courts.

§ 24. That the constitutional conventions may, by ordinance, provide for the election of officers for full state governments, including members of the legislatures and Representatives in the fifty-first Congress; but said state governments shall remain in abeyance until the states shall be admitted into the Union, respectively, as provided in this act. In case the constitution of any of said proposed states shall be ratified by the people, but not otherwise, the legislature thereof may assemble, organize, and elect two Senators of the United States; and the governor and secretary of state of such proposed state shall certify the election of the Senators and Representatives in the manner required by law; and when such state is admitted into the Union, the Senators and Representatives shall be entitled to be admitted to seats in Congress, and to all the rights and privileges of Senators and Representatives of other states in the Congress of the United States; and the officers of the state governments formed in pursuance of said constitutions, as provided by the constitutional conventions, shall proceed to exercise all the functions of such state officers; and all laws in force made by said territories, at the time of their admission into the Union, shall be in force in said states, except as modified or changed by this act or by the constitutions of the states, respectively.

§ 25. That all acts or parts of acts in conflict with the provisions of this act, whether passed by the legislatures of said territories or by Congress, are hereby repealed.

# CONSTITUTION OF THE STATE OF WASHINGTON.

## PREAMBLE.

### ARTICLE I.

#### DECLARATION OF RIGHTS.

- § 1. All power inherent in the people — Source and object of power in government.
- § 2. Recognition of United States constitution as supreme law.
- § 3. Protection of life, liberty, and property.
- § 4. The right of petition and assemblage
- § 5. Freedom of speech and of the press.
- § 6. Mode of administering oaths.
- § 7. Home and private affairs protected.
- § 8. Privileges and franchises restricted.
- § 9. Rights of accused in criminal cases.
- § 10. Administration of justice to be open and speedy.
- § 11. Freedom of conscience — Religious worship or instruction not to be supported by the state — No religious qualification for public employment — Jurors and witnesses not to be questioned touching religious opinion.
- § 12. Special privileges never to be granted.
- § 13. Guaranty of the privilege of the writ of *habeas corpus*.
- § 14. Excessive bails, excessive fines, and cruel punishment forbidden.
- § 15. No conviction to work corruption of blood nor forfeiture.
- § 16. Of taking or damaging private property for public use — Question of public use a judicial question.
- § 17. Of imprisonment for debt.
- § 18. Subordination of military to civil power.
- § 19. Elections to be free and equal, and no military interference with them.
- § 20. All crimes, except capital, bailable.
- § 21. Of the right of trial by jury.
- § 22. Of the right of the accused in criminal prosecutions.
- § 23. Bills of attainder, *ex post facto* laws, and laws impairing contracts forbidden.
- § 24. Of the right to bear arms.
- § 25. Information may be substituted for indictment.
- § 26. No grand jury without order of superior judge.
- § 27. Definition and punishment of treason.
- § 28. Granting of hereditary emoluments and privileges prohibited.

- § 29. This constitution mandatory.
- § 30. Of rights retained by the people.
- § 31. No standing army to be kept in time of peace — No soldier to be quartered in private house, without consent of owner.
- § 32. Importance of fundamental principles.

### ARTICLE II.

#### LEGISLATIVE DEPARTMENT.

- § 1. Legislative power, where vested.
- § 2. Constitution of house of representatives and senate.
- § 3. Legislature to provide for enumerations.
- § 4. Election of members of the house, and their terms of office.
- § 5. First election of representatives under this constitution.
- § 6. Senators to be elected by single districts — Term of office four years — Half retire every second year — Numbering of senatorial districts — Allotment of senators chosen at first election.
- § 7. Only qualified voter eligible to the legislature.
- § 8. Powers of the houses over their members.
- § 9. Powers of the houses over their own procedure.
- § 10. Each house to elect its own officers — Lieutenant-governor, when presiding, has casting vote.
- § 11. Each house to keep a journal, and to sit with open doors — Adjournments.
- § 12. Time of meeting of the legislature — Duration of sessions.
- § 13. Members of legislature ineligible to other office.
- § 14. Officers of other governments ineligible to the legislature — Effect of accepting other office by members.
- § 15. Vacancies in the legislature, how filled.
- § 16. Privileges of members with regard to legal process.
- § 17. Privileges of members with regard to debate.
- § 18. Style of laws.
- § 19. Of the titles to acts of the legislature.
- § 20. Bills may originate in either house.
- § 21. Yeas and nays, when demandable.
- § 22. Number of votes necessary to pass bill.
- § 23. Compensation of members.
- § 24. Legislature never to authorize lottery, nor grant divorce.



- § 25. No extra compensation for public service to be granted, and compensation of public officer not to be changed during his term.
- § 26. Of suits against the state.
- § 27. Elections by the legislature, how conducted.
- § 28. Express restrictions upon special legislation.
- § 29. Contract labor by convicts prohibited.
- § 30. Bribery and corrupt solicitation prohibited — Persons convicted of these offenses disfranchised.
- § 31. Laws not to take effect until ninety days after adjournment, except in emergency — Emergency must be declared by a two-thirds vote.
- § 32. Bills must be signed by presiding officers of both houses.
- § 33. Ownership of land by aliens, to what extent permitted — Who are aliens.
- § 34. Bureau of statistics.
- § 35. Protection of minors and factory employees.
- § 36. No bill to be considered unless introduced ten days before adjournment, except by two-thirds vote.
- § 37. Revisory and amendatory act must set out act revised or section amended.
- § 38. Scope of bills not to be changed by amendment.
- § 39. Officers of this state forbidden to use railroad passes.

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## THE EXECUTIVE.

- § 1. Of whom the executive department consists, and how they shall be chosen.
- § 2. Supreme executive power vested in the governor — His term of office four years.
- § 3. Terms of office of the other executive officers.
- § 4. Returns of elections of executive officers, to whom made and how canvassed — Contests to be decided by the legislature — Commencement of terms of office.
- § 5. The governor may require information from other officers — Must see that the laws are executed.
- § 6. Messages of the governor.
- § 7. May convene the legislature upon extraordinary occasions.
- § 8. The governor is commander-in-chief of the military of the state.
- § 9. The governor has the pardoning power, but subject to regulation and restriction by law.
- § 10. When duties of governor devolve upon lieutenant-governor — When upon the secretary of state.
- § 11. Power of governor to remit fines and forfeitures — Must report reprieves, commutations, pardons, and remission of fines, and the reason therefor.
- § 12. Regulation of the governor's veto power.
- § 13. Governor to fill vacancies during recess of the legislature, and also where no provision is made for filling otherwise.
- § 14. Salary of governor.
- § 15. Official commissions, how signed and attested.
- § 16. Lieutenant-governor to preside over senate — His further duties — His salary.
- § 17. Duties and salary of the secretary of state.
- § 18. Of the seal of state.
- § 19. The duties and salary of the state treasurer.
- § 20. Of the duties and salary of the state auditor.
- § 21. Of the duties and salary of the attorney-general.
- § 22. Of the duties and salary of the superintendent of public instruction.
- § 23. Of the duties and compensation of the commissioner of public lands.
- § 24. The records, books, and papers relating to the state offices to be kept at the seat of government — Governor, secretary of state, treasurer, and auditor to reside at seat of government.
- § 25. What persons ineligible to state offices — Compensation of state officers not to be changed during their term — Legislature may abolish offices of lieutenant-governor, auditor, and commissioner of public lands.

## ARTICLE IV.

## THE JUDICIARY.

- § 1. The judicial power, where vested.
- § 2. The supreme court to consist of five judges — Always to be open — Decisions to be in writing — Number of judges may be increased.
- § 3. Election and allotment of the judges of the supreme court — Who to be chief justice — Terms of office — Vacancies, how filled.
- § 4. Jurisdiction of the supreme court.
- § 5. Organization of the superior court — Election of judges thereof — Their terms of office — Vacancies, how filled.
- § 6. Jurisdiction of the superior court.
- § 7. Judge of superior court may hold court in any county — Judges *pro tempore* by agreement.
- § 8. Judicial officer not to absent himself without leave.
- § 9. Proceedings to remove judge, attorney-general, or prosecuting attorney for misconduct or incompetency.
- § 10. Of the office and jurisdiction of justices of the peace.
- § 11. What courts shall be courts of record.
- § 12. Power to prescribe jurisdiction of inferior courts.
- § 13. Of the compensation of judicial officers generally.
- § 14. Of the salaries of supreme and superior judges.
- § 15. Judges not to exercise any other public employment.
- § 16. Judges not to charge juries with respect to facts, but must declare the law.
- § 17. Who eligible to the office of supreme or superior judge.
- § 18. Supreme court reporter — His appointment, tenure of office, and salary.
- § 19. Judges not to practice law.
- § 20. Cases must be decided within ninety days after submission.
- § 21. Provision to be made for publishing opinions of the supreme court.
- § 22. Clerk of the supreme court — His appointment, tenure of office, and compensation.
- § 23. Commissioners of the superior court — Their appointment and powers.
- § 24. Superior court judges to prescribe uniform rules.
- § 25. Judges to report defects in the laws.
- § 26. Clerk of the superior court.
- § 27. Style of process.
- § 28. Oath of office to be taken by judges.

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IMPEACHMENT.

- § 1. House of representatives to have sole power of impeachment—Senate to try impeachments—Proceedings under impeachment.
- § 2. What officers subject to impeachment—Effect of conviction or acquittal.
- § 3. Officers not liable to impeachment may be removed for misconduct.

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ELECTIONS AND ELECTIVE RIGHTS.

- § 1. Who are qualified electors.
- § 2. Legislature may confer right on women as to school elections.
- § 3. Idiots, insane persons, and criminals excluded.
- § 4. Residence for purpose of voting.
- § 5. Privileges of voters while attending elections.
- § 6. Voting must be by ballot.
- § 7. Provision for registration law.
- § 8. Time of holding elections.

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- § 1. What property must be taxed—Taxes for state expenses and state debt.
- § 2. Taxation must be uniform—Deductions and exemptions.
- § 3. Corporate property, how to be taxed.
- § 4. Corporate property not to be exempted by contract with state.
- § 5. Laws imposing tax must state the object of the levy.
- § 6. Taxes for state purposes to be paid in money only.
- § 7. Statement of receipts and expenditures to be published annually.
- § 8. Taxes to be levied for deficiencies.
- § 9. Special assessments for local improvements in cities.

ARTICLE VIII.

STATE, COUNTY, AND MUNICIPAL INDEBTEDNESS.

- § 1. Limitation upon power of state to contract debts.
- § 2. Indefinite amount in certain emergencies.
- § 3. Every debt to be for a single object—Power to contract debt subject to vote of people—Publication of proposed law before election upon it.
- § 4. Moneys not to be paid out without previous appropriation—Appropriations not to extend beyond two years—Object of appropriation to be distinctly set forth.
- § 5. State not to lend its credit.
- § 6. Limitations upon municipal indebtedness—Provision for payment of same—Restrictions upon same as to object.
- § 7. Counties and municipal corporations not to lend their credit.

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- § 1. Duty of state to provide for education.
- § 2. What the public schools include—To what schools common-school fund applicable.
- § 3. Common-school fund to be irreducible—From what sources derived.
- § 4. Schools to be free from sectarian control.
- § 5. Losses to the school fund to be made good.

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- § 1. Who liable to military duty.
- § 2. Organization, discipline, and command of the militia.
- § 3. Provision for soldiers' home.
- § 4. Keeping of public arms.
- § 5. Privileges of militia-men during attendance at musters and elections.
- § 6. Exemptions from military duty.

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COUNTY, CITY, AND TOWNSHIP ORGANIZATION.

- § 1. Recognition of existing counties.
- § 2. Restrictions upon power to remove county seats.
- § 3. Establishment of new counties—Division of counties.
- § 4. County governments to be uniform—Township organization may be organized by voters.
- § 5. Legislature to provide uniform laws for election of county officers—Their compensation to be in proportion to their duties—Strict accountability to be required of them.
- § 6. Vacancies in county offices, how filled.
- § 7. Eligibility confined to two terms.
- § 8. Compensation of county officers.
- § 9. No county to be released from its state taxes.
- § 10. Municipal corporations to be created by general law only—Cities and towns previously organized may adopt general charter—Cities of twenty thousand may frame their own charters—Proceedings for this purpose—Amendments to such charters.
- § 11. Power of municipal corporations over their local affairs.
- § 12. Legislature cannot impose taxes for local purpose, but may vest this power in corporate authorities.
- § 13. Private property not to be taken for corporate debt.
- § 14. Officers not to use public funds.
- § 15. Custody of moneys of municipal corporations.

ARTICLE XII.

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- § 1. To be formed under general laws only.
- § 2. Certain charters declared invalid.
- § 3. Franchises not to be extended by legislature.
- § 4. Liability of stockholders.
- § 5. What the term "corporation" includes.
- § 6. Fictitious stock and bonds prohibited—Increase of stock.
- § 7. Conditions on which foreign corporations may do business in this state.
- § 8. Liability of corporations not to be shuffled off.
- § 9. State to have no pecuniary interest in corporations.
- § 10. Corporate property subject to right of eminent domain.
- § 11. Corporations not to put in circulation as money anything but lawful money—Liability of stockholders of banking corporations.
- § 12. Personal responsibility of officers of insolvent banks.
- § 13. All transportation companies declared common carriers—Their rights over connecting lines—Their right to make connection with other lines—Must carry without discrimination.

- § 14. Combinations to share earnings are forbidden.
- § 15. Carriers must not discriminate as to rates.
- § 16. Railroad companies not to consolidate with competing companies.
- § 17. Rolling stock to be taxed as personal property.
- § 18. Legislature to fix rates of freight and fare.
- § 19. Telegraph and telephone companies must receive and forward each others' messages— Their rights along railways— Right of eminent domain extended to such companies.
- § 20. Passes to public officers forbidden.
- § 21. Duties of railway companies toward express companies.
- § 22. Monopolies and trusts forbidden.

**ARTICLE XIII.****STATE INSTITUTIONS.**

- § 1. Duty of the state to provide for defectives— Regents of such institutions to be appointed by the governor, with consent of the senate.

**ARTICLE XIV.****SEAT OF GOVERNMENT.**

- § 1. Location must be determined by vote of the people— Method of determining the location.
- § 2. Once located, not to be removed without two-thirds vote of the people.
- § 3. No appropriation for capitol buildings till seat of government located.

**ARTICLE XV.****HARBORS AND TIDE-WATERS.**

- § 1. Commission to establish harbor line— State not to dispose of water front.
- § 2. Leasing wharfage rights.
- § 3. Streets over tide-lands.

**ARTICLE XVI.****SCHOOL AND GRANTED LANDS.**

- § 1. All public lands held in trust.
- § 2. Sale of lands granted for educational purposes.
- § 3. Restrictions upon sale of school lands.
- § 4. Further restrictions on sale of public lands.
- § 5. School funds never to be loaned to private persons or corporations.

**ARTICLE XVII.****TIDE-LANDS.**

- § 1. Assertion of state's title— Vested rights protected.
- § 2. Disclaimer of titles to patented lands.

**ARTICLE XVIII.****STATE SEAL.**

- § 1. Device of the seal.

**ARTICLE XIX.****EXEMPTIONS.**

- § 1. Homestead to be protected by law.

**ARTICLE XX.****PUBLIC HEALTH AND VITAL STATISTICS.**

- § 1. Board of health and bureau of vital statistics to be created.
- § 2. Legislature required to regulate practice of medicine, surgery, and sale of drugs.

**ARTICLE XXI.****WATER AND WATER RIGHTS.**

- § 1. Use of water for irrigation declared a public use.

**ARTICLE XXII.****LEGISLATIVE APPOINTMENT.**

- § 1. Senatorial districts and allotment of senators.
- § 2. Allotment of representatives.

**ARTICLE XXIII.****AMENDMENTS.**

- § 1. Amendments may be proposed by either branch of legislature— Proceedings thereafter.
- § 2. Convention may be called to revise or amend— Proceedings thereupon.
- § 3. All constitutions require ratification by the people.

**ARTICLE XXIV.****BOUNDARIES.**

- § 1. Boundaries of the state defined.

**ARTICLE XXV.****JURISDICTION.**

- § 1. Consent of state to federal jurisdiction over reserved land.

**ARTICLE XXVI.****COMPACT WITH UNITED STATES.**

- § 1. Religious toleration to be always secured.
- § 2. Disclaimer of right to public land— Taxation to be without discrimination against non-residents— United States property not to be taxed.
- § 3. State assumes debt of territory.
- § 4. Public schools to be non-sectarian.

**ARTICLE XXVII.****SCHEDULE.**

- § 1. Existing rights saved.
- § 2. Territorial laws are laws of state.
- § 3. Liabilities to territory inure to state.
- § 4. Other rights of the territory pass to the state.
- § 5. Criminal actions arising in territory to be prosecuted in name of the state— Pending actions to be completed in state courts.
- § 6. Territorial officers become temporarily state officers.
- § 7. Time for election of state officers.
- § 8. Transfer of causes from territorial to state courts.
- § 9. Devices of seals of courts and counties.
- § 10. Probate business to go into superior court— Office of probate judge to cease.
- § 11. Election of certain officers to be provided for.
- § 12. Contested election for superior judge, how determined.
- § 13. Representative in Congress, how elected.
- § 14. District officers to hold over to 1891.
- § 15. Manner of conducting election for voting on this constitution.
- § 16. When this constitution goes into effect.
- § 17. Separate articles submitted for woman suffrage and prohibition.
- § 18. Form of ballot to be used in the election.



[This constitution was framed by a convention of seventy-five delegates, chosen by the people of the Territory of Washington at an election held May 14, 1889, under § 3 of the Enabling Act. The convention met at Olympia on the fourth day of July, 1889, and adjourned on the twenty-second day of August, 1889. The constitution was ratified by the people at an election held on October 1, 1889, and on November 11, 1889, in accordance with § 8 of the Enabling Act, the President of the United States proclaimed the admission of the state of Washington into the Union.]

## PREAMBLE.

We the people of the state of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution.

## ARTICLE I.

### DECLARATION OF RIGHTS.

§ 1. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

§ 2. The constitution of the United States is the supreme law of the land.

**A treaty** is the supreme law of the land; and is as binding on the courts as an act of Congress: *United States v. The Peggy*, 1 Cranch, 103.

Every treaty made by authority of the United States is superior to the constitution and laws of any individual state: *Hauenstein v. Lynham*, 100 U. S. 483.

§ 3. No person shall be deprived of life, liberty, or property without due process of law.

**Due process of law** is simply the ordinary course of law in cases of the same kind: *Ex parte Wall*, 107 U. S. 265; *Weimer v. Banbury*, 30 Mich. 201.

Due process of law in a state is regulated by the law of the state: *Walker v. Sauvinet*, 92 U. S. 90.

§ 4. The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

**A meeting of the people** having a tendency to force and violence, or any apparent tendency thereto, or such as to inspire terror, as being armed, making threatening and violent

speeches, and the like, is unlawful: 2 Wharton's Crim. Law, 8th ed., 1539; *State v. Stran*, 33 Me.; *Rex v. Hughes*, 4 Car. & P. 373.

§ 5. Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

**Every publication**, by writing, printing, or pictures, charging upon or imputing to any person that which renders him liable to punishment, or is calculated to make him infamous,

odious, or ridiculous is libelous *prima facie*, and implies malice in the author or publisher: *White v. Nicholls*, 3 How. 266; *Lansing v. Carpenter*, 9 Wis. 540.

§ 6. The mode of administering an oath or affirmation shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath or affirmation may be administered.

**Any mode of swearing a witness** which he believes binding on his conscience is good

at common law: *Gill v. Calwell*, 27 Breese; *McKinney v. People*, 2 Gill (Ill.) 540.

§ 7. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**Home.** — Mere speaking of a place as a home, without any act showing an intention to return to it, amounts to nothing; but if the acts and language concur and are continued for

many years, they are conclusive: *Pennsylvania v. Ravenal*, 21 How. 103.

The home of a person occupying it is his domicile: *Mitchell v. United States*, 21 Wall. 350.

§ 8. No law granting irrevocably any privilege, franchise, or immunity shall be passed by the legislature.

§ 9. No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

**Twice in jeopardy.** — A person who commits an act which is an offense against both the United States, and the state in which it is committed, commits two offenses; and his acquittal or conviction under the laws of the one cannot be pleaded as a defense to a prosecution by the other. Though one act, it is two offenses: *United States v. Barnhart*, 10 Saw. 491.

If the jurisdiction of the state and federal courts be concurrent, the sentence of either court, either of conviction or acquittal, may be

pleaded in bar of the prosecution before the other: *Houston v. Moore*, 5 Wheat. 1.

The discharge of the jury from giving a verdict, without the consent of the prisoner, the jury being unable to agree, is not a bar to a subsequent trial for the same offense: *United States v. Perez*, 9 Wheat. 579.

Prosecution by one nation for a crime against the law of nations is a bar to a prosecution by another nation: *United States v. Pirates*, 5 Wheat. 197.

§ 10. Justice in all cases shall be administered openly and without unnecessary delay.

§ 11. Absolute freedom of conscience in all matters of religious sentiment, belief, and worship shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion, but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

**Freedom of conscience in religious matters** does not imply freedom to commit crimes against the laws of the land, under the influence of religious belief, or the doctrines of the church: *United States v. Reynolds*, 98 U. S. 145.

Religious belief cannot be accepted as a justification for the commission of an act made criminal by the law of the land: *Id.*

A man cannot excuse his practices which are in violation of law because of his religious belief. To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every individual to become a law unto himself. Government could exist only in name under such circumstances: *Id.*

§ 12. No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.

**The right of citizens to vote** shall not be denied or abridged by the United States, or by any state, on account of race, color, or pre-

vious condition of servitude: *Amendments to Constitution of United States*, art. 15.

§ 13. The privilege of the writ of *habeas corpus* shall not be suspended, unless in case of rebellion or invasion the public safety requires it.

**Habeas corpus.** — Under this section in the United States constitution, where the same

language is used, it is the Congress, and not the President, that is to determine when the public



safety requires the suspension of the writ: *Ex parte Merriman*, Taney, 253; *McCall v. McDowell*, Deady, 259.

A state court or judge authorized by the laws to issue *habeas corpus* may issue it in any case

where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States: *Ableman v. Booth*, 21 How. 506.

§ 14. Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

**Disfranchisement of a citizen** is not excessive or cruel punishment: *Barber v. People*, 20 Johns. 459; *James v. Commonwealth*, 12 Serg. & R. 220. Nor is flogging cruel: *Garcia v. Territory*, 1 N. Mex. 415; *United States v. Collins*, 2 Curt. 194.

Whether a statute restricting the diet of

prisoners to bread and water for fifteen days would be cruel and unusual punishment, *quære*: *Johnson v. Waukasha County*, 64 Wis. 288.

Imprisonment for two years is not objectionable as cruel or unusual punishment for wife-beating: *State v. Pettie*, 30 Am. Rep. 88.

§ 15. No conviction shall work corruption of blood nor forfeiture of estate.

§ 16. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public.

**Private property** cannot, in absence of constitutional provision, be taken for private use against the will of the owner, though compensation be provided: *Osborne v. Hart*, 24 Wis. 89; *Witham v. Osburn*, 4 Or. 318.

**Flooding land**, by artificial obstructions to the flow of a stream, is taking it within the meaning of this provision: *Armand v. Green Bay Canal Co.*, 31 Wis. 316; and generally, any act by which the owner is deprived of the free use of it is taking it: *Pittigrew v. Evansville*, 25 Id. 223.

**Just compensation** being the condition precedent, any act of the legislature providing for taking, without provision for compensation, is void: *Conn. Riv. R. Co. v. County Comm'rs*, 127 Mass. 50; 34 Am. Rep. 338; *Sherman v. Milwaukee etc. R'y*, 40 Wis. 645.

And a provision for maintaining action for compensation is not a sufficient provision for compensation: *Newell v. Smith*, 15 Wis. 101.

A statute authorizing the owner of land to erect and maintain thereon a mill and mill-dam upon and across any navigable stream, upon paying to the owners of lands which are thereby caused to be flowed such damages as may be

assessed in a judicial proceeding, does not deprive such owners of their property without due process of law: *Head v. Amoskeag Man. Co.*, 113 U. S. 9.

The inhibition found in all the constitutions against the taking of private property for public use without compensation does not protect against damaging it without taking it; and it is to remedy this manifest wrong and injustice that the words "or damaged" are inserted. The effect of this section is to declare that private property shall not be invaded for public use, unless the owner receives compensation: *Johnson v. Parkersburg*, 16 W. Va. 402; 37 Am. Rep. 779; *Pekin v. Brexton*, 67 Ill. 477; 16 Am. Rep. 629; *Pekin v. Winkle*, 77 Ill. 56; *Elgin v. Eaton*, 83 Id. 535.

Where a city government changes the grade of a street, after an abutting land-owner has made his improvements in conformity to a grade previously established, and thus injures the property of such abutting owner, this provision is violated, and an action lies for damages: *Johnson v. Parkersburg*, 16 W. Va. 402; 37 Am. Rep. 779.

It is for the courts to determine whether or



not the use for which property is sought to be taken is a public use: *Coster v. Tide Water Co.*, 18 N. J. Eq. 54; *Tyler v. Beacher*, 44 Vt. 648.

Land over which a highway is laid is not taken for public use until the highway is opened by proper authority: *State ex rel. v. James*, 4 Wis. 408.

The constitution contemplates a proceeding in court in all cases of taking private property for public use without consent of the owner. All other methods are excluded. The owner has the right to a trial by jury for ascertaining the compensation to which he is entitled: *Weber v. Santa Clara County*, 59 Cal. 265.

§ 17. There shall be no imprisonment for debt except in cases of absconding debtors.

The word "debt" does not include a demand founded on a tort or penalty for violating a statute: *United States v. Walsh*, Deady, 285; *Hanson v. Fowler*, 1 Saw. 497; *Norman v. Manciet*, 1 Id. 484.

An absconding debtor is one who is about to leave the state secretly or openly without intention of returning, and with-

out fulfilling his obligations to his creditors, "leaving debts behind him unsatisfied": *Norman v. Manciet*, 1 Saw. 484.

Imprisonment of debtor in a manner or under circumstances not fully warranted by the constitution cannot be authorized by statute: *Ex parte Grace*, 12 Iowa, 208; 79 Am. Dec. 529.

§ 18. The military shall be in strict subordination to the civil power.

Martial law cannot arise from a threatened invasion; the necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration: *Ex parte Milligan*, 4 Wall. 2

A state government may declare martial

law so far as is necessary to put down an armed insurrection too strong to be controlled by the civil authority; and the state itself must determine the degree of force which the crisis demands: *Luther v. Borden*, 7 How. 1.

§ 19. All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Race, color, or servitude.—The Fifteenth Amendment to the constitution of the United States prevents the state or the United States from discriminating on account of race, color, or previous condition of servitude, and

invests citizens with a new constitutional right which Congress may protect by appropriate legislation: *United States v. Reese*, 92 U. S. 214; *United States v. Cruikshank*, 92 Id. 542.

§ 20. All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident, or the presumption great.

Bail.—In all other than capital cases, and in all capital cases where the guilt is not evident or the presumption great, defendant is entitled to bail as a matter of right, which no court can properly refuse: *People v. Tinder*, 19 Cal. 539.

The constitution, in declaring bail to be a matter of right, contemplates only those cases where the party has not been already convicted: *Ex parte Voll*, 41 Cal. 29.

The danger of escape increases in proportion to the severity of the impending punishment and the danger of conviction; and in determining the question of accepting bail and the amount thereof, these two elements should be taken into consideration: 1 Bishop's Crim. Proc., sec. 255; *People v. Cunningham*, 3 Park. Cr. 520; *People v. Van Horne*, 8 Barb. 158.

In determining an application for admission to bail, the principal consideration being the question of probable guilt, the court or judge will look into the depositions taken before the coroner, also by the committing magistrate: 1 Bishop's Crim. Proc., sec. 257; *Re v. Horner*, 1 Leach C. C., 4th ed., 270; *State v. Den*, Tayl. 142.

So, also, testimony of witnesses before grand jury: *Ex parte Bramer*, 37 Tex. 1; *Street v. State*, 43 Miss. 1.

Payment by the sureties of their recognizance, in criminal cases, though it discharges the bail, does not discharge the obligation of the principal to appear in court; that obligation still remains, and the principal may at any time be retaken and brought into court: *United States v. Ryder*, 110 U. S. 729.

§ 21. The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

[*Quære*, Can a jury be waived in criminal cases? — Ed.]

The jury contemplated by this section is, except as otherwise specified, the jury as understood at the time of the adoption of the constitution, — the jury of twelve; and a law providing for a jury of a less number in cases not specified in the constitution is void for repugnance to the constitution: *Gaston v. Babcock*, 6 Wis. 503.

As to waiver of trial by jury in criminal cases, see Rapalje's Criminal Procedure, secs. 149, 150.

The right of trial by jury is not infringed by an order refusing a new trial on condition that prevailing party remit a part of the damages awarded him by the jury: *Arkansas v. Mann*, 130 U. S. 69.

This section does not require that a trial by jury shall be provided for equity cases: *Shields v. Thomas*, 18 How. 253; *Burton v. Barbour*, 104 U. S. 126.

Its application is only to those cases in which, at the time of the adoption of the constitution,

a jury could have been demanded: *Norton v. Rooker*, 1 Pinn. 195; *Board of Supervisors v. Dunning*, 20 Wis. 210.

A stipulation in writing that a cause be tried by the court is a waiver of a jury: *Bamberger v. Terry*, 103 U. S. 40. So, also, to submit a case on agreed facts: *Wayne County v. Kennicott*, 103 Id. 554.

The right to a trial by jury can be waived by express agreement in open court, and by implied consent: *Moncure v. Zunts*, 11 Wall. 416; *Kearney v. Case*, 12 Id. 275.

Where a party is present by counsel, and goes to trial before the court, without objection or exception, he has voluntarily waived his right to a trial by jury; but if not present by himself or counsel, it is error for the court to try the case without a jury: *Kearney v. Case*, 12 Wall. 275; *Morgan v. Guy*, 19 Id. 81.

Trial by jury is a fundamental guaranty of the rights and liberties of the people; consequently, every reasonable presumption should be indulged against its waiver: *Hodges v. Easton*, 106 U. S. 408.

§ 22. In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**Rights of the accused.** — The accused is informed of the "nature and cause" of the accusation, when he receives the indictment or information charging the offense according to the common law; and it is sufficient if the acts are stated according to their legal effect: *State v. Kirk*, 10 Or. 505.

The right to meet the witnesses face to face may be waived: *Williams v. State*, 61 Wis. 281; *Miller v. State*, 25 Id. 348.

To show the cause of death, on trial for murder, it is competent to give in evidence dying declarations of deceased made while not in *extremis* and fully conscious that he could not survive: *State v. Cameron*, 2 Pinn. 490; *State v. Dickinson*, 41 Wis. 299; *People v. Sligh*, 48 Mich. 54.

Depositions may be used on trial of criminal action, under stipulation of defendant waiving right to have the witness in court: *People v. Martin*, 52 Mich. 288; *State v. McO'Blennis*, 24 Mo. 402.

Speedy trial is one conducted according to fixed rules, regulations, and proceedings of

law, free from vexatious, capricious, and oppressive delays created by the ministers of justice: *Nixon v. State*, 2 Smedes & M. 497; *Commonwealth v. Carter*, 11 Pick. 277; Cooley on Constitutional Limitations, 382; *Ex parte Stanley*, 4 Nev. 113; *United States v. Stewart*, 2 Dall. 343.

A defendant is entitled to counsel to defend him; and if he is unable to employ counsel, the court will assign a member of the bar to that duty: *Carpenter v. Dane County*, 9 Wis. 274; *Dane County v. Smith*, 13 Id. 585.

When counsel has been assigned, a conviction will not be reversed on the ground that the selection was not made or approved by defendant, no objection being raised when assignment was made: *People v. Murray*, 52 Mich. 288.

As to jury, see art. 1, § 21, notes.

The accused is entitled to compulsory process to compel the attendance of witnesses in his behalf without payment or tender of fees: *West v. State*, 1 Wis. 281.

§ 23. No bill of attainder, *ex post facto* law, or law impairing the obligations of contracts shall ever be passed.

**Ex post facto.** — As to what are *ex post facto* laws, consult the notes under section 10 of

article 1 of the constitution of the United States.



A statute requiring the treasurer of an incorporated company to retain a certain percentage of the interest accruing on the company's bonds payable outside of the state, to persons residing outside the state, impairs the obligation of contracts: *Railway Company v. Pennsylvania*, 15 Wall. 300.

Laws existing when the contract is made, and in the place where it is made and to be performed, enter into and become a part of the contract; and a law enacted subsequently, impairing the obligation of the con-

tract as it existed under those laws, is repugnant to this provision and void: *Walker v. Whitehead*, 16 Wall. 314.

A state constitution which violates this provision is void: *Gunn v. Barry*, 15 Wall. 610.

An exemption from taxation granted to a railway company as an inducement to build its road cannot be taken away by subsequent legislative act: *Humphrey v. Peques*, 16 Wall. 244.

The marriage contract is not within this inhibition: *Rugh v. Ottenheimer*, 6 Or. 231.

§ 24. The right of the individual citizen to bear arms in defense of himself or the state shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.

**To bear arms.**—The provision of the Second Amendment to the constitution of the United States, guaranteeing "the right of the people to keep and bear arms," is a limitation on the power of the United States, and not on that of the state; nevertheless, inasmuch as all citizens capable of bearing arms constitute the reserved military force of the general government, and in view of the general military powers of the United States, the states cannot prohibit the people from keeping and bearing arms so as to deprive the United States of this resource for maintaining the public security: *Presser v. Illinois*, 116 U. S. 252.

The right voluntarily to associate together as a military company or organization, or to drill or parade with arms, without an act of Congress or of the state legislature authorizing the

same, is not an attribute of national citizenship. Military organization and drill are especially under control of government, and cannot be claimed as a right independent of law: *Id.*

State governments, unless restrained by their own constitutions, may regulate or prohibit associations and meetings of people, except peaceable assemblies to perform the duties or exercise the privileges of citizens of the United States, and may also regulate and control military organizations and drills except such as are authorized by the general government: *Id.*

A law prohibiting the carrying of concealed weapons is not in conflict with this provision: *State v. Reid*, 1 Ala. 612; 35 Am. Dec. 44; *State v. Chandler*, 5 La. Ann. 489; 52 Am. Dec. 599.

§ 25. Offenses heretofore required to be prosecuted by indictment may be prosecuted by information or by indictment, as shall be prescribed by law.

**Information.**—A conviction on an information without indictment, for murder in the first degree, and sentence of death thereon, are not illegal by virtue of that clause of the Fourteenth Amendment to the constitution of the United States which prohibits the states

from depriving any person of life, liberty, or property without due process of law: *Hurtado v. California*, 110 U. S. 516.

See Cole, § 000, for cases in which prosecution may be by information.

§ 26. No grand jury shall be drawn or summoned in any county, except the superior judge thereof shall so order.

§ 27. Treason against the state shall consist only in levying war against the state, or adhering to its enemies, or in giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or confession in open court.

§ 28. No hereditary emoluments, privileges, or powers shall be granted or conferred in this state.

§ 29. The provisions of this constitution are mandatory, unless by express words they are declared to be otherwise.

§ 30. The enumeration in this constitution of certain rights shall not be construed to deny others retained by the people.



§ 31. No standing army shall be kept up by this state in time of peace, and no soldier shall in time of peace be quartered in any house without the consent of its owner, nor in time of war except in the manner prescribed by law.

§ 32. A frequent recurrence to fundamental principles is essential to the security of individual right, and the perpetuity of free government.

## ARTICLE II.

### LEGISLATIVE DEPARTMENT

§ 1. The legislative powers shall be vested in a senate and house of representatives, which shall be called the legislature of the state of Washington.

*Legislative power* embraces all power not prohibited to the legislature: *Wisconsin Cent. R'y Co. v. Taylor Co.*, 52 Wis. 37.

§ 2. The house of representatives shall be composed of not less than sixty-three nor more than ninety-nine members. The number of senators shall not be more than one half nor less than one third of the number of members of the house of representatives. The first legislature shall be composed of seventy members of the house of representatives and thirty-five senators.

§ 3. The legislature shall provide by law for an enumeration of the inhabitants of the state in the year one thousand eight hundred and ninety-five, and every ten years thereafter; and at the first session after such enumeration, and also after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and house of representatives, according to the number of inhabitants, excluding Indians not taxed, soldiers, sailors, and officers of the United States army and navy in active service.

§ 4. Members of the house of representatives shall be elected in the year eighteen hundred and eighty-nine at the time and in the manner provided by this constitution, and shall hold their offices for the term of one year and until their successor shall be elected.

§ 5. The next election of the members of the house of representatives after the adoption of this constitution shall be on the first Tuesday after the first Monday of November, eighteen hundred and ninety, and thereafter members of the house of representatives shall be elected biennially, and their term of office shall be two years; and each election shall be on the first Tuesday after the first Monday in November, unless otherwise changed by law.

§ 6. After the first election the senators shall be elected by single districts of convenient and contiguous territory at the same time and in the same manner as members of the house of representatives are

required to be elected, and no representative district shall be divided in the formation of a senatorial district. They shall be elected for the term of four years, one half of their number retiring every two years. The senatorial districts shall be numbered consecutively, and the senators chosen at the first election had by virtue of this constitution, in odd-numbered districts, shall go out of office at the end of the first year, and the senators elected in the even-numbered districts shall go out of office at the end of the third year.

§ 7. No person shall be eligible to the legislature who shall not be a citizen of the United States and a qualified voter in the district for which he is chosen.

§ 8. Each house shall be the judge of the election, returns, and qualifications of its own members, and a majority of each house shall constitute a quorum to do business, but a smaller number may adjourn from day to day and may compel the attendance of absent members in such manner and under such penalties as each house may provide.

§ 9. Each house may determine the rules of its own proceedings, punish for contempt and disorderly behavior, and, with the concurrence of two thirds of all the members elected, expel a member, but no member shall be expelled a second time for the same offense.

§ 10. Each house shall elect its own officers, and when the lieutenant-governor shall not attend as president, or shall act as governor, the senate shall choose a temporary president. When presiding, the lieutenant-governor shall have the deciding vote in case of an equal division of the senate.

§ 11. Each house shall keep a journal of its proceedings and publish the same, except such parts as require secrecy. The doors of each house shall be kept open, except when the public welfare shall require secrecy. Neither house shall adjourn for more than three days, nor to any place other than that in which they may be sitting, without the consent of the other.

§ 12. The first legislature shall meet on the first Wednesday after the first Monday in November, A. D. 1889. The second legislature shall meet on the first Wednesday after the first Monday in January, A. D. 1891, and sessions of the legislature shall be held biennially thereafter, unless specially convened by the governor, but the times of meeting of subsequent sessions may be changed by the legislature. After the first legislature the sessions shall not be more than sixty days.

§ 13. No member of the legislature during the term for which he is elected shall be appointed or elected to any civil office in the state which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected.

§ 14. No person being a member of Congress, or holding any civil

or military office under the United States or any other power, shall be eligible to be a member of the legislature; and if any person after his election as a member of the legislature shall be elected to Congress or be appointed to any other office, civil or military, under the government of the United States, or any other power, his acceptance thereof shall vacate his seat; *provided*, that officers in the militia of the state who receive no annual salary, local officers, and postmasters, whose compensation does not exceed three hundred dollars per annum, shall not be ineligible.

§ 15. The governor shall issue writs of election to fill such vacancies as may occur in either house of the legislature.

§ 16. Members of the legislature shall be privileged from arrest in all cases except treason, felony, and breach of the peace; they shall not be subject to any civil process during the session of the legislature, nor for fifteen days next before the commencement of each session.

**Privilege from arrest.** — This privilege is in the interest of the people as well as the member: *Anderson v. Rountree*, 1 Pinn. 115. It protects, also, delegates to Congress from the territories: *Doty v. Strong*, 1 Id. 84. This would seem to extend to all indictable offenses as well those which are in fact attended with force and violence as those which are only constructive breaches of the peace of the government, inasmuch as they violate its

good order: 1 Bla. Com. 106; 1 Story's Com., sec. 865.

They are privileged not only from arrest, both on judicial and mesne process, but from the service of a summons or other civil process while in attendance on their public duties: *Geyer's Lessee v. Irwin*, 4 Dall. 107; *Nones v. Edsall*, 1 Wall. Jr. 191; 1 Story's Com., sec. 860; *Coxe v. McClenachan*, 3 Dall. 478.

§ 17. No member of the legislature shall be liable in any civil action or criminal prosecution whatever for words spoken in debate.

§ 18. The style of the laws of the state shall be: "Be it enacted by the legislature of the state of Washington"; and no laws shall be enacted except by bill.

The word "bill" is synonymous with law or act: *Durkee v. Janesville*, 26 Wis. 697.

§ 19. No bill shall embrace more than one subject, and that shall be expressed in the title.

**A subject not expressed in the title** is one which is so foreign to the matter expressed in the title that one reading the act with the title in his mind would be surprised to find it in the body of the act, and could not reasonably have expected to find it in the act: *Matter of the Mayor*, 99 N. Y. 569.

The provisions of the act must be such as are connected with or germane to the subject generally set forth in the title: *Mohomet v. Quackembush*, 117 U. S. 508.

But the title should be liberally construed and acts sustained, though their subject-matter may not be expressed with the utmost clearness in the title: *Mills v. Charleton*, 29 Wis.

400. But the title must fairly suggest or furnish a clew to the subject dealt with in the act: *Astor v. New York Arcade R'y Co.*, 113 N. Y. 93.

This provision is violated if an act is so amended as to embrace a subject outside its title: *Stewart v. Father Matthew Society*, 41 Mich. 67. Or when affirmative legislation is had under a title disclosing nothing beyond a purpose to repeal an existing statute: *Stiefel v. Maryland Institute*, 61 Md. 144.

**A title conveying no intelligence** as to the subject-matter of the act is insufficient: *Harland v. Territory*, 3 Wash. 131.

§ 20. Any bill may originate in either house of the legislature, and a bill passed by one house may be amended in the other.

§ 21. The yeas and nays of the members of either house shall be entered on the journal on the demand of one sixth of the members present.



§ 22. No bill shall become a law unless, on its final passage, the vote be taken by yeas and nays, the names of the members voting for and against the same be entered on the journal of each house, and a majority of the members elected to each house be recorded thereon as voting in its favor.

§ 23. Each member of the legislature shall receive for his services five dollars for each day's attendance during the session, and ten cents for every mile he shall travel in going to and returning from the place of meeting of the legislature, on the most usual route.

§ 24. The legislature shall never authorize any lottery, or grant any divorce.

§ 25. The legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor after the services shall have been rendered or the contract entered into, nor shall the compensation of any public officer be increased or diminished during his term of office.

§ 26. The legislature shall direct by law in what manner and in what courts suits may be brought against the state.

§ 27. In all elections by the legislature the members shall vote  *viva voce*, and their votes shall be entered on the journal.

§ 28. The legislature is prohibited from enacting any private or special laws in the following cases:—

1. For changing the names of persons, or constituting one person the heir at law of another.

2. For laying out, opening, or altering highways, except in cases of state roads extending into more than one county, and military roads to aid in the construction of which lands shall have been or may be granted by Congress.

3. For authorizing persons to keep ferries wholly within this state.

4. For authorizing the sale or mortgage of real or personal property of minors, or others under disability.

5. For assessment or collection of taxes, or for extending the time for collection thereof.

6. For granting corporate powers or privileges.

7. For authorizing the apportionment of any part of the school fund.

8. For incorporating any town or village, or to amend the charter thereof.

9. From giving effect to invalid deeds, wills, or other instruments.

10. Releasing or extinguishing, in whole or in part, the indebtedness, liability, or other obligation of any person or corporation to this state, or to any municipal corporation therein.

11. Declaring any person of age, or authorizing any minor to sell, lease, or encumber his or her property

12. Legalizing, except as against the state, the unauthorized or invalid act of any officer.
13. Regulating the rates of interest on money.
14. Remitting fines, penalties, or forfeitures.
15. Providing for the management of common schools.
16. Authorizing the adoption of children.
17. For limitation of civil or criminal action.
18. Changing county lines, locating or changing county seats; *provided*, this shall not be construed to apply to the creation of new counties.

**A special or private statute** is a statute that relates to or concerns a particular person, or certain particular persons by name, or something in which certain individuals or classes of persons are interested in a manner peculiar to themselves, and not common to the entire community: 1 Bla. Com. 85; *State v. Chambers*, 93 N. C. 600; *Montague v. State*, 54 Md. 481; *Allen v. Hirsch*, 8 Or. 412; Bouvier's Law Dict., *voce* Statute; Burrill's Law Dict., *voce* Private Statutes.

The character of the statute, as to whether it is public or private, does not depend upon the duration of its operation: *People v. Wright*, 70 Ill. 388.

So a statute operating alike upon all the people of a particular locality or section of the country has been considered a public statute, notwithstanding its application did not cover the entire state: *Lery v. State*, 6 Ind. 281; *Burnham v. Acton*, 4 Abb. Pr., N. S., 1; *Pierce v. Kimball*, 9 Greenl. 54; *State v. Chambers*,

93 N. C. 600; *People v. Davis*, 61 Barb. 456. In like manner a statute may be public and yet be confined in its operation to certain days, such as laws prohibiting the sale of liquor on Sunday, and the like: *Van Swartow v. Commonwealth*, 24 Pa. St. 131.

An act to amend and consolidate the several acts relating to the charter of a certain city, though general in its operation within the city, is a local law, and not a "general" law: *People v. Hills*, 25 N. Y. 449; *People v. O'Brien*, 38 N. Y. 193.

An act to provide for the making of a particular public improvement, as for the improvement of a particular stream for purposes of navigation, the construction of public buildings, the making of public thoroughfares for the whole state, are not special or local laws: *People v. Allen*, 42 N. Y. 378; *People v. Supervisors of Chautauqua*, 43 Id. 10; *State v. Leun*, 9 Wis. 297; *West v. Blake*, 4 Blackf. 236; *Allen v. Hirsch*, 8 Or. 412.

§ 29. After the first day of January, eighteen hundred and ninety, the labor of convicts of this state shall not be let out by contract to any person, copartnership, company, or corporation, and the legislature shall by law provide for the working of convicts for the benefit of the state.

§ 30. The offense of corrupt solicitation of members of the legislature, or of public officers of the state or any municipal division thereof, and any occupation or practice of solicitation of such members or officers to influence their official action, shall be defined by law, and shall be punished by fine and imprisonment. Any person may be compelled to testify in any lawful investigation or judicial proceeding against any person who may be charged with having committed the offense of bribery or corrupt solicitation, or practice of solicitation, and shall not be permitted to withhold his testimony on the ground that it may criminate himself or subject him to public infamy, but such testimony shall not afterwards be used against him in any judicial proceeding, except for perjury in giving such testimony; and any person convicted of either of the offenses aforesaid shall, as part of the punishment therefor, be disqualified from ever holding any position of honor, trust, or profit in this state. A member who has

a private interest in any bill or measure proposed or pending before the legislature shall disclose the fact to the house of which he is a member, and shall not vote thereon.

§ 31. No law, except appropriation bills, shall take effect until ninety days after the adjournment of the session at which it was enacted, unless in case of any emergency (which emergency must be expressed in the preamble or in the body of the act) the legislature shall otherwise direct by a vote of two thirds of all the members elected to each house; said vote to be taken by yeas and nays and entered on the journals.

§ 32. No bill shall become a law until the same shall have been signed by the presiding officer of each of the two houses in open session, and under such rules as the legislature shall prescribe.

§ 33. The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void; *provided*, that the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire-clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition.

§ 34. There shall be established in the office of the secretary of state a bureau of statistics, agriculture, and immigration, under such regulations as the legislature may provide.

§ 35. The legislature shall pass necessary laws for the protection of persons working in mines, factories, and other employments dangerous to life or deleterious to health, and fix pains and penalties for the enforcement of the same.

§ 36. No bill shall be considered in either house unless the time of its introduction shall have been at least ten days before the final adjournment of the legislature, unless the legislature shall otherwise direct by a vote of two thirds of all the members elected to each house, said vote to be taken by yeas and nays and entered upon the journal, or unless the same be at a special session.

§ 37. No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length.

In amending an act it is not necessary to set forth the section as it stood before amendment. It is sufficient if the act or section be set forth as amended: *Noland v. Cretello*, 2 Or. 55; *Portland v. Stock*, 2 Id. 69; *Doland v. Barnard*, 5 Id. 390; *Arnould v. New*



*Orleans*, 11 La. 56. In Indiana it is ruled otherwise, but not without dissent: *Wilkins v. Miller*, 9 Ind. 102; *Little v. Smiley*, 9 Id. 118.

Whether a statute can be amended by sim-

ply repealing a clause or subdivision of a section, *quære*: *Sayles v. O. C. R. Co.*, 5 Saw. 31.

Repeals by implication are not within this restriction: *Grant Co. v. Sels*, 5 Or. 243; *Stingle v. Nevels*, 9 Id. 62.

§ 38. No amendment to any bill shall be allowed which shall change the scope and object of the bill.

§ 39. It shall not be lawful for any person holding public office in this state to accept or use a pass or to purchase transportation from any railroad or other corporation, other than as the same may be purchased by the general public, and the legislature shall pass laws to enforce this provision.

**An office** is a public station or employment conferred by appointment (or election), and embraces the ideas of tenure, duration, emolument, and duties: *United States v. Hartwell*, 6 Wall. 385.

The position of a public officer is that of an agent or servant of the government rather than that of a contractor of the government: *People v. Vilas*, 36 N. Y. 459.

**An officer** is "one invested by a superior authority, and particularly by government, with the duty and power of transacting affairs of a certain class; . . . a person designated to execute some function of government": *Abbott's Law Dict.*, *vide* Officer.

Offices are usually divided into two classes, — civil and military. "Civil offices are usually divided into three classes, — political, judicial, and ministerial. Political are such as are not immediately connected with the administration of justice, or with the execution of the mandates of a superior, as the President, or head of a department. Judicial offices are those which relate to the administration of justice, and which must be exercised by the persons appointed for that purpose, and not by

deputies. Ministerial offices are those which give the officer no power to judge of the matter to be done, and which require him to obey some superior": *Twenty per Cent Cases*, 13 Wall. 568; *Mallory's Case*, 3 Nott & H. 257; *Kirby's Case*, 3 Id. 265.

One who receives no certificate of appointment, takes no oath of office, has no term or tenure of office, discharges no duties, and exercises no powers depending directly on the authority of law, but simply performs such duties as are required of him by the persons employing him, and whose responsibility is limited to them, is not an officer. "Office" implies authority to exercise some portion of the sovereign power of the state: *Olmstead v. Mayor etc. of New York*, 42 N. Y. Sup. Ct. 481.

A representative in the state legislature is a public officer: *Morril v. Haynes*, 2 N. H. 246;

A person who has been elected, but who has not qualified and entered upon his office, is not an officer: *Cordiell v. Frizell*, 1 Nev. 130; *Zump v. Spence*, 28 Md. 1. He is not an officer either *de jure* or *de facto*: *State v. Beloit*, 21 Wis. 280.

## ARTICLE III.

### THE EXECUTIVE.

§ 1. The executive department shall consist of a governor, lieutenant-governor, secretary of state, treasurer, auditor, attorney-general, superintendent of public instruction, and a commissioner of public lands, who shall be severally chosen by the qualified electors of the state at the same time and place of voting as for the members of the legislature.

§ 2. The supreme executive power of this state shall be vested in a governor, who shall hold his office for a term of four years, and until his successor is elected and qualified.

§ 3. The lieutenant-governor, secretary of state, treasurer, auditor, attorney-general, superintendent of public instruction, and commissioner of public lands shall hold their offices for four years respectively, and until their successors are elected and qualified.

§ 4. The returns of every election for the officers named in the

first section of this article shall be sealed up and transmitted to the seat of government by the returning officers, directed to the secretary of state, who shall deliver the same to the speaker of the house of representatives at the first meeting of the house thereafter, who shall open, publish, and declare the result thereof in the presence of a majority of the members of both houses. The person having the highest number of votes shall be declared duly elected, and a certificate thereof shall be given to such person, signed by the presiding officers of both houses; but if any two or more shall be highest and equal in votes for the same office, one of them shall be chosen by the joint vote of both houses. Contested elections for such officers shall be decided by the legislature in such manner as shall be decided by law. The terms of all officers named in section one of this article shall commence on the second Monday in January after their election, until otherwise provided by law.

§ 5. The governor may require information in writing from the officers of the state upon any subject relating to the duties of their respective offices, and shall see that the laws are faithfully executed.

§ 6. He shall communicate at every session by message to the legislature the condition of the affairs of the state, and recommend such measures as he shall deem expedient for their action.

§ 7. He may, on extraordinary occasions, convene the legislature by proclamation, in which shall be stated the purposes for which the legislature is convened.

§ 8. He shall be commander-in-chief of the military in the state, except when they shall be called into the service of the United States.

§ 9. The pardoning power shall be vested in the governor, under such regulations and restrictions as may be prescribed by law.

§ 10. In case of the removal, resignation, death, or disability of the governor, the duties of the office shall devolve upon the lieutenant-governor, and in case of a vacancy in both the offices of governor and lieutenant-governor, the duties of governor shall devolve upon the secretary of state, who shall act as governor until the disability be removed or a governor be elected.

§ 11. The governor shall have power to remit fines and forfeitures, under such regulations as may be prescribed by law, and shall report to the legislature at its next meeting each case of reprieve, commutation, or pardon granted, and the reasons for granting the same, and also the names of all persons in whose favor remission of fines and forfeitures shall have been made, and the several amounts remitted, and the reasons for the remission.

The word "fine" is usually employed, not to designate a penalty or forfeiture for violation of penal statute, but a pecuniary punishment for a breach of the criminal law: *Common Coun-*

*cil of Indianapolis v. Fairchild*, 1 Ind. 315. It may include a forfeiture or penalty recoverable by civil action: *Hanscomb v. Russell*, 11 Gray, 37.

**Forfeiture**, as used in connection with penal law, is defined to be "penalty or punishment for a default, wrong, or offense, by divesting the wrong-doer's title to some property, — usually property involved in the wrong"; or "the loss of lands or goods by reason of some act in contravention of law": Abbott's Law Dict., *voce* Forfeiture.

§ 12. Every act which shall have passed the legislature shall be, before it becomes a law, presented to the governor. If he approves, he shall sign it; but if not, he shall return it, with his objections, to that house in which it shall have originated, which house shall enter the objections at large upon the journal, and proceed to reconsider. If, after such reconsideration, two thirds of the members present shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of the members present, it shall become a law; but in all such cases the vote of both houses shall be determined by the yeas and nays, and the names of the members voting for or against the bill shall be entered upon the journal of each house respectively. If any bill shall not be returned by the governor within five days, Sundays excepted, after it shall be presented to him, it shall become a law without his signature, unless the general adjournment shall prevent its return, in which case it shall become a law unless the governor, within ten days next after the adjournment, Sundays excepted, shall file such bill, with his objections thereto, in the office of secretary of state, who shall lay the same before the legislature at its next session, in like manner as if it had been returned by the governor. If any bill presented to the governor contain several sections or items, he may object to one or more sections or items while approving other portions of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the section or sections, item or items, to which he objects, and the reasons therefor, and the section or sections, item or items, so objected to, shall not take effect unless passed over the governor's objection, as hereinbefore provided.

§ 13. When, during a recess of the legislature, a vacancy shall happen in any office the appointment to which is vested in the legislature, or when at any time a vacancy shall have occurred in any other state office for the filling of which vacancy no provision is made elsewhere in this constitution, the governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified.

**A vacancy** "happens" whenever there is an office without an incumbent, whether the office has ever been filled or not: *State v. Stocking*, 7 Ind. 326; *State v. Boecker*, 56 Mo. 17; *State v. Irwin*, 5 Nev. 111, 130.

§ 14. The governor shall receive an annual salary of four thousand dollars, which may be increased by law, but shall never exceed six thousand dollars per annum.

§ 15. All commissions shall issue in the name of the state, shall be



signed by the governor, sealed with the seal of the state, and attested by the secretary of state.

§ 16. The lieutenant-governor shall be presiding officer of the state senate, and shall discharge such other duties as may be prescribed by law. He shall receive an annual salary of one thousand dollars, which may be increased by the legislature, but shall never exceed three thousand dollars per annum.

§ 17. The secretary of state shall keep a record of the official acts of the legislature and the executive department of the state, and shall, when required, lay the same, and all matters relative thereto, before either branch of the legislature, and shall perform such other duties as shall be assigned him by law. He shall receive an annual salary of twenty-five hundred dollars, which may be increased by the legislature, but shall never exceed three thousand dollars per annum.

§ 18. There shall be a seal of the state kept by the secretary of state for official purposes, which shall be called "The seal of the State of Washington."

§ 19. The treasurer shall perform such duties as shall be prescribed by law. He shall receive an annual salary of two thousand dollars, which may be increased by the legislature, but shall never exceed four thousand dollars per annum.

§ 20. The auditor shall be auditor of public accounts, and shall have such powers and perform such duties in connection therewith as may be prescribed by law. He shall receive an annual salary of two thousand dollars, which may be increased by the legislature, but shall never exceed three thousand dollars per annum.

§ 21. The attorney-general shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law. He shall receive an annual salary of two thousand dollars, which may be increased by the legislature, but shall never exceed thirty-five hundred dollars per annum.

§ 22. The superintendent of public instruction shall have supervision over all matters pertaining to public schools, and shall perform such specific duties as may be prescribed by law. He shall receive an annual salary of twenty-five hundred dollars, which may be increased by law, but shall never exceed four thousand dollars per annum.

§ 23. The commissioner of public lands shall perform such duties and receive such compensation as the legislature may direct.

§ 24. The governor, secretary of state, treasurer, auditor, superintendent of public instruction, commissioner of public lands, and attorney-general shall severally keep the public records, books, and papers relating to their respective offices at the seat of government, at which place also the governor, secretary of state, treasurer, and auditor shall reside.

§ 25. No person except a citizen of the United States and a qualified elector of this state shall be eligible to hold any state office, and the state treasurer shall be ineligible for the term succeeding that for which he was elected. The legislature may, in its discretion, abolish the offices of the lieutenant-governor, auditor, and commissioner of public lands.

## ARTICLE IV.

### THE JUDICIARY.

§ 1. The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.

§ 2. The supreme court shall consist of five judges, a majority of whom shall be necessary to form a quorum and pronounce a decision. The said court shall always be open for the transaction of business except on non-judicial days. In the determination of causes, all decisions of the court shall be given in writing, and the grounds of the decision shall be stated. The legislature may increase the number of judges of the supreme court from time to time, and may provide for separate departments of said court.

**Quorum.** — The general rule is, in a select and definite body of persons possessing power to elect, that a majority of the quorum may decide: *Ex parte Willcox*, 47 Cow. 402; 17 Am. Dec. 525. It is competent to stipulate that less than a quorum may render judgment: *Walker v. Royan*, 1 Wis. 597.

§ 3. The judges of the supreme court shall be elected by the qualified electors of the state at large, at the general state election, at the times and places at which state officers are elected, unless some other time be provided by the legislature. The first election of judges of the supreme court shall be at the election which shall be held upon the adoption of this constitution, and the judges elected thereat shall be classified by lot, so that two shall hold their office for the term of three years, two for the term of five years, and one for the term of seven years. The lot shall be drawn by the judges who shall for that purpose assemble at the seat of government, and they shall cause the result thereof to be certified to the secretary of state, and filed in his office. The judge having the shortest term to serve, not holding his office by appointment or election to fill a vacancy, shall be the chief justice, and shall preside at all sessions of the supreme court, and in case there shall be two judges having in like manner the same short term, the other judges of the supreme court shall determine which of them shall be chief justice. In case of the absence of the chief justice, the judges

having in like manner the shortest or next shortest term to serve shall preside. After the first election the terms of judges elected shall be six years from and after the second Monday in January next succeeding their election. If a vacancy occur in the office of a judge of the supreme court, the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall take place at the next succeeding general election, and the judge so elected shall hold the office for the remainder of the unexpired term. The term of office of the judges of the supreme court first elected shall commence as soon as the state shall have been admitted into the Union, and continue for the term herein provided, and until their successors are elected and qualified. The sessions of the supreme court shall be held at the seat of government until otherwise provided by law.

§ 4. The supreme court shall have original jurisdiction in *habeas corpus* and *quo warranto* and *mandamus* as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars (\$200), unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of *mandamus*, review, prohibition, *habeas corpus*, *certiorari*, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of *habeas corpus* to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any superior court of the state, or any judge thereof.

§ 5. There shall be in each of the organized counties of this state a superior court, for which at least one judge shall be elected by the qualified electors of the county at the general state election; *provided*, that until otherwise directed by the legislature one judge only shall be elected for the counties of Spokane and Stevens; one judge for the county of Whitman; one judge for the counties of Lincoln, Okanogan, Douglas, and Adams; one judge for the counties of Walla Walla and Franklin; one judge for the counties of Columbia, Garfield, and Asotin; one judge for the counties of Kittitas, Yakima, and Klickitat; one judge for the counties of Clark, Skamania, Pacific, Cowlitz, and Wahkiakum; one judge for the counties of Thurston, Chehalis, Mason, and Lewis; one judge for the county of Pierce; one judge for the county of King; one judge for the counties of Jefferson, Island, Kitsap, San Juan, and Clallam; and one judge for the counties of What-



com, Skagit, and Snohomish. In any county where there shall be more than one superior judge, there may be as many sessions of the superior court at the same time as there are judges thereof, and whenever the governor shall direct a superior judge to hold court in any county other than that for which he has been elected, there may be as many sessions of the superior court in said county at the same time as there are judges therein or assigned to duty therein by the governor, and the business of the court shall be so distributed and assigned by law, or, in the absence of legislation therefor, by such rules and orders of court as shall best promote and secure the convenient and expeditious transaction thereof. The judgments, decrees, orders, and proceedings of any session of the superior court held by any one or more of the judges of such court shall be equally effectual as if all the judges of said court presided at such session. The first superior judges elected under this constitution shall hold their offices for the period of three years, and until their successors shall be elected and qualified, and thereafter the term of office of all superior judges in this state shall be for four years from the second Monday in January next succeeding their election, and until their successors are elected and qualified. The first election of judges of the superior court shall be at the election held for the adoption of this constitution. If a vacancy occurs in the office of judge of the superior court, the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall be at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term.

§ 6. The superior court shall have original jurisdiction in all cases in equity and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to one hundred dollars, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They shall always be open, except on non-judicial days, and their process shall extend to all parts

of the state. Said courts and their judges shall have power to issue writs of *mandamus*, *quo warranto*, review, *certiorari*, prohibition, and writs of *habeas corpus* on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of *habeas corpus* may be issued and served on legal holidays and non-judicial days.

§ 7. The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his duty to do so. A case in the superior court may be tried by a judge *pro tempore*, who must be a member of the bar, agreed upon in writing by the parties litigant or their attorneys of record, approved by the court, and sworn to try the case.

§ 8. Any judicial officer who shall absent himself from the state for more than sixty consecutive days shall be deemed to have forfeited his office; *provided*, that in cases of extreme necessity the governor may extend the leave of absence such time as the necessity therefor shall exist.

§ 9. Any judge of any court of record, the attorney-general, or any prosecuting attorney may be removed from office by joint resolution of the legislature, in which three fourths of the members elected to each house shall concur, for incompetency, corruption, malfeasance, or delinquency in office, or other sufficient cause stated in such resolution. But no removal shall be made unless the officer complained of shall have been served with a copy of the charges against him as the ground of removal, and shall have an opportunity of being heard in his defense. Such resolution shall be entered at length on the journal of both houses, and on the question of removal the ayes and nays shall also be entered on the journal.

§ 10. The legislature shall determine the number of justices of the peace to be elected in incorporated cities or towns and in precincts, and shall prescribe by law the powers, duties, and jurisdiction of justices of the peace; *provided*, that such jurisdiction granted by the legislature shall not trench upon the jurisdiction of superior or other courts of record, except that justices of the peace may be made police justices of incorporated cities and towns. In incorporated cities or towns having more than five thousand inhabitants, the justices of the peace shall receive such salary as may be provided by law, and shall receive no fees for their own use.

The jurisdiction and powers of justices of the peace are derived from statutory provisions: *Martin v. Fales*, 18 Me. 23; 36 Am. Dec. 693. They exercise no common-law powers: *Albright v. Lapp*, 26 Pa. St. 99; 67 Am. Dec. 402.

§ 11. The supreme court and the superior court shall be courts of record, and the legislature shall have power to provide that any of

the courts of this state, excepting justices of the peace, shall be courts of record.

§ 12. The legislature shall prescribe by law the jurisdiction and powers of any of the inferior courts which may be established in pursuance of this constitution.

§ 13. No judicial officer, except court commissioners and unsalaried justices of the peace, shall receive to his own use any fees or perquisites of office. The judges of the supreme court and judges of the superior courts shall severally, at stated times, during their continuance in office, receive for their services the salaries prescribed by law therefor, which shall not be increased after their election, nor during the term for which they shall have been elected. The salaries of the judges of the supreme court shall be paid by the state. One half of the salary of each of the superior court judges shall be paid by the state, and the other one half by the county or counties for which he is elected. In cases where a judge is provided for more than one county, that portion of his salary which is to be paid by the counties shall be apportioned between or among them according to the assessed value of their taxable property, to be determined by the assessment next preceding the time for which such salary is to be paid.

§ 14. Each of the judges of the supreme court shall receive an annual salary of four thousand dollars (\$4,000); each of the superior court judges shall receive an annual salary of three thousand dollars (\$3,000), which said salaries shall be payable quarterly. The legislature may increase the salaries of the judges herein provided.

§ 15. The judges of the supreme court and the judges of the superior court shall be ineligible to any other office or public employment than a judicial office or employment during the term for which they shall have been elected.

§ 16. Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

**Charging the jury.**—The court should not charge the jury upon controverted facts, nor declare the weight of evidence: *Cahoon v. Marshall*, 25 Cal. 198; *Cludwell v. Centre*, 30 Id. 539; *McNeil v. Barney*, 51 Id. 603.

But it is not error to assume, in the charge, a fact about which there is no controversy in

the case: *Watson v. Damon*, 54 Cal. 278; *Page v. Tucker*, 54 Id. 121.

Nor will a judgment be reversed for error of the court in charging as to the facts, if no injury could arise from the charge: *Bradley v. Leo*, 38 Cal. 366.

§ 17. No person shall be eligible to the office of judge of the supreme court or judge of a superior court unless he shall have been admitted to practice in the courts of record of this state or of the territory of Washington.

§ 18. The judges of the supreme court shall appoint a reporter for the decisions of that court, who shall be removable at their pleasure. He shall receive such annual salary as shall be prescribed by law.



§ 19. No judge of a court of record shall practice law in any court of this state during his continuance in office.

§ 20. Every case submitted to a judge of a superior court for his decision shall be decided by him within ninety days from the submission thereof; *provided*, that if within said period of ninety days a rehearing shall have been ordered, then the period within which he is to decide shall commence at the time the cause is submitted upon such a rehearing.

§ 21. The legislature shall provide for the speedy publication of opinions of the supreme court, and all opinions shall be free for publication by any person.

§ 22. The judges of the supreme court shall appoint a clerk of that court, who shall be removable at their pleasure, but the legislature may provide for the election of the clerk of the supreme court and prescribe the term of his office. The clerk of the supreme court shall receive such compensation by salary only as shall be provided by law.

§ 23. There may be appointed in each county, by the judge of the superior court having jurisdiction therein, one or more court commissioners, not exceeding three in number, who shall have authority to perform like duties as a judge of the superior court at chambers, subject to revision by such judge, to take depositions and to perform such other business connected with the administration of justice as may be prescribed by law.

§ 24. The judges of the superior courts shall, from time to time, establish uniform rules for the government of the superior courts.

§ 25. Superior judges shall, on or before the first day of November in each year, report in writing to the judges of the supreme court such defects and omissions in the laws as their experience may suggest, and the judges of the supreme court shall, on or before the first day of January in each year, report in writing to the governor such defects and omissions in the laws as they may believe to exist.

§ 26. The county clerk shall be, by virtue of his office, clerk of the superior court.

§ 27. The style of all process shall be "The State of Washington," and all prosecutions shall be conducted in its name and by its authority.

§ 28. Every judge of the supreme court, and every judge of a superior court shall, before entering upon the duties of his office, take and subscribe an oath that he will support the constitution of the United States and the constitution of the state of Washington, and will faithfully and impartially discharge the duties of judge to the best of his ability, which oath shall be filed in the office of the secretary of state.

## ARTICLE V.

## IMPEACHMENT.

§ 1. The house of representatives shall have the sole power of impeachment. The concurrence of a majority of all the members shall be necessary to an impeachment. All impeachments shall be tried by the senate, and when sitting for that purpose, the senators shall be upon oath or affirmation to do justice according to law and evidence. When the governor or lieutenant-governor is on trial, the chief justice of the supreme court shall preside. No person shall be convicted without a concurrence of two thirds of the senators elected.

§ 2. The governor and other state and judicial officers, except judges and justices of courts not of record, shall be liable to impeachment for high crimes or misdemeanors, or malfeasance in office, but judgment in such cases shall extend only to removal from office and disqualification to hold any office of honor, trust, or profit in the state. The party, whether convicted or acquitted, shall, nevertheless, be liable to prosecution, trial, judgment, and punishment according to law.

§ 3. All officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law.

## ARTICLE VI.

## ELECTIONS AND ELECTIVE RIGHTS.

§ 1. All male persons of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all elections: They shall be citizens of the United States; they shall have lived in the state one year, and in the county ninety days, and in the city, town, ward, or precinct thirty days immediately preceding the election at which they offer to vote; *provided*, that Indians not taxed shall never be allowed the elective franchise; *provided further*, that all male persons who at the time of the adoption of this constitution are qualified electors of the territory shall be electors.

§ 2. The legislature may provide that there shall be no denial of the elective franchise at any school election on account of sex.

§ 3. All idiots, insane persons, and persons convicted of infamous crime unless restored to their civil rights, are excluded from the elective franchise.

§ 4. For the purpose of voting and eligibility to office, no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence, while in the civil or military service of the state or of the United States, nor while a student at any

institution of learning, nor while kept at public expense at any poor-house or other asylum, nor while confined in public prison, nor while engaged in the navigation of the waters of this state or of the United States, or of the high seas.

§ 5. Voters shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at elections and in going to and returning therefrom. No elector shall be required to do military duty on the day of any election except in time of war or public danger.

§ 6. All elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot.

§ 7. The legislature shall enact a registration law, and shall require a compliance with such law before any elector shall be allowed to vote; *provided*, that this provision is not compulsory upon the legislature, except as to cities and towns having a population of over five hundred inhabitants. In all other cases the legislature may or may not require registration as a prerequisite to the right to vote, and the same system of registration need not be adopted for both classes.

§ 8. The first election of county and district officers, not otherwise provided for in this constitution, shall be on the Tuesday next after the first Monday in November, 1890, and thereafter all elections for such officers shall be held biennially on the Tuesday next succeeding the first Monday in November. The first election of all state officers not otherwise provided for in this constitution, after the election held for the adoption of this constitution, shall be on the Tuesday next after the first Monday in November, 1892, and the elections for such state officers shall be held in every fourth year thereafter on the Tuesday succeeding the first Monday in November.

## ARTICLE VII.

### REVENUE AND TAXATION.

§ 1. All property in the state not exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The legislature shall provide by law for an annual tax sufficient, with other sources of revenue, to defray the estimated ordinary expenses of the state for each fiscal year. And for the purpose of paying the state debt, if there be any, the legislature shall provide for levying a tax annually, sufficient to pay the annual interest and principal of such debt within twenty years from the final passage of the law creating the debt.

§ 2. The legislature shall provide by law a uniform and equal rate



of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property; *provided*, that a deduction of debts from credits may be authorized; *provided further*, that the property of the United States, and of the state, counties, school districts, and other municipal corporations, and such other property as the legislature may by general laws provide, shall be exempt from taxation.

**General power of taxation.** — The imposition, modification, and removal of taxes, and the exemption of property therefrom, is an ordinary exercise of the power of state sovereignty: *Gilman v. Sheboygan*, 2 Black, 510.

The power of taxation belongs exclusively to the legislative branch of the government, but may be delegated by the legislature to municipal corporations: *United States v. New Orleans*, 98 U. S. 381.

The right of taxation can be used only in aid of a public object, and cannot be exercised in aid of private enterprises: *Loan Association v. Topeka*, 20 Wall. 655.

**United States have priority.** — In case of a tax upon the same subject by the United States and a state government, the claim of the United States as the supreme authority must be preferred: *Union Pac. R. R. Co. v. Penniston*, 18 Wall. 5.

**Tax on income and franchise.** — A tax upon a corporation may be proportioned to the income received, as well as to the value of the privileges granted, or the property owned: *Minot v. Philadelphia, W., & B. R. R.*, 18 Wall. 206.

**Uniformity.** — A tax is uniform within the meaning of the constitutional provision on that subject, when it operates with the same effect in all places where the subject is found; and it is not wanting in such uniformity because the thing taxed is not equally distributed in all parts of the United States: *Edge v. Robertson* (Head Money Cases), 112 U. S. 580.

A tax levied upon real estate only is a discrimination in favor of the personal property obnoxious to the objection of want of uniformity: *Gilman v. Sheboygan*, 2 Black, 510. A state law taxing all legacies, gifts, and inheritances going to aliens is constitutional; the privilege of taking them may be denied to aliens altogether: *Magee v. Guina*, 8 How. 490; *Prevost v. Greenaux*, 19 Ill. 1; *Frederickson v. Louisiana*, 23 Id. 445.

While a uniform and equal rate of assessment and taxation must be provided by law on all the property in the state, yet perfect equality in the assessment of taxes is unattainable; approximation to it is all that can be had: Cooley on Taxation, c. 6, p. 167; *Commonwealth v. Savings Bank*, 5 Allen, 428; *Ould v. Richmond*, 23 Gratt. 464; *Allen v. Drew*, 44 Vt. 174; *Dubuque v. Railway Co.*, 47 Iowa, 196; *Beals v. Amador Co.*, 35 Cal. 624; *City of East Portland v. Multnomah County*, 6 Or. 62; *Crawford v. Linn County*, 11 Id. 482.

**No property** can be granted exemption

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from taxation, unless it is embraced within the excepted classes specified in the constitution: *Gilman v. City of Sheboygan*, 2 Black, 510; *Crawford v. Linn County*, 11 Or. 482.

**Taxation must not interfere with interstate commerce.** — A state cannot require a license tax from persons dealing in goods in original packages which are not the growth, or produce, or manufacture of the state. It is in conflict with the power vested in Congress to regulate commerce: *Wilton v. Missouri*, 91 U. S. 275; *Ward v. Maryland*, 12 Wall. 418; *Webber v. Virginia*, 103 U. S. 344.

Nor can a state tax passengers, whether citizens or foreigners, entering a port; it is unconstitutional as regulating commerce: *Smith v. Turner*, *Norris v. Barton* (Passenger Cases), 7 How. 283; *New York v. Compagnie Générale Transatlantique*, 107 U. S. 59.

Nor can a state levy and collect a tax on passengers leaving it by stage-coach or railroad, to be paid by the transportation companies: *Crandall v. Nevada*, 6 Wall. 35.

Nor tax a ferry between states bordering on dividing waters: *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

The requirement that each vessel passing a quarantine station pay a fee for examination as to her sanitary condition and the ports from which she came is a compensation for services rendered, and not a tax, within the meaning of the constitution inhibiting the levying of tonnage tax by the states: *Morgan's R. R. & Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455.

**Wharfage**, exacted by city ordinance, though graduated by size of the vessel, is not illegal: *Parkersburg & O. R. Trans. Co. v. Parkersburg*, 107 U. S. 691; *Cannon v. New Orleans*, 20 Wall. 577. The property of a corporation — although the corporation is a creature of Congress, and the company is an agent of the general government, designed to be employed in the legitimate service of the government, both military and postal — is not exempt from state taxation: *Union Pac. R. R. Co. v. Penniston*, 18 Wall. 5.

But securities issued by the United States cannot be taxed: *Society for Savings v. Coite*, 6 Wall. 594; *New York v. Comm'rs of Taxes*, 2 Black, 620; 2 Id. 635, note; 2 Wall. 200 (Bank Tax Case).

**Poll-tax constitutional.** — A state constitution providing that taxes be uniform in respect to persons and property does not forbid the legislature commuting taxes or assessments with individuals or corporate bodies: *Chicago v. Sheldon*, 9 Wall. 50.

§ 3. The legislature shall provide by general law for the assessing and levying of taxes on all corporation property as near as may be by the same methods as are provided for the assessing and levying of taxes on individual property.

§ 4. The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the state shall be a party.

§ 5. No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied.

§ 6. All taxes levied and collected for state purposes shall be paid in money only into the state treasury.

§ 7. An accurate statement of the receipts and expenditures of the public moneys shall be published annually in such manner as the legislature may provide.

§ 8. Whenever the expenses of any fiscal year shall exceed the income, the legislature may provide for levying a tax for the ensuing fiscal year, sufficient, with other sources of income, to pay the deficiency, as well as the estimated expenses of the ensuing fiscal year.

§ 9. The legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same.

Consult note to § 3 of art. 15.

## ARTICLE VIII.

### STATE, COUNTY, AND MUNICIPAL INDEBTEDNESS.

§ 1. The state may, to meet casual deficits or failure in revenues or for expenses not provided for, contract debts, but such debts, direct and contingent, singly or in the aggregate, shall not at any time exceed four hundred thousand dollars (\$400,000), and the moneys arising from the loans creating such debts shall be applied to the purpose for which they were obtained, or to repay the debts so contracted, and to no other purpose whatever.

**What is a debt.** — A debt against the benevolent or penal institutions of the state, or any of them, is a debt against the state: *State v. Mills*, 55 Wis. 229, 245. But a debt of a municipal corporation is not: *State ex rel. v. Madison*, 7 Id. 688; *Watertown v. Cady*, 20 Id. 501. In *People v. Pacheco*, 27 Cal. 175, it is held that an act which creates obligations to pay money, extending over a series of years,

but at the same time provides for raising money by taxation, to meet the payments as they mature, and appropriates the money in advance to that purpose, does not create a debt. But in *Coulson v. Portland*, Deady, 481, Judge Deady criticises this decision, which he characterizes as an "artificial and unlooked for construction of popular and plain terms and phrases."

See notes to § 6.

§ 2. In addition to the above limited power to contract debts, the state may contract debts to repel invasion, suppress insurrection, or



to defend the state in war, but the money arising from the contracting of such debts shall be applied to the purpose for which it was raised, and to no other purpose whatever.

§ 3. Except the debts specified in sections one and two of this article, no debts shall hereafter be contracted by or on behalf of this state, unless such debt shall be authorized by law for some single work or object to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within twenty years from the time of the contracting thereof. No such law shall take effect, until it shall, at a general election, have been submitted to the people and have received a majority of all the votes cast for and against it at such election, and all moneys raised by authority of such law shall be applied only to the specific object therein stated, or to the payment of the debt thereby created, and such law shall be published in at least one newspaper in each county, if one be published therein, throughout the state, for three months next preceding the election at which it is submitted to the people.

§ 4. No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years from the first day of May next after the passage of such appropriation act, and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient for such law to refer to any other law to fix such sum.

§ 5. The credit of the state shall not, in any manner, be given or loaned to or in aid of any individual, association, company, or corporation.

§ 6. No county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one half per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of three fifths of the voters therein voting at an election to be held for that purpose, nor in cases requiring such assent shall the total indebtedness at any time exceed five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county purposes previous to the incurring of such indebtedness, except that in incorporated cities the assessment shall be taken from the last assessment for city purposes; *provided*, that no part of the indebtedness allowed in this section shall be incurred for any purpose other than strictly county, city, town, school district, or other municipal purposes; *provided fur-*



ther, that any city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding five per centum additional for supplying such city or town with water, artificial light, and sewers, when the works for supplying such water, light, and sewers shall be owned and controlled by the municipality.

**Municipal debts.** — Entering into an agreement by a municipal corporation to pay certain sums in the future in installments is contracting debts, to the aggregate amount of the payments agreed to be made, notwithstanding the municipality has the power to raise a sufficient sum by taxation to meet the payments as they fall due: *Salem Water Co. v. Salem*, 5 Or. 29.

installments, and exceeding in the aggregate the amount of indebtedness which the city is allowed by its charter to contract, would be void, notwithstanding provision is made in the ordinance for the payments of the installments as they fall due by levying a tax therefor: *Coulson v. Portland*, Deady, 496.

See notes to § 1.

An ordinance assuming a liability payable in

§ 7. No county, city, town, or other municipal corporation shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association, company, or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company, or corporation.

## ARTICLE IX.

### EDUCATION.

§ 1. It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

§ 2. The legislature shall provide for a general and uniform system of public schools. The public-school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common-school fund, and the state tax for common schools, shall be exclusively applied to the support of the common schools.

§ 3. The principal of the common-school fund shall remain permanent and irreducible. The said fund shall be derived from the following named sources, to wit: Appropriations and donations by the state to this fund; donations and bequests by individuals to the state or public for common schools; the proceeds of lands and other property which revert to the state by escheat and forfeiture; the proceeds of all property granted to the state, when the purpose of the grant is not specified or is uncertain; funds accumulated in the treasury of the state for the disbursement of which provision has not been made by law; the proceeds of the sale of timber, stone, minerals, or other property from school and state lands, other than those granted for specific purposes; all moneys received from persons appropriating timber, stone, minerals, or other property from school and state lands other than those granted for specific purposes, and all moneys other than

rental recovered from persons trespassing on said lands; five per centum of the proceeds of the sale of public lands lying within the state which shall be sold by the United States subsequent to the admission of the state into the Union, as approved by section 13 of the act of Congress enabling the admission of the state into the Union; the principal of all funds arising from the sale of lands and other property which have been and hereafter may be granted to the state for the support of common schools. The legislature may make further provisions for enlarging said fund. The interest accruing on said fund, together with all rentals and other revenues derived therefrom, and from lands and other property devoted to the common-school fund, shall be exclusively applied to the current use of the common schools.

§ 4. All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

§ 5. All losses to the permanent common-school or any other state educational fund which shall be occasioned by defalcation, mismanagement, or fraud of the agents or officers controlling or managing the same shall be audited by the proper authorities of the state. The amount so audited shall be a permanent funded debt against the state in favor of the particular fund sustaining such loss, upon which not less than six per cent annual interest shall be paid. The amount of liability so created shall not be counted as a part of the indebtedness authorized and limited elsewhere in this constitution.

## ARTICLE X.

### MILITIA.

§ 1. All able-bodied male citizens of this state between the ages of eighteen (18) and forty-five (45) years, except such as are exempt by laws of the United States or by the laws of this state, shall be liable to military duty.

§ 2. The legislature shall provide by law for organizing and disciplining the militia in such manner as it may deem expedient, not incompatible with the constitution and laws of the United States. Officers of the militia shall be elected or appointed in such manner as the legislature shall from time to time direct, and shall be commissioned by the governor. The governor shall have power to call forth the militia to execute the laws of the state to suppress insurrections and repel invasions.

§ 3. The legislature shall provide by law for the maintenance of a soldiers' home for honorably discharged Union soldiers, sailors, marines and members of the state militia disabled while in the line of duty, and who are *bona fide* citizens of the state.

§ 4. The legislature shall provide by law for the protection and safe-keeping of the public arms.

§ 5. The militia shall, in all cases, except treason, felony and breach of the peace, be privileged from arrest during the attendance at musters and elections of officers, and in going to and returning from the same.

§ 6. No person or persons having conscientious scruples against bearing arms shall be compelled to do militia duty in time of peace: *provided*, such person or persons shall pay an equivalent for such exemption.

*Vide notes to § 24 of art. 1.*

## ARTICLE XI.

### COUNTY, CITY, AND TOWNSHIP ORGANIZATION.

§ 1. The several counties of the territory of Washington existing at the time of the adoption of this constitution are hereby recognized as legal subdivisions of this state.

§ 2. No county seat shall be removed unless three fifths of the qualified electors of the county voting on the proposition at a general election shall vote in favor of such removal, and three fifths of all votes cast on the proposition shall be required to relocate a county seat. A proposition of removal shall not be submitted in the same county more than once in four years.

§ 3. No new county shall be established which shall reduce any county to a population less than four thousand (4,000), nor shall a new county be formed containing a less population than two thousand (2,000). There shall be no territory stricken from any county unless a majority of the voters living in such territory shall petition therefor, and then only under such other conditions as may be prescribed by a general law applicable to the whole state. Every county which shall be enlarged or created from territory taken from any other county or counties shall be liable for a just proportion of the existing debts and liabilities of the county or counties from which such territory shall be taken; *provided*, that in such accounting neither county shall be charged with any debt or liability then existing, incurred in the purchase of any county property or in the purchase or construction of any county buildings then in use or under construction which shall fall within and be retained by the county; *provided further*, that this shall not be construed to affect the rights of creditors.

§ 4. The legislature shall establish a system of county government, which shall be uniform throughout the state, and by general laws shall provide for township organization, under which any county may organize whenever a majority of the qualified electors of such county voting



at a general election shall so determine; and whenever a county shall adopt township organization the assessment and collection of the revenue shall be made, and the business of such county and the local affairs of the several townships therein, shall be managed and transacted in the manner prescribed by such general law.

§ 5. The legislature, by general and uniform laws, shall provide for the election in the several counties of boards of county commissioners, sheriffs, county clerks, treasurers, prosecuting attorneys, and other county, township, or precinct and district officers, as public convenience may require, and shall prescribe their duties and fix their term of office. It shall regulate the compensation of all such officers, in proportion to their duties, and for that purpose may classify the counties by population. And it shall provide for the strict accountability of such officers for all fees which may be collected by them, and for all public moneys which may be paid to them, or officially come into their possession.

§ 6. The board of county commissioners in each county shall fill all vacancies occurring in any county, township, precinct, or road district office of such county by appointment, and officers thus appointed shall hold office till the next general election, and until their successors are elected and qualified.

§ 7. No county officer shall be eligible to hold his office more than two terms in succession.

§ 8. The legislature shall fix the compensation by salaries of all county officers, and of constables in cities having a population of five thousand and upwards, except that public administrators, surveyors, and coroners may or may not be salaried officers. The salary of any county, city, town, or municipal officer shall not be increased or diminished after his election or during his term of office, nor shall the term of any such officer be extended beyond the period for which he is elected or appointed.

§ 9. No county, nor the inhabitants thereof, nor the property therein, shall be released or discharged from its or their proportionate share of taxes to be levied for state purposes, nor shall commutation for such taxes be authorized in any form whatever.

§ 10. Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized and all charters thereof framed or adopted by authority

of this constitution shall be subject to and controlled by general laws. Any city containing a population of twenty thousand inhabitants or more shall be permitted to frame a charter for its own government consistent with and subject to the constitution and laws of this state, and for such purpose the legislative authority of such city may cause an election to be had, at which election there shall be chosen by the qualified electors of said city fifteen freeholders thereof, who shall have been residents of said city for a period of at least two years preceding their election, and qualified electors, whose duty it shall be to convene within ten days after their election, and prepare and propose a charter for such city. Such proposed charter shall be submitted to the qualified electors of said city, and if a majority of such qualified electors voting thereon ratify the same, it shall become the charter of said city, and shall become the organic law thereof, and supersede any existing charter, including amendments thereto, and all special laws inconsistent with such charter. Said proposed charter shall be published in two daily newspapers published in said city for at least thirty days prior to the day of submitting the same to the electors for their approval, as above provided. All elections in this section authorized shall only be had upon notice, which notice shall specify the object of calling such election, and shall be given for at least ten days before the day of election in all election districts of said city. Said elections may be general or special elections, and, except as herein provided, shall be governed by the law regulating and controlling general or special elections in said city. Such charter may be amended by proposals therefor submitted by the legislative authority of such city to the electors thereof at any general election, after notice of said submission published as above specified, and ratified by a majority of the qualified electors voting thereon. In submitting any such charter or amendment thereto, any alternate article or proposition may be presented for the choice of the voters, and may be voted on separately without prejudice to others.

**Charters of cities** which are not organized under the general laws for the classification and organization of cities are subject to alteration by general statutes, under the provision that all charters "framed or adopted by authority of this constitution shall be subject to and controlled by general laws": *Thomason v. Ashworth*, 73 Cal. 73.

§ 11. Any county, city, town, or township, may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.

§ 12. The legislature shall have no power to impose taxes upon counties, cities, towns, or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.

§ 13. Private property shall not be taken or sold for the payment

of the corporate debt of any public or municipal corporation, except in the mode provided by law for the levy and collection of taxes.

§ 14. The making of profit out of county, city, town, or other public money, or using the same for any purpose not authorized by law, by any officer having the possession or control thereof, shall be a felony, and shall be prosecuted and punished as prescribed by law.

§ 15. All moneys, assessments, and taxes belonging to or collected for the use of any county, city, town, or other public or municipal corporation, coming into the hands of any officer thereof, shall immediately be deposited with the treasurer, or other legal depository to the credit of such city, town, or other corporation respectively, for the benefit of the funds to which they belong.

**A municipal corporation is not only a representative of the state, but is a portion of its governmental power. It is one of the creatures of the state, made for a specific purpose, — to execute within a limited sphere the powers of the state, and its revenues cannot be taxed by Congress: *United States v. Baltimore & O. R. R. Co.*, 17 Wall. 322.**

**A state has power, in absence of constitutional restriction, to determine what portion of her territory shall, for local purposes, be within the limits of a city and subject to its government, and to prescribe the rate of taxation at which such portions shall be assessed: *Kelly v. Pittsburg*, 104 U. S. 78.**

**Municipal corporations have only such powers of government as are expressly granted to them, or such as are necessary to carry into effect those that are granted. No powers can be implied except such as are essential to the objects and purposes of the corporation as created and established. They can bind the people and property only to the extent of**

**their powers: *Ottawa v. Carey*, 108 U. S. 110.**

**Mode of exercising power, when prescribed by the law conferring the power, must be pursued. In such case the mode becomes the measure of the power: *Springfield Mill Co. v. Lane County*, 5 Or. 265.**

**Formality not required. — A municipal corporation can exercise powers conferred upon it by the legislature through its agents, without the formality of a resolution or ordinance by its council: *Fanning v. Gregoire*, 16 How. 524.**

**Municipal corporations acting within the limits of the powers conferred upon them by the legislature in the exercise of a special franchise granted to them are responsible for the acts and contracts of their agents duly appointed and authorized, within the scope of the authority of such agents, in the same manner as other corporations or individuals are responsible on their promises: *Clark v. City of Washington*, 12 Wheat. 40.**

## ARTICLE XII.

### CORPORATIONS OTHER THAN MUNICIPAL.

§ 1. Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended, or repealed by the legislature at any time, and all corporations doing business in this state may, as to such business, be regulated, limited, or restrained by law.

§ 2. All existing charters, franchises, special or exclusive privileges, under which an actual and *bona fide* organization shall not have taken place, and business been commenced in good faith, at the time of the adoption of this constitution, shall thereafter have no validity.

§ 3. The legislature shall not extend any franchise or charter, nor remit the forfeiture of any franchise or charter of any corporation now existing, or which shall hereafter exist under the laws of this state.

§ 4. Each stockholder in all incorporated companies, except corporations organized for banking or insurance purposes, shall be liable



for the debts of the corporation to the amount of his unpaid stock, and no more, and one or more stockholders may be joined as parties defendant in suits to recover upon this liability.

§ 5. The term "corporations," as used in this article, shall be construed to include all associations and joint-stock companies having any powers or privileges of corporations not possessed by individuals or partnerships, and all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons.

§ 6. Corporations shall not issue stock, except to *bona fide* subscribers therefor, or their assignees; nor shall any corporation issue any bond or other obligation for the payment of money, except for money or property received or labor done. The stock of corporations shall not be increased, except in pursuance of a general law, nor shall any law authorize the increase of stock, without the consent of the person or persons holding the larger amount in value of the stock, nor without due notice of the proposed increase having been previously given in such manner as may be prescribed by law. All fictitious increase of stock or indebtedness shall be void.

§ 7. No corporation organized outside the limits of this state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state.

§ 8. No corporation shall lease or alienate any franchise, so as to relieve the franchise, or property held thereunder, from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise or any of its privileges.

§ 9. The state shall not in any manner loan its credit, nor shall it subscribe to or be interested in the stock of any company, association, or corporation.

§ 10. The exercise of the right of eminent domain shall never be so abridged or construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use the same as the property of individuals.

§ 11. No corporation, association, or individual shall issue or put in circulation as money anything but the lawful money of the United States. Each stockholder of any banking or insurance corporation or joint-stock association shall be individually and personally liable equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporation or association accruing, while they remain such stockholders, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares.

§ 12. Any president, director, manager, cashier, or other officer of any banking institution who shall receive or assent to the reception of deposits after he shall have knowledge of the fact that such banking institution is insolvent or in failing circumstances, shall be individually responsible for such deposits so received.

§ 13. All railroad, canal, and other transportation companies are declared to be common carriers, and subject to legislative control. Any association or corporation organized for the purpose, under the laws of this state, shall have the right to connect at the state line with railroads of other states. Every railroad company shall have the right with its road, whether the same is now constructed or may hereafter be constructed, to intersect, cross, or connect with any other railroad, and when such railroads are of the same or similar gauge they shall, at all crossings and at all points where a railroad shall begin or terminate at or near any other railroad, form proper connections so that the cars of any such railroad companies may be speedily transferred from one railroad to another. All railroad companies shall receive and transport each the other's passengers, tonnage, and cars, without delay or discrimination.

§ 14. No railroad company or other common carrier shall combine or make any contract with the owners of any vessel that leaves port or makes port in this state, or with any common carrier, by which combination or contract the earnings of one doing the carrying are to be shared by the other not doing the carrying.

§ 15. No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this state, or coming from or going to any other state. Persons and property transported over any railroad, or by any other transportation company, or individual, shall be delivered at any station, landing, or port at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port, or landing. Excursion and commutation tickets may be issued at special rates.

§ 16. No railroad corporation shall consolidate its stock, property, or franchises with any other railroad corporation owning a competing line.

§ 17. The rolling stock and other movable property belonging to any railroad company or corporation in this state shall be considered personal property, and shall be liable to taxation and to execution and sale in the same manner as the personal property of individuals, and such property shall not be exempted from execution and sale.

§ 18. The legislature shall pass laws establishing reasonable maxi-

imum rates of charges for the transportation of passengers and freight, and to correct abuses and to prevent discrimination and extortion in the rates of freight and passenger tariffs on the different railroads and other common carriers in the state, and shall enforce such laws by adequate penalties. A railroad and transportation commission may be established, and its powers and duties fully defined by law.

§ 19. Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph and telephone within this state, and said companies shall receive and transmit each other's messages without delay or discrimination, and all of such companies are hereby declared to be common carriers and subject to legislative control. Railroad corporations organized or doing business in this state shall allow telegraph and telephone corporations and companies to construct and maintain telegraph lines on and along the rights of way of such railroads and railroad companies, and no railroad corporation organized or doing business in this state shall allow any telegraph corporation or company any facilities, privileges, or rates for transportation of men or material or for repairing their lines not allowed to all telegraph companies. The right of eminent domain is hereby extended to all telegraph and telephone companies. The legislature shall, by general law of uniform operation, provide reasonable regulations to give effect to this section.

§ 20. No railroad or other transportation company shall grant free passes, or sell tickets or passes at a discount, other than as sold to the public generally, to any member of the legislature, or to any person holding any public office within this state. The legislature shall pass laws to carry this provision into effect.

§ 21. Railroad companies, now or hereafter organized or doing business in this state shall allow all express companies organized or doing business in this state transportation over all lines of railroad owned or operated by such railroad companies upon equal terms with any other express company; and no railroad corporation organized or doing business in this state shall allow any express corporation or company any facilities, privileges, or rates for transportation of men or materials or property carried by them, or for doing the business of such express companies, not allowed to all express companies.

§ 22. Monopolies and trusts shall never be allowed in this state, and no incorporated company, copartnership, or association of persons in this state shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustees, or assignees of such stockholders, or with any copartnership or association of persons, or in any manner whatever, for the purpose of fixing the price or limiting the production



or regulating the transportation of any product or commodity. The legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchise.

### ARTICLE XIII.

#### STATE INSTITUTIONS.

§ 1. Educational, reformatory, and penal institutions, those for the benefit of blind, deaf, dumb, or otherwise defective youth, for the insane or idiotic, and such other institutions as the public good may require, shall be fostered and supported by the state, subject to such regulations as may be provided by law. The regents, trustees, or commissioners of all such institutions existing at the time of the adoption of this constitution, and of such as shall thereafter be established by law, shall be appointed by the governor, by and with the advice and consent of the senate; and upon all nominations made by the governor, the question shall be taken by the ayes and noes, and entered upon the journal.

### ARTICLE XIV.

#### SEAT OF GOVERNMENT.

§ 1. The legislature shall have no power to change or to locate the seat of government of this state; but the question of the permanent location of the seat of government of the state shall be submitted to the qualified electors of the territory, at the election to be held for the adoption of this constitution. A majority of all the votes cast at said election, upon said question, shall be necessary to determine the permanent location of the seat of government for the state; and no place shall ever be the seat of government which shall not receive a majority of the votes cast on that matter. In case there shall be no choice of location at said first election, the legislature shall, at its first regular session after the adoption of this constitution, provide for submitting to the qualified electors of the state, at the next succeeding general election thereafter, the question of choice of location between the three places for which the highest number of votes shall have been cast at the said first election. Said legislature shall provide further, that in case there shall be no choice of location at said second election, the question of choice between the two places for which the highest number of votes shall have been cast shall be submitted in like manner to the qualified electors of the state at the next ensuing general election; *provided*, that until the seat of government shall have been permanently located as herein provided the temporary location shall remain at the city of Olympia.

§ 2. When the seat of government shall have been located as herein provided, the location thereof shall not thereafter be changed except by a vote of two thirds of all the qualified electors of the state voting on that question, at a general election, at which the question of location of the seat of government shall have been submitted by the legislature.

§ 3. The legislature shall make no appropriations or expenditures for capitol buildings or grounds, except to keep the territorial capitol buildings and grounds in repair, and for making all necessary additions thereto, until the seat of government shall have been permanently located, and the public buildings are erected at the permanent capital in pursuance of law.

## ARTICLE XV.

### HARBORS AND TIDE-WATERS.

§ 1. The legislature shall provide for the appointment of a commission whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays, and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof upon either side. The state shall never give, sell, or lease to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high tide, and within not less than fifty feet nor more than six hundred feet of such harbor line (as the commission shall determine) be sold or granted by the state, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce.

§ 2. The legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks, and other structures, upon the areas mentioned in section one of this article, but no lease shall be made for any term longer than thirty years, or the legislature may provide by general laws for the building and maintaining upon such area wharves, docks, and other structures.

§ 3. Municipal corporations shall have the right to extend their streets over intervening tide-lands to and across the area reserved as herein provided.

## ARTICLE XVI.

## SCHOOL AND GRANTED LANDS.

§ 1. All the public lands granted to the state are held in trust for all the people, and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interests disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States.

§ 2. None of the lands granted to the state for educational purposes shall be sold otherwise than at public auction to the highest bidder; and the value thereof, less the improvements, shall, before any sale, be appraised by a board of appraisers, to be provided by law. The terms of payment also to be prescribed by law, and no sale shall be valid unless the sum bid be equal to the appraised value of said land. In estimating the value of such lands for disposal, the value of improvements thereon shall be excluded; *provided*, that the sale of all school and university land heretofore made by the commissioners of any county or the university commissioners, when the purchase price has been paid in good faith, may be confirmed by the legislature.

§ 3. No more than one fourth of the land granted to the state for educational purposes shall be sold prior to January 1, 1895, and not more than one half prior to January 1, 1905; *provided*, that nothing herein shall be so construed as to prevent the state from selling the timber or stone off of any of the state lands in such manner and on such terms as may be prescribed by law; *and provided further*, that no sale of timber-lands shall be valid unless the full value of such lands is paid or secured to the state.

§ 4. No more than one hundred and sixty (160) acres of any granted lands of the state shall be offered for sale in one parcel, and all lands within the limits of any incorporated city, or within two miles of the boundary of any incorporated city, where the valuation of such lands shall be found by appraisal to exceed one hundred dollars (\$100) per acre shall, before the same be sold, be platted into lots and blocks of not more than five acres in a block, and not more than one block shall be offered for sale in one parcel.

§ 5. None of the permanent school fund shall ever be loaned to private persons or corporations, but it may be invested in national, state, county, or municipal bonds.



## ARTICLE XVII.

## TIDE-LANDS.

§ 1. The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes; *provided*, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.

**State title to land between high and low tide.** — The title of the state to the lands between the line of mean high water and low water does not rest upon grant by the general government, but upon the inherent sovereignty of the state: *Pollard's Lessee v. Hopton*, 3 How. 212; *Barney v. Keokuk*, 94 U. S. 324; *Hinnman v. Warren*, 6 Or. 408.

§ 2. The state of Washington disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States; *provided*, the same is not impeached for fraud.

**The swamp-land act of 1850** operated as a grant *in presenti* to the states then in existence of all swamp-lands in their respective jurisdictions; but the title to the swamp-lands within a territory did not pass out of the United States by that act: *Rice v. Sioux City & St. P. R. R. Co.*, 110 U. S. 695.

## ARTICLE XVIII.

## STATE SEAL.

§ 1. The seal of the state of Washington shall be a seal encircled with the words, "The seal of the State of Washington," with the vignette of General George Washington as the central figure, and beneath the vignette the figures "1889."

## ARTICLE XIX.

## EXEMPTIONS.

§ 1. The legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families.

## ARTICLE XX.

## PUBLIC HEALTH AND VITAL STATISTICS.

§ 1. There shall be established by law a state board of health and a bureau of vital statistics in connection therewith, with such powers as the legislature may direct.

§ 2. The legislature shall enact laws to regulate the practice of medicine and surgery, and the sale of drugs and medicines.

## ARTICLE XXI.

## WATER AND WATER RIGHTS.

§ 1. The use of the waters of this state for irrigation, mining, and manufacturing purposes shall be deemed a public use.

## ARTICLE XXII.

## LEGISLATIVE APPORTIONMENTS.

§ 1. Until otherwise provided by law, the state shall be divided into twenty-four (24) senatorial districts, and said districts shall be constituted and numbered as follows: The counties of Stevens and Spokane shall constitute the first district, and be entitled to one senator; the county of Spokane shall constitute the second district, and be entitled to three senators; the county of Lincoln shall constitute the third district, and be entitled to one senator; the counties of Okanogan, Lincoln, Adams, and Franklin shall constitute the fourth district, and be entitled to one senator; the county of Whitman shall constitute the fifth district, and be entitled to three senators; the counties of Garfield and Asotin shall constitute the sixth district, and be entitled to one senator; the county of Columbia shall constitute the seventh district, and be entitled to one senator; the county of Walla Walla shall constitute the eighth district, and be entitled to two senators; the counties of Yakima and Douglas shall constitute the ninth district, and be entitled to one senator; the county of Kittitas shall constitute the tenth district, and be entitled to one senator; the counties of Klickitat and Skamania shall constitute the eleventh district, and be entitled to one senator; the county of Clarke shall constitute the twelfth district, and be entitled to one senator; the county of Cowlitz shall constitute the thirteenth district, and be entitled to one senator; the county of Lewis shall constitute the fourteenth district, and be entitled to one senator; the counties of Pacific and Wahkiakum shall constitute the fifteenth district, and be entitled to one senator; the county of Thurston shall constitute the sixteenth district, and be entitled to one senator; the county of Chehalis shall constitute the seventeenth district, and be entitled to one senator; the county of Pierce shall constitute the eighteenth district, and be entitled to three senators; the county of King shall constitute the nineteenth district, and be entitled to five senators; the counties of Mason and Kitsap shall constitute the twentieth district, and be entitled to one senator; the counties of Jefferson, Clallam, and San Juan shall constitute the twenty-first district, and be entitled to one senator; the county of Snohomish shall constitute the twenty-second district, and shall be entitled to one senator; the counties of Skagit and Island shall constitute the twenty-third district, and be entitled to one senator; the county of Whatcom shall constitute the twenty-fourth district, and be entitled to one senator.

§ 2. Until otherwise provided by law, the representatives shall be divided among the several counties of the state in the following manner: The county of Adams shall have one representative; the county

of Asotin shall have one representative; the county of Chehalis shall have two representatives; the county of Clarke shall have three representatives; the county of Clallam shall have one representative; the county of Columbia shall have two representatives; the county of Cowlitz shall have one representative; the county of Douglas shall have one representative; the county of Franklin shall have one representative; the county of Garfield shall have one representative; the county of Island shall have one representative; the county of Jefferson shall have two representatives; the county of King shall have eight representatives; the county of Klickitat shall have two representatives; the county of Kittitas shall have two representatives; the county of Kitsap shall have one representative; the county of Lewis shall have two representatives; the county of Lincoln shall have two representatives; the county of Mason shall have one representative; the county of Okanogan shall have one representative; the county of Pacific shall have one representative; the county of Pierce shall have six representatives; the county of San Juan shall have one representative; the county of Skamania shall have one representative; the county of Snohomish shall have two representatives; the county of Skagit shall have two representatives; the county of Spokane shall have six representatives; the county of Stevens shall have one representative; the county of Thurston shall have two representatives; the county of Walla Walla shall have three representatives; the county of Wahkiakum shall have one representative; the county of Whatcom shall have two representatives; the county of Whitman shall have five representatives; the county of Yakima shall have one representative.

## ARTICLE XXIII.

### AMENDMENTS.

§ 1. Any amendment or amendments to this constitution may be proposed in either branch of the legislature; and if the same shall be agreed to by two thirds of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the ayes and noes thereon, and be submitted to the qualified electors of the state for their approval, at the next general election; and if the people approve and ratify such amendment or amendments, by a majority of the electors voting thereon, the same shall become part of this constitution, and proclamation thereof shall be made by the governor; *provided*, that if more than one amendment be submitted, they shall be submitted in such a manner that the people may vote for or against such [each] amendment separately. The legislature shall also cause the amendments that are to be submitted to the people to be published for at least three months next preceding



the election, in some weekly newspaper, in every county where a newspaper is published throughout the state.

§ 2. Whenever two thirds of the members elected to each branch of the legislature shall deem it necessary to call a convention to revise or amend this constitution, they shall recommend to the electors to vote at the next general election for or against a convention; and if a majority of all the electors voting at said election shall have voted for a convention, the legislature shall at the next session provide by law for calling the same; and such convention shall consist of a number of members, not less than that of the most numerous branch of the legislature.

§ 3. Any constitution adopted by such convention shall have no validity until it has been submitted to and adopted by the people.

## ARTICLE XXIV.

### BOUNDARIES.

§ 1. The boundaries of the state of Washington shall be as follows: Beginning at a point in the Pacific Ocean one marine league due west of and opposite the middle of the mouth of the north ship channel of the Columbia River, thence running easterly to and up the middle channel of said river and where it is divided by islands up the middle of the widest channel thereof to where the forty-sixth parallel of north latitude crosses said river, near the mouth of the Walla Walla River; thence east on said forty-sixth parallel of latitude to the middle of the main channel of the Shoshone or Snake River; thence follow down the middle of the main channel of Snake River to a point opposite the mouth of the Kooskooskia or Clear Water River; thence due north to the forty-ninth parallel of north latitude; thence west along said forty-ninth parallel of north latitude to the middle of the channel which separates Vancouver's Island from the continent, that is to say to a point in longitude one hundred and twenty-three degrees, nineteen minutes, and fifteen seconds west; thence following the boundary line between the United States and British possessions through the channel which separates Vancouver's Island from the continent to the termination of the boundary line between the United States and British possessions at a point in the Pacific Ocean equidistant between Bonnilla Point, on Vancouver's Island, and Tatoosh Island lighthouse; thence running in a southerly course and parallel with the coast line, keeping one marine league off shore, to place of beginning.

## ARTICLE XXV.

### JURISDICTION.

§ 1. The consent of the state of Washington is hereby given to the exercise by the Congress of the United States of exclusive legis-

lation in all cases whatsoever over such tract or parcels of land as are now held or reserved by the government of the United States for the purpose of erecting or maintaining thereon forts, magazines, arsenals, dock-yards, light-houses, and other needful buildings, in accordance with the provisions of the seventeenth paragraph of the eighth section of the first article of the constitution of the United States; *provided*, that a sufficient description by metes and bounds, and an accurate plat or map of each such tract or parcel of land be filed in the proper office of record in the county in which the same is situated, together with copies of the orders, deeds, patents, or other evidences in writing of the title of the United States; *and provided*, that all civil process issued from the courts of this state, and such criminal process as may issue under the authority of this state, against any person charged with crime in cases arising outside of such reservations, may be served and executed thereon in the same mode and manner and by the same officers as if the consent herein given had not been made.

## ARTICLE XXVI.

### COMPACT WITH THE UNITED STATES.

The following ordinance shall be irrevocable without the consent of the United States and the people of this state:—

*First.* That perfect toleration of religious sentiment shall be secured, and that no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.

*Second.* That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States, and that the lands belonging to citizens of the United States residing without the limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof, and that no taxes shall be imposed by the state on lands or property therein belonging to or which may be hereafter purchased by the United States or reserved for use; *provided*, that nothing in this ordinance shall preclude the state from taxing, as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress

containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of Congress may prescribe.

*Third.* The debts and liabilities of the territory of Washington, and payment of the same, are hereby assumed by this state.

*Fourth.* Provision shall be made for the establishment and maintenance of systems of public schools free from sectarian control, which shall be open to all the children of said state.

## ARTICLE XXVII.

### SCHEDULE.

In order that no inconvenience may arise by reason of a change from a territorial to a state government, it is hereby declared and ordained as follows: —

§ 1. No existing rights, actions, suits, proceedings, contracts, or claims shall be affected by a change in the form of government, but all shall continue as if no such change had taken place; and all process which may have been issued under the authority of the territory of Washington previous to its admission into the Union shall be as valid as if issued in the name of the state.

§ 2. All laws now in force in the territory of Washington which are not repugnant to this constitution shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature; *provided*, that this section shall not be so construed as to validate any act of the legislature of Washington Territory granting shore or tide lands to any person, company, or any municipal or private corporation.

§ 3. All debts, fines, penalties, and forfeitures which have accrued or may hereafter accrue to the territory of Washington shall inure to the state of Washington.

§ 4. All recognizances heretofore taken or which may be taken before the change from a territorial to a state government shall remain valid, and shall pass to and may be prosecuted in the name of the state, and all bonds executed to the territory of Washington, or to any county or municipal corporation, or to any officer or court in his or its official capacity, shall pass to the state authorities and their successors in office, for the uses therein expressed, and may be sued for and recovered accordingly; and all the estate, real, personal, and mixed, and all judgments, decrees, bonds, specialties, choses in action, and claims or debts, of whatever description, belonging to the territory of Washington, shall inure to and vest in the state of Washington, and may be sued for and recovered in the same manner and to the same extent by the state of Washington as the same could have been by the territory of Washington.



§ 5. All criminal prosecutions and penal actions which may have arisen, or which may arise, before the change from a territorial to a state government, and which shall then be pending, shall be prosecuted to judgment and execution in the name of the state. All offenses committed against the laws of the territory of Washington, before the change from a territorial to state government, and which shall not be prosecuted before such change, may be prosecuted in the name and by the authority of the state of Washington, with like effect as though such change had not taken place; and all penalties incurred shall remain the same as if this constitution had not been adopted. All actions at law and suits in equity which may be pending in any of the courts of the territory of Washington at the time of a change from a territorial to a state government shall be continued and transferred to the court of the state having jurisdiction of the subject-matter thereof.

§ 6. All officers now holding their office under the authority of the United States, or of the territory of Washington, shall continue to hold and exercise their respective offices until they shall be superseded by the authority of the state.

§ 7. All officers provided for in this constitution, including a county clerk for each county, when no other time is fixed for their election, shall be elected at the election to be held for the adoption of this constitution on the first Tuesday of October, 1889.

§ 8. Whenever the judge of the superior court of any county, elected or appointed under the provisions of this constitution, shall have qualified, the several causes then pending in the district court of the territory, except such causes as would have been within the exclusive jurisdiction of the United States district court, had such court existed at the time of the commencement of such causes within such county, and the records, papers, and proceedings of said district court, and the seal and other property pertaining thereto, shall pass into the jurisdiction and possession of the superior court of such county. And where the same judge is elected for two or more counties, it shall be the duty of the clerk of the district court having custody of such papers and records to transmit to the clerk of such county or counties other than that in which such records are kept the original papers in all cases pending in such district court and belonging to the jurisdiction of such county or counties, together with transcript of so much of the records of said district court as relate to the same; and until the district courts of the territory shall be superseded in manner aforesaid, the said district courts and the judges thereof shall continue with the same jurisdiction and powers, to be exercised in the same judicial districts respectively, as heretofore constituted under the laws of the territory. Whenever a quorum of the judges of the supreme court of the

state shall have been elected and qualified, the causes then pending in the supreme court of the territory, except such causes as would have been within the exclusive jurisdiction of the United States circuit court had such court existed at the time of the commencement of such causes, and the papers, records, and proceedings of said court, and the seal and other property pertaining thereto, shall pass into the jurisdiction and possession of the supreme court of the state, and until so superseded the supreme court of the territory and the judges thereof shall continue with like powers and jurisdiction as if this constitution had not been adopted.

§ 9. Until otherwise provided by law, the seal now in use in the supreme court of the territory shall be the seal of the supreme court of the state. The seal of the superior courts of the several counties of the state shall be, until otherwise provided by law, the vignette of General George Washington, with the words "Seal of the superior court of — county" surrounding the vignette. The seal of municipalities and of all county officers of the territory shall be the seals of such municipalities and county officers, respectively, under the state, until otherwise provided by law.

§ 10. When the state is admitted into the Union, and the superior courts in their respective counties organized, the books, records, papers, and proceedings of the probate court in each county, and all causes and matters of administration pending therein, shall, upon the expiration of the term of office of the probate judges, on the second Monday in January, 1891, pass into the jurisdiction and possession of the superior court of the same county created by this constitution, and the said court shall proceed to final judgment or decree, order, or other determination in the several matters and causes as the territorial probate court might have done if this constitution had not been adopted. And until the expiration of the term of office of the probate judges, such probate judges shall perform the duties now imposed upon them by the laws of the territory. The superior courts shall have appellate and revisory jurisdiction over the decisions of the probate courts as now provided by law until such latter courts expire by limitation.

§ 11. The legislature, at its first session, shall provide for the election of all officers whose election is not provided for elsewhere in this constitution, and fix the time for the commencement and duration of their term.

§ 12. In case of a contest of election between candidates at the first general election under this constitution for judges of the superior courts, the evidence shall be taken in the manner prescribed by the territorial laws, and the testimony so taken shall be certified to the secretary of state, and said officer, together with the governor and treasurer

of state, shall review the evidence and determine who is entitled to the certificate of election

§ 13. One representative in the Congress of the United States shall be elected from the state at large at the first election provided for in this constitution, and thereafter at such times and places and in such manner as may be prescribed by law. When a new apportionment shall be made by Congress, the legislature shall divide the state into congressional districts, in accordance with such apportionment. The vote cast for representative in Congress at the first election shall be canvassed and the result determined in the manner provided for by the laws of the territory for the canvass of the vote for delegate in Congress.

§ 14. All district, county, and precinct officers who may be in office at the time of the adoption of this constitution, and the county clerk of each county elected at the first election, shall hold their respective offices until the second Monday of January, A. D. 1891, and until such time as their successors may be elected and qualified, in accordance with the provisions of this constitution; and the official bonds of all such officers shall continue in full force and effect as though this constitution had not been adopted, and such officers shall continue to receive the compensation now provided until the same be changed by law.

§ 15. The election held at the time of the adoption of this constitution shall be held and conducted in all respects according to the laws of the territory; and the votes cast at said election for all officers (where no other provisions are made in this constitution), and for the adoption of this constitution, and the several separate articles, and the location of the state capital, shall be canvassed and returned in the several counties in the manner provided by territorial laws, and shall be returned to the secretary of the territory in the manner provided by the Enabling Act.

§ 16. The provisions of this constitution shall be in force from the day on which the President of the United States shall issue his proclamation declaring the state of Washington admitted into the Union, and the terms of all officers elected at the first election under the provisions of this constitution shall commence on the Monday next succeeding the issue of said proclamation, unless otherwise provided herein.

§ 17. The following separate articles shall be submitted to the people for adoption or rejection at the election for the adoption of this constitution:—

Separate article No. 1. "All persons, male and female, of the age of twenty-one years or over, possessing the qualifications provided by this constitution, shall be entitled to vote at all elections."



Separate article No. 2. "It shall not be lawful for any individual, company, or corporation, within the limits of this state, to manufacture, or cause to be manufactured, or to sell, or offer for sale, or in any manner dispose of any alcoholic, malt, or spirituous liquors, except for medicinal, sacramental, or scientific purposes."

If a majority of the ballots cast at said election on said separate articles be in favor of the adoption of either of said separate articles, then such separate article so receiving a majority shall become a part of this constitution, and shall govern and control any provision of the constitution in conflict therewith.

§ 18. The form of ballot to be used in voting for or against this constitution, or for or against the separate articles, or for the permanent location of the seat of government, shall be,—

1. For the constitution, ———.
- Against the constitution, ———.
2. For woman suffrage article, ———.
- Against woman suffrage article, ———.
3. For prohibition article, ———.
- Against prohibition article, ———.

[The result of the election was against both woman suffrage and prohibition.]

4. For the permanent location of the seat of government. [Name of place voted for.]

§ 19. The legislature is hereby authorized to appropriate from the state treasury sufficient money to pay any of the expenses of this convention not provided for by the Enabling Act of Congress.

## CERTIFICATE.

We, the undersigned, members of the convention to form a constitution for the state of Washington, which is to be submitted to the people for their adoption or rejection, do hereby declare this to be the constitution formed by us, and in testimony thereof, do hereunto set our hands, this the twenty-second day of August, anno Domini one thousand eight hundred and eighty-nine.

JOHN P. HOYT, President.	GEORGE COMEGYS.
J. J. BROWNE.	OLIVER H. JOY.
N. G. BLALOCK.	DAVID E. DURIE.
JOHN F. GOWEY.	D. BUCHANAN.
FRANK M. DALLAM.	JOHN R. KINNAR.
JAMES Z. MOORE.	GEORGE W. TIBBETTS.
E. H. SULLIVAN.	H. W. FAIRWEATHER.
GEORGE TURNER.	THOMAS C. GRIFFITTS.
AUSTIN MIRES.	C. H. WARNER.
M. M. GODMAN.	J. P. T. McCROSKEY.
GWIN HICKS.	S. C. COSGROVE.
WM. F. PROSSER.	THOS. HAYTON.
LOUIS SOHNS.	SAM'L H. BERRY.
A. A. LINDSLEY.	D. J. CROWLEY.
J. J. WEISENBURGER.	J. T. McDONALD.
P. C. SULLIVAN.	JOHN M. REED.
R. S. MORE.	EDWARD ELDRIDGE.
THOMAS T. MINOR.	GEORGE H. STEVENSON.
J. J. TRAVIS.	SILVIUS A. DICKEY.
ARNOLD J. WEST.	HENRY WINSOR.
CHARLES T. FAY.	THEODORE L. STILES.
CHARLES P. COEY.	JAMES A. BURK.
ROBT F. STURDEVANT.	JOHN McREAVY.
JOHN A. SHOUDY.	R. O. DUNBAR.
ALLEN WEIR.	MORGAN MORGANS.
W. B. GRAY.	JAS. POWER.
TRUSTEN P. DYER.	B. B. GLASCOCK.
GEO. H. JONES.	O. A. BOWEN.
B. L. SHARPSTEIN.	HARRISON CLOTHIER.
H. M. LILLIS.	MATT. J. McELROY.
J. F. VAN NAME.	J. T. ESHELMAN.
ALBERT SCHOOLEY.	ROBERT JAMISON.
H. C. WILSON.	HIRAM E. ALLEN.
T. M. REED.	H. F. SUKSDORF.
S. H. MANLY.	
RICHARD JEFFS.	Attest:
FRANCIS HENRY.	JNO. L. BOOGE, <i>Chief Clerk.</i>

[The signatures of seventy-one members are appended to the constitution. The four whose signatures are not attached are James Hungate of Whitman County, Lewis Neace of Walla Walla County, J. C. Kellogg of Island County, and W. L. Newton of King County.]

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